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Case No: HQ16X01238

Neutral Citation Number: [2019] EWHC xxxx (QB)

THE POST OFFICE GROUP LITIGATION

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 8 March 2019

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

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

- -

Judgment (No.3) "Common Issues"

- -

Patrick Green QC, Kathleen Donnelly, Henry Warwick, Ognjen Miletic and Reanne Mackenzie (instructed by Freeths LLP) for the **Claimants**
David Cavender QC, Owain Draper and Gideon Cohen (instructed by Womble Bond Dickinson LLP) for the **Defendant**

Hearing dates: 7, 8, 12, 13, 14, 15, 19, 20, 21, 22 and 26 November 2018
3, 4, 5 and 6 December 2018

Draft distributed to parties on 8 March 2019

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Mr Justice Fraser:

A. Introduction

1. This judgment is in the following parts:

A. Introduction

B. The Common Issues

C. The Lead Claimants

D. The Post Office Witnesses

E. The Factual Matrix

F. The Relationship between the Post Office and the National Federation of Sub Postmasters ("NFSP")

G. Contractual Formation

H. The Contract Terms

I. Express and implied terms

J. Relational Contracts

K. Supply of Goods and Services Act

L. Agency, Accounting and Horizon

M. Suspension and Termination

N. Assistants

O. Onerous or Unusual Terms

P. Unfair Contract Terms

Q. Conclusions and Summary

R. Answers to the Common Issues

Appendix 1: Extracts of the relevant SPMC terms
Appendix 2: Extracts of the relevant NTC terms
Appendix 3: Agreed Flow chart for Transaction Corrections
Appendix 4: Agreed Flow chart for Branch Trading Statement
Appendix 5: Appendix 2 of document dated 7 September 2012 entitled Branch Audit Trend Analysis YTD Q1 2012/2013 {G/7/6}

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2. These proceedings are being conducted pursuant to a Group Litigation Order ("GLO") made on 22 March 2017 by Senior Master Fontaine. Although there is an introduction to these group proceedings in both my first and second written judgments in this matter, both of which concern procedural rather than substantive issues, which are at [2017] EWHC 2844 (QB) and [2018] EWHC 2698 (QB), I provide a similar introduction here. This is in order that this judgment can serve independently and be as comprehensible as possible to a reader with no background information to the litigation from those earlier judgments.

3. In general terms, in this Group Litigation there are a group of approximately 600 claimants, who were all for the most part sub-postmasters, although a small number were Crown Office employees and managers/assistants, who have contracts of employment with the defendant which are different to the contracts of the sub-postmasters. Some of the claimants therefore have a different status to the sub-postmasters generally. The defendant, as is well known, operates the network of over 11,000 Post Office branches throughout the UK. The defendant used to be called Post Office Counters Ltd, and changed its name in 2002 to simply Post Office Ltd. It refers to itself as "Post Office", without the use of the definite article, and I was told (although none of the witnesses seemed particularly clear about this) that this may be for copyright reasons. In some of the documents, it referred to itself as POCL when it was called Post Office Counters Ltd. I shall refer to it in this judgment as the Post Office. It is state owned.

4. 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 branch 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 Post Office has been independent of Royal Mail Group since 2012, when the Postal Services Act 2011 came into force. The Post Office is not responsible for delivering mail. It does however provide postal based and other services to the general public. The range of services it offers has developed and changed over time. A customer of today probably expects far more of his or her local Post Office than would have been the case 30 years ago. As an example, it is no longer possible to purchase a vehicle license (what used to be a paper "car tax disc") at a Post Office, or cash a Giro for payment of state benefit, but one can change foreign currency, purchase tickets to play the National Lottery, as well as perform other financial transactions. Post Office branches, often in rural areas, are the hub of the community in terms of these and other services. Sub-postmasters would, and do, often run the Post Office within a shop or other small business. The sub-postmaster would receive compensation from the Post Office for running the branch. This would be dependent upon the amount of business performed at the branch. The Post Office provides a large number of services for other companies through the post office branches. These other companies are called the Post Office's "clients". For example, Camelot (which runs the National Lottery) makes its games available, through lottery scratch cards and bi-weekly lotteries, to the customers who will buy such products in a post office branch. Camelot is a client of the Post Office.

5. In about 1999/2000, the Post Office introduced a new computerised system for the accounting function both in the branches, and between the branches and itself. This

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was (and still is) called Horizon, or the Horizon system. Nowadays, it is an online system, having become a different system called Horizon Online in 2010. In 2000 and for some years afterwards, it operated down a telephone line, called the Official Branch Telephone Line. The requirement upon the sub-postmasters to provide this was stated in the following terms "The Official Branch Telephone Line must be provided by BT in order that Post Office Ltd may use the line for the Post Office Ltd Asymmetric Digital Subscriber Line [ADSL] service." Private use of this line by the sub-postmasters was permitted, but only if this did not conflict with its use as the ADSL service. If it did conflict, the private use was to cease. Horizon was an electronic point of sale and accounting system, and was adopted by the Post Office 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.

6. Those of older generations who remember a time before smart phones, broadband and wi-fi, may recall the days of dial-up modems and other even older IT technology. There is no doubt that digital technology, and the capacity and use of micro-processors and IT systems generally, has increased exponentially over the last 20 years or so. Back in the year 2000, almost a lifetime ago in terms of computer technology, I have no doubt that Horizon was seen as a cutting-edge development and it moved branch accounting for the Post Office into the computer age. It was operated through a dedicated Horizon terminal installed at the branch, and indeed most branches would have more than one such terminal.

7. However, regardless of the intention of those behind the design, adoption and installation of Horizon, this Group Litigation has at its core the Horizon system. All of the claimants were users of the Horizon system, and indeed they were required to use the Horizon system by the Post Office. There was no "opt in" or "opt out" alternative, and to be fair to the Post Office, if a large entity is going to move into the digital age, it would have made no sense to have done so piecemeal. However, the claimants' case is that the Horizon system contained, or must have contained, a large number of software coding errors, bugs and defects, and as a result of this threw up apparent shortfalls and discrepancies in the accounting of different branches. Alleged shortfalls in the claimants' financial accounting with the Post Office are said, on the claimants' case, to have been caused by these problems with the way the Horizon system operated, the training that was provided to use it, and also a general failure of the Horizon helpline. These shortfalls and discrepancies, it is said by the claimants, originated after Horizon started being used. Horizon was designed and installed by Fujitsu Ltd, a very well-known IT company, which is not a party to these proceedings.

8. The different claimants all had different experiences with Horizon over different periods of time. However, there is at least one common theme. At the time, these accounting shortfalls that came to the notice of the Post Office were pursued as exactly that – shortfalls - with the relevant claimants. The Post Office's stance both then, and now, was and is that the claimants were responsible for these shortfalls, and that the shortfalls represented actual amounts of money missing from the claimants' accounting. An alternative way of putting what may amount to the same point, but using the approach of the pleadings, is that the Post Office maintains it is for individual sub-postmasters to prove that the shortfalls were *not* their individual responsibility, and failing proof of that by an individual sub-post-master, then the

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shortfalls were their individual responsibility and the sub-postmaster in question would have to pay the relevant sum and face the consequences.

9. I am going to deal with the individual circumstances of the six Lead Claimants in the section of the judgment headed "The Lead Claimants". In this litigation, there have been Generic Pleadings (which set out the case generally for both the sides of the litigation) and also Individual Pleadings (which set out each Lead Claimant's case separately). For the Group Litigation to achieve and resolve anything, it must resolve issues that affect all the many hundreds of claimants, as well as fully resolve some of the individual claimants' cases.

10. I have said in each of my written judgments in this case before, and in a number of interlocutory hearings as well, that this is bitterly contested litigation. The parties are, literally, poles apart in their approach to the issues, and in their approach to the litigation generally. When shortfalls occurred, the Post Office demanded (and I use that word advisedly) that each individual sub-postmaster pay the sums in question. This stance was consistent with what remains the Post Office's general position, which is that if Horizon shows a shortfall of X pounds, that shortfall of X pounds must have been caused by the sub-postmaster. Some shortfalls started in the hundreds of pounds, and moved into the thousands, and then tens of thousands, of pounds over a few months. Some claimants paid these amounts to the Post Office out of their own resources, even though they did not believe or accept that there was anything deficient in their accounting. Some of the shortfalls were only for modest sums. Some claimants were lucky enough to find accounting irregularities in their favour. Others were convicted in the criminal courts of false accounting, fraud, theft or other offences. It should be noted that for these prosecutions, the prosecuting authority was not the Crown Prosecution Service, but the Post Office itself. These claimants claim malicious prosecution against the defendant, and also claim that there was a "cover up" at the Post Office over the shortcomings in Horizon. Some claimants were made bankrupt. There are claims for damages for financial loss, personal injury, deceit, duress, unconscionable dealing, harassment and unjust enrichment brought against the Post Office. There is currently a Criminal Cases Review Commission ("CCRC") review underway in respect of the convictions of a significant number of the claimants. These are being dealt with together by the CCRC and are, effectively, awaiting the outcome of the technical aspects of this litigation.

11. The Post Office disputes the whole basis of the claimants' case. Indeed, in its written Opening for the Common Issues trial, the Post Office stated that:

"[if the Claimants' case were right] this would have a very serious impact on Post Office and its ability to control its network throughout the UK"

and

"If the Claimants were right in the broad thrust of their case, this would represent an existential threat to Post Office's ability to continue to carry on its business throughout the UK in the way it presently does."

This approach by the Post Office to the question of responsibility for shortfalls, and to the litigation, is a point to which I shall return.

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12. This litigation has, from the date of the GLO onwards, required extensive case management at a great many stages of its turbulent life. The making of a GLO at all was opposed by the Post Office, which maintained that there was a not insignificant number of sub-postmasters who knowingly submitted false accounts using the Horizon system, that the case of every individual claimant in the litigation was different, and there was no common theme that connected them. Prior to the first CMC before me on 19 October 2017, the Post Office initially sought to have no substantive trial(s) listed at all, with a further CMC to be held one year later in late 2018, to fix what would be the first trial date sometime during 2019. I described that then, and still consider this to be, "a 19th Century timetable". Modern litigation has to be progressed in accordance with the Civil Procedure Rules, and Group Litigation in accordance with CPR Part 19. The whole ethos is to achieve efficient and cost-effective resolution of disputes. This Group Litigation simply cannot be allowed to drag on for years and years. It should also be remembered that the court does not make Group Litigation Orders lightly. Such an order can only be made with the express approval of the President of the Queen's Bench Division. It is, to my mind, fanciful to imagine that such an order would be made unless there were reasonable grounds to conclude that there are common themes connecting all the different claimants and their claims against the Post Office. Further, it is notable that the Post Office did not seek to appeal the making of the Group Litigation Order.

13. I have also been realistic in terms of my expectations of the parties and what can be fairly brought to trial in a reasonable time scale. I do not consider that I have set, at any stage, an over-ambitious or exceptionally brisk timetable for the substantive hearings. In October 2017 I set down the first trial, to determine what are called "the Common Issues", for November 2018, which was the earliest time that the parties told me they could be ready for such a trial. I also set down the next trial, for "the Horizon Issues", for March 2019, at the same time. In early 2018 I informed the parties that the third trial would be likely to be held in the early summer of 2019, and this would most likely be the full trial of at least some of the Lead Claimants' cases. The Post Office resisted Round 3 of the litigation (as it came to be called colloquially) being heard in 2019 at all, because it was said that this was too ambitious and would be unlikely to assist in resolving more than a few individual cases. The Post Office also regularly observes that resolution of issues would be unlikely to have wider application to other claimants. It was necessary to move Round 3 to later in 2019, and that will now be taking place in November 2019, to deal with a number of other issues including limitation.

14. It does appear to me that the Post Office in particular has resisted timely resolution of this Group Litigation whenever it can, and certainly throughout 2017 and 2018. A good example of this is the fact that for these Common Issues, the Post Office submitted in its Opening Submissions that I ought to use my discretion to order that these findings do not have binding effect upon all the other claimants. I simply cannot accept that such an order would be in the interests of anyone. In my judgment, it would be wholly counterproductive to the way that this Group Litigation has been case managed from the outset. What it would mean, however, were I to accede to this, is that the Post Office would be free to run its arguments in this trial, all over again, against every single one of the claimants other than the six Lead Claimants. It would wholly undermine the purpose of Group Litigation.

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15. One potential explanation for this reluctance by the Post Office to progress the litigation is a decision that it would seek to spin out these proceedings for as long as it possibly could. Whether that is what lies behind it or not, I do not intend to allow this to occur. The Post Office has also, on its own evidence for an interlocutory application seeking to strike out very large amounts of the Lead Claimants' witness statements, had concerns that the trial might lead to bad publicity for the Post Office. I gave further information concerning this at [55] of ***Bates v Post Office Ltd (No.2)*** at [2018] EWHC 2698 (QB).

16. Until this litigation is resolved, I intend to hold substantive trials in tranches every single judicial term from November 2019 onwards into the future. This is so that this litigation is resolved as swiftly as possible in accordance with the overriding objective. I explained this to the parties in October 2017, throughout 2018, again during the Common Issues trial, again in January 2019, and I repeat it now. Even on that intended timetable, some claimants may be waiting far longer than is ideal to have their claims fully resolved. Some of the claimants are retired; some are elderly; some have (as I have said) criminal convictions under review by the Criminal Cases Review Commission. Nobody involved in this litigation is getting any younger as time passes. The Post Office itself is under a cloud in respect of these unresolved allegations and I consider it to be an obvious point that resolution of this litigation as soon as possible is in the interests of all the parties – all the claimants and the Post Office – in the interests of justice and is also in the wider public interest.

17. I simply will not tolerate any approach to the litigation that does anything other than seek to resolve these many issues as promptly as possible, taking into account fairness and the overriding objective in CPR Part 1.

18. The Post Office has maintained throughout that the Horizon system worked perfectly well, although now that the parties' respective IT experts have met and reached agreement on some matters that latter point will become far more technical, and of course may change. The Post Office asserts generally, but in particular in relation to the operation of Clause 12 of the Sub Postmasters Contract ("SPMC") and Clause 4 of the Network Transformation Contract ("NTC") (dealt with in detail below), that it is entitled to rely upon an inference that the shortfalls shown by Horizon are correct and the responsibility of the individual SPM in question. In a sense, that sentence could be said to sum up a large area of the dispute between the parties. Is the Post Office entitled to rely upon such an inference concerning the technical functionality of the Horizon system? The full and final resolution of that question will have to wait for a later trial. However, the Post Office also accuses the claimants of a "kitchen sink" approach to the many different contractual issues, and submits that the claimants must be hoping that by casting their net particularly wide on an enormous number (for example) of implied terms, they might actually end up with something to which they are not, in law, entitled. The Post Office also submitted that the claimants are seeking wholly to rewrite the bargain they struck with the Post Office when they contracted to provide services as sub-postmasters.

19. The Post Office, in many instances with some vigour, pursued the shortfalls with different claimants as accounting discrepancies for which those claimants were contractually and legally responsible. The claimants denied responsibility for them, and in all the Lead Cases, their evidence is that they did their best to investigate them but could not do so because of the way that Horizon operated, and because of the way

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that the Post Office behaved. The Lead Claimants all gave evidence that they had sought the assistance of the Post Office in getting to the bottom of the shortfalls. Not only did they not receive such assistance, Mr Bates as an example (who had prior experience in IT matters) asked for further training and was told he was not entitled to any.

20. Some sub-postmasters had their contracts with the defendant terminated, sometimes very abruptly. In Mr Bates' case, this was done whilst he was expressly challenging the accuracy of Horizon and he believes this was expressly done *because* he was so challenging this. In Mrs Stubbs' case, notwithstanding her 27 years' experience, service and prior record (both as assistant to her husband, who was originally the sub-postmaster, and as sub-postmistress herself after he died), she found herself suspended and locked out of her Post Office. The claimants also believe that the Post Office, over time, came to know about these difficulties with the Horizon system, but did not address them, did not publicise these problems, and actually expressly told them that there was nothing wrong with the Horizon system and that they were the only SPMs who were experiencing such difficulties.

21. Nothing in this judgment should be taken as my expressing any concluded view on the functionality of the Horizon system, as the issues relating to that will be tried by me in March 2019. Nor should this judgment be taken to be making any findings in fact concerning any particular allegations of breach by the Post Office. This judgment is concerned with the Common Issues. However, this cannot be done in complete hermetic isolation from any facts at all. The Post Office adopted a curious position so far as the Lead Claimants' evidence of fact is concerned. Having failed to have that evidence struck out, and not having sought to appeal that order, Mr Cavender QC cross-examined on a great many aspects of it. The Post Office made submissions that some of the Lead Claimants were positively lying to the court (for instance Mr Abdulla), and were mistaken in fact as to contract documents provided prior to contract formation (for instance Mr Bates). However, at the same time, the Post Office urged me not to make findings as to credit. This appeared, on close examination during oral submissions, to amount to adopting a hybrid approach to witnesses, and an approach with which I am not familiar (nor can I find any authority). The Post Office was entitled to challenge the credit of the Lead Claimants, if it so chose. However, the Post Office seemed to want findings on that only if they were in the Post Office's favour. This is a peculiarly one-way approach by any litigant, and is a point to which I will return in Part C of the judgment when I deal with the Lead Claimants' evidence.

22. Because the subject matter of this litigation is so controversial, there has been a great amount of public interest in its subject matter. Over the years, and prior to the issue of proceedings by the claimants there was an action group formed, called Justice For Sub Postmasters Alliance ("JFSA"). Mr Bates was centrally involved in this. 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 by the Post Office for reasons that are currently unclear. Evidence was given to a Parliamentary Select Committee by the Chief Executive of the Post Office in February 2015. This was in relation to the Mediation Scheme that had run for a while jointly under the auspices of the Post Office, Second Sight and JFSA. That publicly funded scheme ended without resolving

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the issues between the Post Office and sub-postmasters involved, and was roundly criticised in an adjournment debate in the House of Commons. There have been various reports and documentaries in the media, including a BBC Panorama documentary entitled "Trouble at the Post Office" in August 2015.

23. There is a large amount of public interest in the case generally, as demonstrated by the fact that three different applications by the press (including the Press Association and a national newspaper) were made in the first two days of the trial (all of these being dealt with by consent and without the need for any ruling), and a fourth application on the final day of evidence. The first three applications related to the supply to the press of skeleton arguments (also called written openings) and witness statements, although the latter with the addresses of the witnesses redacted. The principles in ***Cape Intermediate Holdings Ltd v Dring*** [2018] EWCA Civ 1795 at [69], [89], [90], [92] to [95] and [112] per Hamblen LJ (with whom the President of the QBD and Newey LJ agreed) make it clear that both the written openings, and the witness statements of witnesses once they have been called, can and should be made available to non-parties.

24. The fourth application was by Mr Wallis, a freelance journalist, which he made himself. He had attended every day of the trial, and was posting reports online of what was occurring during the legal argument and evidence at the trial. By his application he sought permission to record the proceedings on his own equipment. He explained the reason for this was so he could provide accurate quotations of evidence.

25. The trial had the benefit of an electronic trial bundle from a private provider. As part of this service, a "real time" transcript was also being made available to the court and the parties during the actual evidence, with counsels' questions and the witness' evidence appearing on a number of screens in court (the documents being referred to at the time appearing on another screen called the "common screen"). This transcript was then compiled into refined form by, usually, about 5.30pm each day, and that document would then be e mailed by the provider to the parties and the court in both PDF and Word form. A further finalised version would then be produced after corrections by the parties, and uploaded to the electronic bundle.

26. I refused Mr Wallis' application to record the proceedings himself. However, neither party objected to his being provided with the daily transcript at the end of each day, or the finalised version thereafter. [53] of ***Cape Intermediate Holdings v Dring*** makes it clear that although the proper means for a non-party to obtain a trial transcript is set out in CPR 39APD6, "if, as in this case, a private transcription service was provided at trial then the appropriate and most cost effective course of action is likely to be to seek a copy from the provider….." This was not opposed by either the Claimants or the Post Office who were sharing the cost of the electronic trial bundle between them in any event. This meant that Mr Wallis, and by extension all those who read his reports (which would have included many of the hundreds of claimants), had access to fully accurate passages of evidence and argument.

27. I refer to the press interest for completeness, because applications from the press were received, and also because it is part of the background. However, for the avoidance of doubt, I wish to make it clear that all the issues in this litigation, both these Common Issues and the other issues yet to be tried, will be decided objectively on the evidence given in court and the submissions on the law. The fact that I have referred to matters

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by way of background above (for example the Parliamentary Select Committee and the BBC documentary) does not mean that I have taken matters other than the evidence and legal argument in this trial into account.

28. Another point with which I have to deal is what Mr Cavender QC for the Post Office described in Opening as a "challenge to the court". He submitted that "one of the challenges to the court might be how it approaches that situation where its sympathies on one side might be in a certain sub-postmaster group in one direction and with a more commercial group in another". It ought not to be necessary to state that no judge makes decisions based on personal sympathy. It also ought not to be necessary to recite that every party, and every witness, comes to the court at a substantive trial with a clean slate, regardless of the procedural history of the proceedings. This litigation is being tried by a judge and not a jury, but even juries are told (and are assumed) to make their decisions objectively and to put no personal emotion into the decision making process. The Post Office may have made these submissions because, on an objective analysis, it fears objective scrutiny of its behaviour, or it may have made them for other reasons. Of the six Lead Claimants, three were chosen by the Post Office and three were chosen by those acting for the claimants. Mrs Stubbs had a particular experience with the Post Office, and this was described by Mr Cavender as being "at one end of the spectrum". He did not identify what that spectrum was, but I assume he meant her experience was an extreme one. Given she was presented with a document to sign in the branch post office the very day after her husband had died, the Post Office may well be right. The Post Office cannot find the document she signed that day. I certainly hope none of the other claimants had documents presented to them in such circumstances. I will deal with Mrs Stubbs' individual circumstances in C: The Lead Claimants.

29. I would however add only this. Although the parties cannot agree on very much, they are agreed that the Post Office is an important national institution that provides a crucial service to society. They are agreed that in some rural communities, for example, the Post Office is the only way that individuals and businesses can access cash, banking services and financial services. The Post Office has explained that due to the size of its network, and the nature of the business transacted, it has to have "a very high degree of control" over what sub-postmasters do and how they do it. Because of the way that the parties approach the litigation, each of them prays these features in aid of why their answers to the Common Issues are to be preferred.

30. I found the approach by both parties in some respects unhelpful. The rule of law means that all individuals and legal entities are subject to the same laws as everyone else. There is no special exemption available for the Post Office, or for sub-postmasters. The balance of bargaining power can be a relevant feature in the law of contract, and this is well known, and commercial common sense is also relevant. However, a party (here the Post Office) threatening dire consequences to national business should their case *not* be preferred is not helpful, and seemed to me to be an attempt to put the court *in terrorem.*

31. The first Common Issue, as will be seen, is whether the contracts between the claimants and the Post Office are what is called "relational contracts". This *might* prove to be one of the most important issues in the litigation, although whether that is correct or not cannot be prejudged at this stage. In my judgment, it is certainly one of the most important issues. Even if I do find that it is a relational contract, inevitably

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the parties are not agreed on what the effect of such a finding would be. But there is no separate set of legal rules for how the Post Office is entitled to contract with its sub-postmasters, simply because it is the Post Office, and vice versa.

32. It would, in my judgment, be entirely wrong to start consideration of an issue such as whether the contracts are relational, by taking account of a risk said to lurk in the background that if the answer in this litigation is unfavourable to the Post Office, then the Post Office would no longer be able "to control" its network of branches, or that its business would as a result of such a finding come under "existential threat". Commercial common sense comes into matters of contractual construction. Contractual arrangements involve apportionment of risk and reward between the different contracting parties. They also involve, by definition, parties agreeing to an arrangement between themselves in a particular way. The Post Office accuses the claimants of seeking entirely "to rewrite the bargain that was struck". Given at least some of those bargains were struck by sub-postmasters after others amongst the cohorts of claimants say that they had brought to the attention of Post Office itself their views concerning the functionality of Horizon, assertions about what bargains were in law struck, may well be heavily affected by the decision on whether these were relational contracts. It is also true (and the parties are agreed) that cash is used in the majority (or at least a great many) of the transactions performed in Post Office branches, and that sub-postmasters deal with that cash, and occupy a position of trust. There is an obvious element of trust involved in dealing with such transactions, and I consider that this is an important component of the parties' relationship. However, the fact that trust is involved is not in itself an answer to the different Common Issues.

33. There are two different types of contracts that are under consideration. The first is the Sub-postmaster Contract, or SPMC. This was then modified and became known as the Modified SPMC. The second is the Network Transformation Contract, or NTC. This model of contract became used after something called the Network Transformation Programme ("NTP") which was initiated by the Post Office in 2011, firstly in pilot form. In general terms, the NTP involved rationalisation of the Post Office branch network. Some branches were closed and the incumbent sub-postmasters and mistresses were paid compensation. These were called "compulsory exiters" and the compensation, which was 26 months' remuneration, was paid from something called the Discretionary Fund. A significant number of SPMs – I am told about 2,700 - remained on the terms that governed their appointment before the NTP, and there are a great number whose terms of appointment are the terms in the NTC. New sub-postmasters were engaged on the terms in the NTC. There are two types of post office established under the NTP. One type was called "Main", and these were larger branches. The other type was called "Local", and these were smaller, more local post offices. There are no issues in this litigation, and no claimants, governed by the Main NTC. There are many governed by the Local NTC. I will therefore use the description NTC to mean the terms of the NTC for Local Post Offices. There is also a contract called a Temporary Sub-postmaster Contract, although the terms of that did not feature to an appreciable degree in the evidence. In order to attempt to keep this judgment to a reasonable length, I have extracted many of the conditions in both the SPMC and the NTC into Appendices 1 and 2 respectively. I also only deal with the Modified SPMC (as opposed to the SPMC) where necessary. This should not be interpreted as not taking account of the full extent of all the clauses in all the contracts as required. Equally, a vast number of authorities were cited in argument,

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approximately 140 in total. I have read them all, but I only deal in this judgment with those I have found necessary to determine the Common Issues. For the clauses within each of the SPMC and the NTC, I shall use Section 1 Clause 1 for such a term within the SPMC; and Part 1 Paragraph 1 for a term within the NTC, to try to help avoid confusion.

34. Each side called evidence of fact. I heard from each of the six Lead Claimants. The Post Office called fourteen witnesses. All of the witnesses were cross-examined. I deal with my conclusions as to these witnesses in Parts C and D of this judgment. The Post Office objected to vast tracts of the Lead Claimants' evidence of fact and sought to strike it out in advance of the trial; I dismissed this application in ***Bates v Post Office Ltd (No.2)*** at [2018] EWHC 2698 (QB). In closing, the Post Office sought to persuade me that none of the evidence that I had refused to strike out was relevant to any of the Common Issues. The Post Office seemed to adopt an extraordinarily narrow approach to relevance, generally along the lines that any evidence that is unfavourable to the Post Office is not relevant. The Post Office adduced a significant quantity of evidence of its own to demonstrate (as it saw it) that (for example) Horizon training was perfectly well designed and adequate; on the other hand, it sought to keep out specific evidence by Lead Claimants of their own individual experiences.

35. However, although some facts that were agreed, the parties could not agree the factual matrix and could not even agree how Branch Trading Statements were produced. The Post Office was also anxious to avoid any adverse comment by me in any respect in this judgment. I was asked to "be careful", and to be aware of "the sensitivity", in terms of comments or findings that the Post Office said were "not necessary". I have made it clear that I will make no findings concerning breach, causation or loss in this judgment, as these are for later rounds of the litigation.

36. I deal below in Part F with the relationship between the Post Office and the NFPS, the very detailed confidentiality provisions within the Grant Framework Agreement (by which the Post Office provides funding to the NFPS) and the potentially serious consequences to the NFPS if it were to be in breach of that agreement. I also deal below with the circumstances in which the contents of that agreement were finally made public about 18 months after it was signed, and only after a lengthy period of pressure by someone using the Freedom of Information Act. There seems to be a culture of secrecy and excessive confidentiality generally within the Post Office, but particularly focused on Horizon.

37. The Post Office set up a working group to deal with certain matters, including Horizon, and something termed the Horizon solution. A document was produced on 12 June 2014 called "X Action Summary", with X being a proper noun. The proper noun in the title was redacted in the copy of the document disclosed. The X Action Summary was produced by the X Working Group. The Post Office calls some or all of its Working Groups after animals, and I was told that X was the name of an animal. Parts of the text within the document were also redacted. The document was produced by three different people within Post Office, none of them being an in-house solicitor.

38. During the cross-examination of Ms Van Den Bogerd, Mr Green QC sought to ask certain questions with the X Action Summary document on the common screen. This led to objections from Mr Cavender and after submissions I disallowed some

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questions. However, given my difficulty in understanding how the name of an animal, the title of both the Working Group and the Action Summary, could be privileged, given that a part of the Action Summary had not been redacted, I asked Mr Cavender personally to review the redactions made of the contents, and in particular the title of the document, and to clarify the basis upon which privilege was claimed over the name of an animal, if this was to be maintained.

39. Mr Cavender did this, and on the next hearing day robustly maintained the assertion of privilege on two bases. He said he was "completely satisfied" that the document was "privileged for the dual purpose of being prepared for the dominant purpose of litigation and for the purpose of getting legal advice." He submitted that "the question is to decide, in a dual purpose document, which parts are part of the privilege part and which parts can fairly fall outside it. The privilege part is entitled to have a title, and it does." This rather missed the fact that the title was the title of the whole document, including the title of the non-privileged part. It must be common ground that part of the working group's activities were not privileged, as parts of the report were not privileged. It is difficult to see how the title of the Working Group itself could be privileged.

40. However, the assertion of privilege effectively brought this to an end. Legal professional privilege is conveniently referred to as being potentially of two types, namely legal advice privilege, and litigation privilege. The ethos that underpins this is equally applicable to both limbs, namely that any person is entitled to consult their lawyer in confidence. Where such privilege exists (and is not waived or abrogated) it is paramount and absolute. As Lord Taylor CJ stated in ***R v Derby Magistrates Court ex p. B*** [1996] AC 487:

"Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests….."

41. I deal with some of the unredacted passages in this judgment. There are some interesting passages which include recommendations, one of which is in section 4.1.4 which states the "recommended remediation" is:

"The creation of an audit program by Post Office's Finance department in order to review samples of data from sub-postmasters. <u>This would ensure consistency of accounts and enable a higher chance of detecting errors in accounts due to problems with Horizon.</u>"
(emphasis added)

Given part of the claimants' case is that there were software problems with Horizon that caused errors in sub-postmasters' accounts, which those SPMs could not detect, and the Post Office's case is that there were not, this recommendation is likely to be explored further in the Horizon trial.

42. Given the X Working Group produced the X Action Summary, and part of that summary is not privileged, I remain of the view that it is difficult to understand how X, the name of an animal, can itself be privileged. However, that is the approach that the Post Office has taken and so I have put the name of X (which was shown on the electronic trial bundle document title anyway, which is why I described this at the

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time as a storm in a teacup) out of my mind. Other redactions are not quite so easily explained, and in my judgment demonstrate a culture of secrecy in the Post Office. I deal with this further at [120] below.

43. Finally, before turning to the Common Issues, I should deal with the breadth of submissions. The parties between them submitted 139 different authorities (77 of which were "core" authorities, 62 being described as "non-core") and numerous extracts of legal textbooks and articles. They also lodged different written legal submissions of considerable length, as it the modern way. Although I have read and considered all of the authorities and the arguments, I will not deal with each and every one of them in this judgment, which is likely to be far longer than ideal in any event. I will only deal with those that I consider necessary to reach and explain my decision on each of the Common Issues.

B. The Common Issues

44. These were agreed by the parties. The broad intention was to choose a sufficient number of what might be called "contractual issues" that had the widest potential application to as many of the claimants as possible so that all the claims could proceed to the next stage with binding findings having been made on the Common Issues.

45. They are as follows. Two implied terms are agreed and these are identified in Part C of this judgment. The wording of the Common Issues and the headings are those of the parties, although the issues have been refined to remove references to the pleadings so that they can be understood upon a stand-alone reading, without requiring the pleadings to be read alongside:

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Relational Contract

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

Implied terms

2. Which, if any, of the terms in the paragraphs listed below were implied terms (or incidents of such implied terms) of the contracts between Post Office and Subpostmasters?

(a) *To provide adequate training and support (particularly if and when the Defendant imposed new working practices or systems or required the provision of new services)*

(b) *To provide a system which was reasonably fit for purpose, including any or adequate error repellency*

(c) *Properly and accurately to effect, record, maintain and keep records of all transactions effected using Horizon*

(d) *Properly and accurately to produce all relevant records and/or to explain all relevant transactions and/or any alleged or apparent shortfalls attributed to Claimants*

(e) *To co-operate in seeking to identify the possible or likely causes of any apparent or alleged shortfalls and/or whether or not there was indeed any shortfall at all*

(f) *To seek to identify such causes itself, in any event*

(g) *To disclose possible causes of apparent or alleged shortfalls (and the cause thereof) to Claimants candidly, fully and frankly*

(h) *To make reasonable enquiry, undertake reasonable analysis and even-handed investigation, and give fair consideration to the facts and information available as to the possible causes of the appearance of alleged or apparent shortfalls (and the cause thereof)*

(i) *To communicate, alternatively, not to conceal known problems, bugs or errors in or generated by Horizon that might have financial (and other resulting) implications for Claimants*

(j) *To communicate, alternatively, not to conceal the extent to which other Subpostmasters were experiencing relating to Horizon and the generation of discrepancies and alleged shortfalls*

(k) *Not to conceal from Claimants the Defendant's ability to alter remotely data or transactions upon which the calculation of the branch accounts (and any discrepancy, or alleged shortfalls) depended*

(l) *Properly, fully and fairly to investigate any alleged or apparent shortfalls*

(m) *Not to seek recovery from Claimants unless and until: (i) the Defendant had complied with its duties above (or some of them); (ii) the Defendant has established that the alleged shortfall represented a genuine loss to the Defendant; and (iii) the Defendant had carried out a reasonable and fair investigation as to the cause and reason for the alleged shortfall and whether it was properly attributed to the Claimant under the terms of the Subpostmaster contract (construed as aforesaid)*

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(n) *Not to suspend Claimants: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and proper cause; and/or (iii) in circumstances where the Defendant was itself in material breach of duty*

(o) *Not to terminate Claimants' contracts: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and proper cause; and/or (iii) in circumstances where the Defendant was itself in material breach of duty*

(p) *Not to take steps which would undermine the relationship of trust and confidence between Claimants and the Defendant*

(q) *To exercise any contractual, or other power, honestly and in good faith for the purpose for which it was conferred*

(r) *Not to exercise any discretion arbitrarily, capriciously or unreasonably*

(s) *To exercise any such discretion in accordance with the obligations of good faith, fair dealing, transparency, co-operation, and trust and confidence*

(t) *To take reasonable care in performing its functions and/or exercising its functions within the relationship, particularly those which could affect the accounts (and therefore liability to alleged shortfalls), business, health and reputation of Claimants*

(u) *The ability of the Defendant to recover and/or seek to recover any alleged shortfalls, whether while the relevant Claimant was a Subpostmaster or post-termination, was subject to an implied term requiring Post Office to do the same within a reasonable time of discovery or the date by which, with reasonable diligence, Post Office could have made such discovery.*

(For the avoidance of doubt, the admitted *Stirling v Maitland* and Necessary Cooperation implied terms are agreed)

3. If the terms alleged above at (q), (r), (s), and (t) are to be implied, to what contractual powers, discretions and/or functions in the SPMC and NTC do such terms apply?

(a) *To exercise any contractual, or other power, honestly and in good faith for the purpose for which it was conferred*

(b) *Not to exercise any discretion arbitrarily, capriciously or unreasonably*

(c) *To exercise any such discretion in accordance with the obligations of good faith, fair dealing, transparency, co-operation, and trust and confidence*

(d) *To take reasonable care in performing its functions and/or exercising its functions within the relationship, particularly those which could affect the accounts (and therefore liability to alleged shortfalls), business, health and reputation of Claimants.*

Supply of Goods and Services Act 1982

4. Did Post Office supply Horizon, the Helpline and/or training/materials to Subpostmasters (i) as services under "relevant contracts for the supply of services" and (ii) in the course of its business, such that there was an implied term requiring Post Office to carry out any such services with reasonable care and skill, pursuant to section 13 of the Supply of Goods and Services Act 1982?

Onerous or unusual terms

5. Were any or all of the express terms in the paragraphs listed below onerous and unusual, so as to be unenforceable unless Post Office brought them fairly and reasonably to the Subpostmasters' attention?

(a) Para 51.1 and 51.3 (rules, instructions and standards);

(i) *SPMC*

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- *Section 1, paragraph 13: "SECTIONS 1-23 contain the general terms of a Subpostmaster's appointment. [The Defendant] issues the Subpostmaster with rules and Postal Instructions which deal with the various classes of Post Office Business to be transacted at his sub-office."*
- *Section 1, paragraph 5: "...Retention of the appointment as Subpostmaster is dependent on the sub-office being well managed and the work performed properly to the satisfaction of [the Defendant]."*
- *Section 1, paragraph 14: "The rules provided for the instruction and guidance of Subpostmasters must be kept up to date. They must be carefully studied and applied. No breach of rules will be excused on the grounds of ignorance."*
- *Section 1, paragraph 18: "Changes in conditions of service and operational instructions, including those which are agreed with the National Federation of Sub-Postmasters, will appear from time to time in Counter News or by amendment to the Contract. Such changes and instructions are deemed to form part of the Subpostmaster's contract."*
- *Section 1, paragraph 19: "All instructions received from the Regional General Manager should be carried out as promptly as possible."*

(ii) <u>NTC</u>

- *Part 2, paragraph 1.1 "The Operator agrees to operate the Branch on behalf of [the Defendant] in accordance with the terms of the Agreement (including for the avoidance of doubt the Manual)", and the definition of Manual at Part 5 paragraph 1.1 as follows:*

"The following list includes the manuals, guidelines and instructions which currently come under the definition of "Manual":

- *Local Post Office Operations Manual*
- *Horizon online administration and equipment operations manual*
- *National lottery operations manual (where branch offers this product)*
- *Ordering stock and operations manual*
- *Post Office outreach services operations manual (where applicable)*
- *Post Office paystation operations manual*
- *Security operations manual*
- *Horizon system user guide (online)*
- *Horizon online help (online)*
- *Branch Focus*
- *Post Office branch standards*
- *Post Office Ltd's Accessibility Guide*
- *Branch Conformance Standards*
- *Post Office cash and secure stock remittance services manual (online)*
- *FOS project operations manual*
- *FOS project training workbook (x2)*
- *Mailwork specification (where applicable)*
- *Any other instructions to operators or updates to such instructions issued by [the Defendant] from time to time"*

- *Part 5, paragraph 1.3: "[the Defendant] may amend the list of documents set out in this Part 5 and may amend the contents of any manual or documents on that list by giving written notification (which may be by electronic means) to the Operator. In*

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the Agreement, unless otherwise specified, a reference to the Manual is a reference to it as amended, consolidated or extended by [the Defendant] from time to time."

- *Part 5, paragraph 1.5: "In addition to the Manual, [the Defendant] may issue to the Operator instructions which deal with various classes of Products and Services to be transacted at the Branch and the design and operational standards required to run the Branch."*
- *Part 5, paragraph 1.6: "All such instructions must be complied with immediately (unless otherwise notified by [the Defendant]) and must be kept up to date by incorporation of updates issued by [the Defendant]. They must be carefully studied by the Operator, its Manager and Assistants. No breach of instructions will be excused on the grounds of ignorance."*
- *Part 2, paragraph 3.2.1, 3.2.2: "The Operator shall…" "maintain the highest standards in all matters connected with the Branch and Branch Premises, including implementing and maintaining the standards specified in the Manual" and "comply with all instructions given to it by [the Defendant] with regard to standards and quality in the operation of the Branch".*

(b) Para 52.1 and 52.3 (classes of business);

(i) *SPMC*

- *Section 1, paragraph 6: "The Subpostmaster is informed at the time of his appointment of the classes of business he is required to provide. He must also undertake, if called upon to do so later, any other class of business not required at the time of his appointment but which [the Defendant] may subsequently and reasonably require him to do, except that [the Defendant] may not require him to undertake Mailwork where the Subpostmaster did not undertake to do so as part of the terms of his appointment."*
- *Section 1, paragraph 7: "If [the Defendant] alters the services to be provided or withdraws a service the Subpostmaster has no claim to compensation for any disappointment which may result from the change."*

(ii) *NTC*

- *Part 2, paragraph 1.7: "[The Defendant] has the right to enter into contracts or arrangements with Clients for the handling of Products or the supply of Services by the Network (including the Branch) on such terms as [the Defendant] considers fit. [The Defendant] retains the discretion as to where within the Network particular products and services are offered"*

(c) Para 54.1 and 54.3 (accounts and liability for loss);

(i) *SPMC*

- *Section 12, paragraph 4: "The Subpostmaster must ensure that accounts of all stock and cash entrusted to him by [the Defendant] are kept in the form prescribed by [the Defendant]…"*
- *Section 12, paragraph 12: "The Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants. Deficiencies due to such losses must be made good without delay."*
- *Section 12, paragraph 13: "The financial responsibility of the Subpostmaster does not cease when he relinquishes his appointment and he will be required to make good any losses incurred during his term of office which may subsequently come to light."*

(ii) *NTC*

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- *Part 2, paragraph 3.6.6: "The Operator shall: account for and remit to [the Defendant] all monies collected from Customers in connection with Transactions in accordance with the Manual. Any cash which [the Defendant] provides to the Operator or which the Operator collects as a result of Transactions does not belong to the Operator and shall be held by the Operator (at the Operator's risk) on behalf of, and in trust for, [the Defendant] and the Clients. Any such cash shall not form part of the assets of the Operator. The operator acknowledges it is expressly forbidden from making use of any such amount due to [the Defendant] for any purpose other than the operation of the Branch and it must on no account apply to its own private use, for however short a period, any portion of funds belonging to [the Defendant] entrusted to it. Any breach of this clause 3.6.6 and/or any misuse of [the Defendant's] cash by the Operator or its Personnel shall be deemed to be a material breach of the Agreement which cannot be remedied and may render the offender liable to prosecution."*
- *Part 2, paragraph 4.1: "The Operator shall be fully liable for any loss of or damage to, any Post Office Cash and Stock (however this occurs and whether it occurs as a result of any negligence by the Operator, its Personnel or otherwise, or as a result of any breach of the Agreement by the Operator) except for losses arising from the criminal act of a third party (other than Personnel) which the Operator could not have prevented or mitigated by following [the Defendant's] security procedures or by taking reasonable care. Any deficiencies in stocks of Products and/or any resulting shortfall in the money payable to [the Defendant] must be made good by the Operator without delay so that, in the case of any shortfall, [the Defendant] is paid the full amount when due in accordance with the Manual".*
- *Part 2, paragraph 4.2: "The Operator's responsibility for such items shall begin from the time at which the Post Office Cash and Stock are received by the Operator and shall end when the Post Office Cash and Stock are given to Customers in the proper conduct of the Branch or are returned to [the Defendant] or, in the case of cash or financial instruments are collected by a cash in transit provider or are paid into a bank. Whilst the Post Office Cash and Stock are in the Operator's possession, it shall keep them in a place of security."*
- *Part 2, paragraph 4.3: "The Operator shall retain financial responsibility (in accordance with the Agreement) following the termination of the Agreement, and it will be required to make good any losses (including losses arising from Transaction corrections and stock losses) incurred during its operation of the Branch which may subsequently come to light."*
- *Part 2, paragraph 13.1: "The Operator shall reimburse [the Defendant] in full on demand for all losses, claims, demands, proceedings, liabilities, costs and expenses (including reasonable legal costs and expenses) incurred by [the Defendant] as a result of: (13.1.1) any negligence or breach of the Agreement by the Operator or its Personnel; (13.1.2) any misuse or infringement of any Intellectual Property of any third party by the Operator or its Personnel; and/or (13.1.3) any claim brought under the EA and/or its regulations in respect of the Branch"..*

(d) Para 56.1.a. and 56.2.a (assistants);

(i) *SPMC (1994 to 2006)*

- *Section 15, paragraph 2: "Assistants are employees of the Subpostmaster. A Subpostmaster will be held wholly responsible for any failure, on the part of his Assistants, to apply Post Office rules, or to provide a proper standard of service to the public. He will also be required to make good any deficiency, of cash or stock, which may result from his assistants' actions."*

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(ii) *SPMC (as amended in July 2006)*

- *Section 15, paragraph 2: "Assistants are employees of the Subpostmaster, and the Subpostmaster will consequently be held wholly responsible for any failure on the part of his Assistants to: (2.1) apply Post Office ® rules or instructions as required by [the Defendant]; (2.2) complete any training necessary in order to properly provide Post Office ® Services; and (2.3) comply with the obligations set out below. The Subpostmaster will also be required to make good any deficiency of cash or stock which may result from his Assistants' actions or inactions."*

(e) Para 60.1 and 60.3 (suspension);

(i) *SPMC*

- *Section 19, paragraph 4: "A Subpostmaster may be suspended from office at any time if that course is considered desirable in the interests of [the Defendant] in consequence of his: (a) being arrested, (b) having civil or criminal proceedings brought or made against him, (c) where irregularities or misconduct at the office(s) where he holds appointment(s) have been established to the satisfaction of [the Defendant], or are admitted, or are suspected and are being investigated."*
- *Section 19, paragraphs 5 and 6: "Where a Subpostmaster is suspended his remuneration in respect of any period of suspension will be withheld so long as such suspension continues"; "On the termination of the period of suspension whether by termination of contract or reinstatement, the Subpostmaster's remuneration in respect of the period may, after consideration of the whole of the circumstances of the case, be forfeited wholly or in part...".*

(ii) *NTC*

- *Part 2, paragraph 15.1: "[The Defendant] may suspend the Operator from operating the Branch (and/or, acting reasonably, require the Operator to suspend all or any of its Assistants engaged in the Branch from working in the Branch), where [the Defendant] considers this to be necessary in the interests of [the Defendant] as a result of: (15.1.1) the Operator and/or any Assistant being arrested, charged or investigated by the police or [the Defendant] in connection with any offence or alleged offence; (15.1.2) civil proceedings being brought against the Operator and/or any Assistant; or (15.1.3) there being grounds to suspect that the Operator is insolvent, to suspect that the Operator has committed any material or persistent breach of the Agreement, or to suspect any irregularities or misconduct in the operation of the Branch, the Basic Business or any other Post Office® branches with which the Operator and/or any Assistant is connected (including any financial irregularities or misconduct)."*
- *Part 2, paragraph 15.2: "During the period of any suspension, whether under clause 15.1 or otherwise, [the Defendant] may: (15.2.1) suspend payment of all sums due to the Operator under the Agreement; (15.2.2) with the agreement of the Operator appoint a temporary substitute for the Operator to operate the Branch from the Branch Premises, in which case any Fees in relation to Transactions carried out at the Branch will be paid by [the Defendant] direct to such temporary substitute; and (15.2.3) to the extent such costs have been agreed with the Operator, deduct its costs incurred in appointing a temporary substitute together with other costs and expenses incurred by [the Defendant] as a result of the suspension from any payments due to the Operator under the Agreement. [The Defendant] shall initially meet the cost of appointing the temporary substitute but shall be entitled to recoup some or all of such cost from the Operator in accordance with clause 15.2.3 or otherwise. Following the end of the period suspension, [the Defendant] may, in its discretion taking into*

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account the relevant circumstances, agree to pay the Operator all or part of such sums as have been suspended in accordance with clause 15.2.1."

- *Part 2, paragraph 15.3: "Following the Operator's suspension, whether under clause 15.1 or otherwise, the Operator shall at its own cost and expense promptly take all reasonable steps to enable [the Defendant] to maintain access for Customers during the period of suspension to Products and Services."*

(f) Para 61.1 and 61.3 (termination);

(i) *SPMC*

- *Section 1, paragraph 10: "… The Agreement may be determined by [the Defendant] at any time in case of Breach of Condition by [the Subpostmaster], or non-performance of his obligation or non-provision of Post Office Services, but otherwise may be determined by [the Defendant] on not less than three months notice."*

(ii) *NTC*

- *Part 2, paragraph 16.1: "Following the Commencement Date the Agreement will continue until: (16.1.1) either Party gives to the other not less than 6 months' written notice (unless otherwise agreed between the Parties in writing), which cannot be given so as to expire before the first anniversary of the Start Date; or (16.1.2) it is terminated at any time in accordance with its terms."*
- *Part 2, paragraph 16.2: "In addition to any other rights of termination contained in other Parts, [the Defendant] may terminate the Agreement immediately on giving written notice to the Operator if the Operator:*

16.2.1 commits any material breach of the provisions of the Agreement or any other contract or arrangement between the Parties and fails to remedy the breach (if capable of remedy) within 14 days of a written notice from [the Defendant] specifying the breach and requiring the same to be remedied. Any references in these Standard Conditions to a breach of a particular obligation by the Operator being deemed to be material and/or irremediable are not intended to be exhaustive and shall not prevent [the Defendant] from exercising its rights under this clause in respect of any other breach of the Agreement which is material and/or irremediable;

16.2.2 fails to provide the Products or Services to the standards required by [the Defendant] as set out in the Manual and fails to remedy the failure (if capable of remedy) within 14 days of a written notice from [the Defendant] specifying the failure and requiring the same to be remedied; …

16.2.16 fails to pay any sum due to [the Defendant] under the Agreement by the due date".

(g) Para 62.1 and 62.3 (no compensation for loss of office).

(i) *SPMC*

- *Section 1, paragraph 8: "The terms of the appointment of Subpostmaster do not entitle the holder to be paid sick or annual leave, pension or to compensation for loss of office."*

(ii) *NTC*

- *Part 2, paragraph 17.11: "The Operator acknowledges that he shall not be entitled to receive any compensation or other sums in the event of the termination or suspension of the Agreement."*

6. If so, what, if any, steps was the Post Office required to take to draw such terms to the attention of the Subpostmaster?

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Unfair Contract Terms

7. Were any or all of the terms at Common Issue (5) above unenforceable pursuant to the Unfair Contract Terms Act 1977?

Liability for Alleged Losses

8. What is the proper construction of section 12, clause 12 of the SPMC?

"The Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants. Deficiencies due to such losses must be made good without delay."

9. What is the proper construction of Part 2, paragraph 4.1 of the NTC?

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

Agency and Accounts

<u>Post Office as agent</u>

10. Was Post Office the agent of Subpostmasters:

(a) For the purpose of rendering and making available accounts and/or was under an equitable duty to render accounts

(b) Further or alternatively, for the specific purpose of effecting, reconciling and recording transactions initiated by the Claimants, the Defendant acted for itself and, simultaneously, for the Claimants, as their agent

11. If so, was the Defendant thereby required to comply with any or all of the following obligations:

(a) Properly and accurately to effect, execute, record, and/or maintain and keep records of all transactions which the Claimants initiated using Horizon or for which the Claimants were potentially responsible

(b) To render and make available to the Claimant accounts

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(c) Further or alternatively, where the Defendant alleged shortfalls to be attributed to the Claimants, to comply with the duties set out in paragraph 2 (d) to (l) above.

Subpostmasters as agents

12. Was the extent and effect of the agency of Subpostmasters to Post Office such that:

(a) (i) Subpostmasters owed fiduciary duties to Post Office, including a duty to act in Post Office's interests in relation to the functions they undertook on Post Office's behalf (which functions included holding and dealing with Post Office cash and stock, effecting and recording Post Office transactions, generating liabilities for Post Office, maintaining proper and accurate records and preparing and rendering accounts); (ii) Subpostmasters owed a duty to account to Post Office

(b) 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

(c) 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

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

Suspension and Termination

Suspension

14. On a proper construction of the SPMC and NTC, in what circumstances and/or on what basis was Post Office entitled to suspend pursuant to SPMC Section 19, clause 4 and Part 2, paragraph 15.1 NTC?

(i) SPMC

- *"A Subpostmaster may be suspended from office at any time if that course is considered desirable in the interests of* [the Defendant] *in consequence of his: (a) being arrested, (b) having civil or criminal proceedings brought or made against him, (c) where irregularities or misconduct at the office(s) where he holds appointment(s) have been established to the satisfaction of* [the Defendant]*, or are admitted, or are suspected and are being investigated."*

(ii) NTC

- *""*[The Defendant] *may suspend the Operator from operating the Branch (and/or, acting reasonably, require the Operator to suspend all or any of its Assistants engaged in the Branch from working in the Branch), where* [the Defendant] *considers this to be necessary in the interests of* [the Defendant] *as a result of: (15.1.1) the Operator and/or any Assistant being arrested, charged or investigated by the police or* [the Defendant] *in connection with any offence or alleged offence; (15.1.2) civil proceedings being brought against the Operator and/or any Assistant; or (15.1.3) there being grounds to suspect that the Operator is insolvent, to suspect that the*

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Operator has committed any material or persistent breach of the Agreement, or to suspect any irregularities or misconduct in the operation of the Branch, the Basic Business or any other Post Office® branches with which the Operator and/or any Assistant is connected (including any financial irregularities or misconduct)."

Summary Termination

15. On a proper construction of the SPMC and NTC, in what circumstances and/or on what basis was Post Office entitled summarily to terminate?

(i) *SPMC*

- Section 1, clause 10: *"... The Agreement may be determined by* [the Defendant] *at any time in case of Breach of Condition by* [the Subpostmaster], *or non-performance of his obligation or non-provision of Post Office Services, but otherwise may be determined by* [the Defendant] *on not less than three months notice."*

(ii) *NTC*

- Part 2, paragraph 16.2: *"In addition to any other rights of termination contained in other Parts,* [the Defendant] *may terminate the Agreement immediately on giving written notice to the Operator if the Operator:*

16.2.1 commits any material breach of the provisions of the Agreement or any other contract or arrangement between the Parties and fails to remedy the breach (if capable of remedy) within 14 days of a written notice from [the Defendant] *specifying the breach and requiring the same to be remedied. Any references in these Standard Conditions to a breach of a particular obligation by the Operator being deemed to be material and/or irremediable are not intended to be exhaustive and shall not prevent* [the Defendant] *from exercising its rights under this clause in respect of any other breach of the Agreement which is material and/or irremediable;*

16.2.2 fails to provide the Products or Services to the standards required by [the Defendant] as set out in the Manual and fails to remedy the failure (if capable of remedy) within 14 days of a written notice from [the Defendant] *specifying the failure and requiring the same to be remedied; ...*

16.2.16 fails to pay any sum due to [the Defendant] *under the Agreement by the due date*".

Termination on Notice

16. On a proper construction of the SPMC and NTC, in what circumstances and/or on what basis was Post Office entitled to terminate on notice, without cause?

(i) *SPMC*

- *Section 1, clause 10* : *"... The Agreement may be determined by* [the Defendant] *at any time in case of Breach of Condition by* [the Subpostmaster], *or non-performance of his obligation or non-provision of Post Office Services, but otherwise may be determined by* [the Defendant] *on not less than three months notice."*

(ii) *NTC*

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- *Part 2, paragraph 16.1: "Following the Commencement Date the Agreement will continue until: (16.1.1) either Party gives to the other not less than 6 months' written notice (unless otherwise agreed between the Parties in writing), which cannot be given so as to expire before the first anniversary of the Start Date; or (16.1.2) it is terminated at any time in accordance with its terms."*

True Agreement

17. Do the express written terms of the SPMC and NTC between Post Office and Subpostmasters represent the true agreement between the parties, as to termination (in this regard, the Claimants rely on *Autoclenz v Belcher* [2011] UKSC 41)?

18. If not, was the "true agreement" between the parties that:
(i) neither party intended that the Claimants' investments in goodwill or otherwise in the business should or would be forfeited on 3 months' notice:
(a) without substantial cause or reason, established after a fair investigation and consideration;
(b) if the Defendant was itself in material breach of contract;
(c) vindictively, capriciously or arbitrarily; or
(d) in response to reasonable correspondence about (i) any apparent breach by the Defendant, or (ii) alleged shortfalls and the difficulties faced by Subpostmasters in investigating alleged shortfalls (such as in the case of Alan Bates and his letters dated 19 December 2000, 18 July 2001, 7 January 2002, and 13 February 2002).
(ii) the Defendant would not terminate without giving such notice as the court may hold to be reasonable (which the Claimants will contend was, on any view, never to be less than 12 months)?

Compensation for loss of office

19. On a proper construction of the SPMC and NTC, where Post Office lawfully and validly terminated a Subpostmaster's engagement, on notice or without notice for cause, was the Subpostmaster entitled to any compensation for loss of office or wrongful termination?

(i) *SPMC*

- *Section 1, clause 8: "The terms of the appointment of Subpostmaster do not entitle the holder to be paid sick or annual leave, pension or to compensation for loss of office."*

(ii) *NTC*

- *Part 2, paragraph 17.11: "The Operator acknowledges that he shall not be entitled to receive any compensation or other sums in the event of the termination or suspension of the Agreement."*

20. On a proper construction of the SPMC and NTC, in what, if any, circumstances are Subpostmaster's breach of contract claims for loss of business, loss of profit and consequential losses (including reduced profit from linked retail premises) limited to

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

Subsequent appointments

21. On a proper construction of the SPMC and NTC, what if any restrictions were there on Post Office's discretion as to whether or not to appoint as a Subpostmaster the prospective purchaser of a Subpostmasters' business?

(i) *SPMC*

- *Section 1, Clause 9: "If on resignation of his appointment the Subpostmaster disposes of his private business and/or premises in which the sub-office is situated, the person acquiring the private business and/or the premises or exchanging contracts in connection with the purchase of the private business and/or premises will not be entitled to preferential consideration for appointment as Subpostmaster."*

(ii) *NTC*

- *Part 2, paragraph 19: "...On termination of the Agreement, the appointment of any New Operator shall be entirely at the discretion of [the Defendant]. [The Defendant] may, but shall not be obliged to, consider any application for the operation of a Post Office branch at the Branch Premises made by a genuine prospective purchaser of the Basic Business and the property interest at the Branch Premises, but any such prospective purchaser shall not be given preferential treatment in the application or appointment process."*

Assistants

22. Did SPMC section 15, clause 7.1; NTC, Part 2, clauses 2.3 and 2.5 and/or any of the implied terms contended for by the parties and found by the Court purport to confer a benefit on Assistants for the purposes of section 1 of the Contracts (Rights of Third Parties) Act, and if so which of these terms did so?

(i) *SPMC (as amended in July 2006)*

- *Section 15, clause 7.1: "[The Defendant] will: (7.1.1) provide the Subpostmaster with relevant training materials and processes to carry out the required training of his Assistants on the Post Office ® Products and Services; (7.1.2) inform the Subpostmaster as soon as possible where new or revised training will be necessary as a result of changes in either the law or Post Office ® Products and Services; and (7.1.3) where appropriate ... update the training materials (or processes) or provide new training materials (or processes) to the Subpostmaster. However, it is the Subpostmaster's responsibility to ensure the proper deployment within his Post Office ® branch of any materials and processes provided by [the Defendant] and to ensure that his Assistants receive all the training which is necessary in order to be able to properly provide the Post Office ® Products and Services and to perform any other tasks required in connection with the operation of the Post Office ® branch."*

(ii) *NTC*

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- *Part 2, paragraphs 2.3: "Where [the Defendant] considers it necessary, it shall initially train the first Manager and such number of Assistants as [the Defendant] shall determine, in the operation of the System at the Branch."*
- *Part 2, paragraphs 2.5: "[the Defendant] may require the Manager and/or the Assistants to undertake further training at any reasonable location and time during the Term if [the Defendant] (2.5.1) reasonably considers such training to be essential; or (2.5.2) wishes to train them in new and improved techniques which have been devised and which the Operator will be required to use in operating the System."*

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

C. The Lead Claimants

46. These were chosen by the parties themselves, three by the claimants and three by the Post Office. Their experiences covered different periods of time, and both the SPMC (including the Modified SPMC) and the NTC. Branch Post Offices almost always have associated retail businesses. The very basic summary of the model is that the SPM is paid, or earns, some revenue from the Post Office for running the Post Office, and also attracts customers to his or her associated business because customers will come into the Post Office to (say) post packages and so on, and also become customers of the retail side. This is called "footfall". Also, customers of the retail business, whether that is (for example) a newsagents, small convenience shop or haberdashers, may decide to use the Post Office whilst doing non-Post Office related shopping. The SPM will therefore usually own, or lease, the retail premises, but operate the Post Office from within those premises.

Agreed Facts

47. The parties agreed, in advance of the Common Issues trial, certain facts. These were included in a document entitled "Factual Matrix for the Common Issues Trial", which was then revised in terms of its format and called "Revised Factual Matrix for the Common Issues Trial". These facts were grouped into three categories. Category 1 was "Facts agreed, relevance agreed". This meant that the facts were agreed, and it was also agreed that they were part of the admissible factual matrix for the Common Issues Trial. All the categories were numbered sequentially. Category 1 was numbered 1 to 22; Category 2 was numbered 23 to 61; and Category 3 was numbered 62 to 80.

48. Category 2 was entitled "Claimants' facts in issue and/or relevance disputed". Effectively these were facts which the Claimants asserted formed part of the admissible factual matrix for the Common Issues Trial, but the Post Office did not agree. The stance of the Post Office was either that the relevance of the fact was disputed; that the truth of the fact was not agreed (either because the Post Office denied it was true, or did not admit it was true); or both, namely it was not agreed as a fact and was not accepted as being relevant.

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49. Category 3 was the mirror image of Category 2, and was entitled "Defendant's facts in issue and/or relevance disputed". Effectively these were facts which the Defendant asserted formed part of the admissible factual matrix for the Common Issues Trial, but the Claimants did not agree. The stance of the Claimants was either that the relevance of the fact was disputed; that the truth of the fact was not agreed (either because the Claimants denied it was true, or did not admit it was true); or both, namely it was not agreed as a fact and was not accepted as being relevant.

50. There were 22 facts in Category 1. Category 1 is a category that would ordinarily be recognised as being an agreed fact for the purposes of this Common Issues Trial. However, Category 2 had 39 "facts" asserted by the Claimants, and of these 39, not all were in issues in terms of being facts, but were in issue in terms of relevance. Therefore, the number of entries in Category 2 that were accepted as being true, but whose relevance to the Common Issues was challenged by the Post Office, numbered 11. The number of entries in Category 3 that were accepted as being true, but whose relevance was challenged by the Claimants, was three out of a total of 18.

51. There were therefore 36 facts that were agreed or admitted by both parties as facts, although the relevance of 14 of that number was in issue. These were as follows (and I retain the numbering adopted by the parties in the Revised Factual Matrix):

Category 1

Post Office Operations

1. The Defendant operates its business through a network of around 11,600 branches throughout the UK. The Defendant offers products and services to the public via this network.
2. The Defendant's products and services include products and services provided by other businesses and organisations (referred to as "clients").
3. The Defendant requires some minimum products and services to be offered by its branches, but does not require all Post Office branches to offer all products and services it offers.
4. The Defendant contracts with Subpostmasters on standard form contracts, the terms of which are not open to negotiation by individual Claimants.
5. The Defendant's business has been operating for many years and is expected to continue for many years more. The Defendant has to adapt its practices and services over time to take account of changes in technology, commercial practices, consumer preferences and government policy.
6. The Defendant's objective has always been to maintain a wide geographical spread of Post Office branches and to offer as much continuity of service to customers as it can consistently with prevailing commercial practices, consumer preferences and government policy.
7. Subpostmasters typically stand to benefit from the relationship with the Defendant 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 footfall and revenue for the retail businesses that Subpostmasters typically operate alongside the Post Office business.

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Subpostmaster Business Types

8. Subpostmasters may be individuals, companies or partnerships.
9. Some Subpostmasters operate more than one branch.
10. It is the responsibility of the Subpostmaster to provide the premises from which the branch will operate.
11. Most Post Office branches have a separate retail business in the same premises or on the same site, which retail business is typically operated by or on behalf of the Subpostmaster.
12. The Defendant generally publicises a Subpostmaster vacancy in a given area (whether or not at an existing branch location).
13. Where Subpostmaster applications are invited in relation to an existing Post Office branch location, the Defendant typically informs prospective Subpostmasters of the previous 12 months' remuneration / fees achieved at the branch.
14. The Defendant typically requires prospective Subpostmasters to provide a business case for the operation of the relevant branch.
15. Post Office incurs expense and time-costs in recruiting (including advertising for applicants and assessing and selecting applicants) and training new Subpostmasters.

Appointment of Subpostmasters

16. The Defendant incurs long term and expensive commitments in respect of the Subpostmaster relationship, including by providing valuable cash, stock and equipment to Subpostmasters on an unsecured basis.

Operation of a Post Office Branch

17. The operation of the contractual relationship between individual Subpostmasters and the Defendant requires communication and co-operation.
18. The Defendant offers initial training to a new Subpostmaster.

Use of Assistants in Post Office Branches

19. Subpostmasters can employ other people to run a Post Office branch on their behalf and/or to assist them in the operation of the branch.
20. Subpostmasters can exercise supervision and control over their assistants.

Horizon

21. Horizon is an electronic point of sale and accounting system introduced by the Defendant in Post Office branches in or around 1999/2000, and thereafter amended from time to time, including an amendment in 2010, introducing ‘Horizon Online’.
22. All large-scale and sophisticated IT systems have a risk of errors.

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Category 2
Operation of a Post Office Branch

32. Claimants seeking to dispute apparent shortfalls did not have an option within Horizon to do so, and were required to contact the Helpline to seek assistance.
36. A branch cannot enter (or "roll over" into) a new trading period without the Subpostmaster declaring to Post Office the completion of the Branch Trading Statement.
37. The Defendant operated the Network Business Support Helpline ("**the Helpline**") which it provided and recommended to Claimants as a primary source of advice and assistance in relation to Horizon, transactions, errors and issues relating to their trading statements and accounts.

Accounting to the Defendant

38. The Defendant required Claimants to comply with contractual obligations in relation to the keeping and production of branch accounts.
39. The Defendant had the power to seek recovery from Claimants for losses relating to branch accounts.
40. The Defendant in fact sought recovery from the Claimants for apparent shortfalls.
41. Whether it would be right to infer or presume that a shortfall and loss was caused instead by a bug or error in Horizon.
44. The Defendant required Claimants to *'balance and complete a Branch Trading Statement'* at the end of each branch trading period (as stated in the Operations Manual at §9.3). Initially this was required on a weekly basis, but the Defendant subsequently changed this to a 4 or 5 weekly cycle (as notified to individual branches by the Defendant).
47. The Defendant possessed and/or controlled the underlying transaction data in relation to such transactions.

Horizon

49. Horizon comprised computer system hardware and software, communications equipment in branch, and central data centres where records of transactions made in branch were processed, recorded and retained.
57. Fujitsu's role included providing a telephone advice service, for and on behalf of the Defendant (or by agreement with the Defendant) as a point of contact in relation to technical problems with the Horizon system or equipment.

Category 3
Post Office Operations

63. The Defendant requires some minimum products and services to be offered by its branches, but does not require all Post Office branches to offer all products and services it offers.
This part of 63 is admitted. A second part, which added "save that changes may be agreed as regards opening hours and/or the products to be offered at individual branches" was not.
Operation of a Post Office Branch

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72. Some Subpostmasters and assistants may act dishonestly in the conduct of their branches, including in defrauding the Defendant.

Accounting to the Defendant

80. If Subpostmasters submit false accounts to the Defendant, that can lead to concealing losses from it, sometimes for many months or even years.

52. Of those in Categories 2 and 3, it will be relevant to consider (given the parties' lack of agreement) firstly whether they are facts (for those that are not agreed as facts), and also whether they are part of the relevant factual matrix for resolution of the Common Issues. I shall deal with this further in Part E when I come to consider the conclusions following the review of the evidence.

53. It can also be seen that the relevance of the Branch Trading Statement, which expressly forms part of Common Issues 13 (and also arises implicitly in respect of Common Issue 12(c)), is challenged by the Post Office, namely those numbered 32 and 36 above. This is part of how an individual SPM stated an account to the Post Office in order to roll over into the next Trading Period. The mechanics of how this was done and the choices of the SPM if he or she wished to dispute any shortfall, discrepancy or Transaction Correction ("TC") issued on Horizon, is undoubtedly a part of the factual background to resolution of the Common Issues. This is not, in my judgment, to use post-contractual matters of fact to construe the terms of the contract. Indeed, when Mr Bates and Mrs Stubbs contracted with the Post Office, Horizon had not even been introduced. The whole of Horizon was post-contractual. The Branch Trading Statement and how it was produced are undoubtedly of relevance to Common Issues 12 and 13.

54. The Post Office wished to exclude, and made this very clear in closing, any evidence of how Horizon was actually operated in fact. The court had heard evidence and the Lead Claimants were cross examined on what they had in fact done, and how they could or did act when their problems arose. However, the Post Office submitted that none of that evidence was relevant to *any* of the Common Issues. I reject that, and in my judgment such evidence is plainly relevant to Common Issue 13.

55. This can be tested in the following way. Common Issue 13 is to be answered for all the Lead Claimants at least (putting to one side the issue of Group Litigation and Common Issues being for the utility of resolving the whole litigation for all claimants). Horizon did not exist when Mr Bates contracted with the Post Office; it was introduced in late 2000. I do not consider Common Issue 13 can properly be considered at all for Mr Bates without considering what he did in fact do, or the options that he in fact had, in respect of the Branch Trading Statement that was part of the Horizon regime. Further, I consider the same approach applies to each of the other five Lead Claimants, even though (at its extreme for Mrs Dar and Mrs Stockdale) they contracted on the terms of the NTC and the Horizon system had been well in use by then, and had been for many years. I will therefore address, in outline terms only (as I am not in this judgment making any findings as to breach) the evidence of each of the Lead Claimants concerning how their shortfalls arose and how this affected what they did, and what they were told to do (on their evidence) by the Helpline.

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56. Because of the way that the Branch Trading Statement was produced, and my views as above which were expressed to the parties, I invited them at the closing submissions stage to agree at a high level (in a flow chart form if that could be done, using text alone if not) the different steps available to an SPM at the end of a trading period if a Transaction Correction ("TC") were generated, and if there were a discrepancy shown on Horizon when a Branch Trading Statement was required. They did so, titling these Flowchart 1 and Flowchart 2 respectively, and additionally including some agreed notes. These documents are Appendix 3 and Appendix 4 to this judgment.

57. Finally before turning to the individual witnesses, the Post Office adopted a curious position on the credit of some witnesses. There were issues of fact between some of the Lead Claimants and the Post Office on matters that went to the Common Issues. For example, for Mr Bates it was in issue whether he actually received a copy of the SPMC before he took over the branch. For Mr Abdulla, the sequence of buttons and commands which would be pressed by him as a SPM at the end of a Trading Period when a Branch Trading Statement had to be generated was also the subject of contested facts. Although the Post Office made submissions as to these witnesses' credit – for example Mr Abdulla was said to have "lied frequently and brazenly" (in paragraph 592 of the Post Office's Closing Submissions) and some of his evidence was said to be "new and obviously untrue" (paragraph 593) the Post Office in Closing Submissions initially invited me not to make findings on credit.

58. That was plainly a confused position on the part of the Post Office. After a degree of exploration during oral closings, this confusion was not resolved. I therefore invited the Post Office to clarify their position on this after the hearing in writing. This was done, and the Post Office submitted that "the Court should refrain from making any findings of fact on matters going to issues outside the scope of the Common Issues trial, specifically matters going to issues of breach and causation."

59. I accept that the correct approach is not to make any findings on issues of breach and causation, or one what are called Horizon Issues, which effectively deal with the operation and accuracy of the Horizon system, and whether it is robust and/or whether it had the propensity to generate errors and shortfalls.

60. The Post Office is obviously concerned that findings of fact in this judgment may affect its prospects during any future trial on breach and causation. I will not be making any findings of fact in this judgment that go to contested facts that will be dealt with as part of breach or causation. However, that is not the same as saying that the court cannot and should not deal with the credit of witnesses where this has been so directly challenged. A finding, say, in Mr Bates' favour on issues of fact such as whether he received a copy of the SPMC has to be made one way or the other, as that affects the formation of contractual terms in his case. That is not however, if that finding is in Mr Bates' favour, to say that thereafter and for all time in these proceedings everything that Mr Bates says in evidence will as a result be accepted uncritically by the court on future other issues. All a court can do is weigh up the evidence before it, observe it being tested against the other side's evidence and documents that are put to a witness, and come to a conclusion.

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61. The Post Office also invited me specifically "Not [to] take account of evidence which, while it may go to the witness's credibility, risks trespassing on a future trial or trials" (emphasis in original).

62. I do not consider that it is the right approach to ignore evidence just because of such a risk. In my judgment the correct approach is to consider the evidence that was led by all the parties in the Common Issues trial, but not to make findings on matters that are more properly to be dealt with in later trials, such as the operation and efficacy of the Horizon system, breach, causation and loss. Some of the Common Issues are pure questions of construction, and the evidence will not be relevant to them at all. Some require an understanding of the Horizon and Post Office accounting process, such as Common Issue 13. Some, so far as they concern individual Lead Claimants such as Mr Bates, include issues of fact such as whether he actually received a full copy of the SPMC. Where such issues of fact arise, I will deal with them. I will make no findings going to breach or causation, as they are not part of the Common Issues.

63. There is one other point that requires addressing at this stage, and that is the way that Branch Trading Statements came to be created at the end of a Branch Trading Period. This was explored particularly by the Post Office with Mr Sabir and Mr Abdulla. At the beginning of the Common Issues trial, the following five facts were contended for by the Claimants in the Factual Matrix:

> 32. Claimants seeking to dispute apparent shortfalls did not have an option within Horizon to do so, and were required to contact the Helpline to seek assistance.
> 36. A branch cannot enter (or "roll over" into) a new trading period without the Subpostmaster declaring to Post Office the completion of the Branch Trading Statement.
> 37. The Defendant operated the Network Business Support Helpline ("**the Helpline**") which it provided and recommended to Claimants as a primary source of advice and assistance in relation to Horizon, transactions, errors and issues relating to their trading statements and accounts.
> 44. The Defendant required Claimants to *'balance and complete a Branch Trading Statement'* at the end of each branch trading period (as stated in the Operations Manual at §9.3). Initially this was required on a weekly basis, but the Defendant subsequently changed this to a 4 or 5 weekly cycle (as notified to individual branches by the Defendant).
> 47. The Defendant possessed and/or controlled the underlying transaction data in relation to such transactions.

64. These were Category 2 facts. As explained above, Category 2 was entitled "Claimants' facts in issue and/or relevance disputed". These were facts which the Claimants asserted formed part of the admissible factual matrix for the Common Issues Trial, but the Post Office did not agree. The Post Office contended either that the relevance of the fact was disputed; that the truth of the fact was not agreed (either because the Post Office denied it was true, or did not admit it was true); or both, namely it was not agreed as a fact and was not accepted as being relevant. If the Claimants are right, and these are both facts, and relevant, then findings will be required.

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65. Mr Bates entered into a contractual arrangement with the Post Office in 1998, which was before the Horizon system had even been introduced. More recently, Mrs Stockdale became a sub-postmistress for the Post Office in May 2014, and Mrs Dar in November 2014. The other three Lead Claimants' agreements with the Post Office fell during this 16 year period. As one would expect, the contractual terms changed over time, and so did the Post Office's policy and practice in terms of how it engaged its sub-postmasters and sub-postmistresses (to whom I will collectively refer as SPMs).

66. Of the two main different contracts used, the SPMC is a set of contract terms drafted by the Post Office. The original version is a 1994 document, although based on a 1991 document (the date of document D2.1/1 in the trial bundle). Subsequent amendments were made to the 1994 document by the Post Office over time. There were also later versions produced in 2006. This document also existed in two different forms, termed the Standard SPMC and the Modified SPMC. The Post Office has described the main difference between the Standard and Modified versions as being to the remuneration of the SPMs. The SPMC that would have been relevant to Mr Bates and Mrs Stubbs is the 1994 Standard SPMC; other claimant SPMs would have contracted on its terms during the period prior to 2006. The version relevant to Mr Sabir is the 2006 Standard SPMC, and the version relevant to Mr Abdulla is the 2006 Modified SPMC. The way in which these contracts were amended was very difficult to follow. The list of amendments (the Claimants refer to them as variations) which were issued by the Post Office were not made within the body of the document, they were listed at the front. Also, each separate section (and in the 1994 Standard SPMC, prior to any amendments, there were 23 such sections from Section 1 "Contract and Status" to Section 23 "Counter Automation") had within that section a number of appendices. Given the number of amendments made over the years, these became extraordinarily numerous. In the 2006 Standard SPMC, before one even reached the provisions of Section 1, there were over 40 pages of amendments listed at the front of the document. The 1994 SPMC was 113 pages long. The 2006 Modified SPMC was 109 pages long.

67. In 2011 the Post Office embarked upon something called the Network Transformation Programme. This was a major overhaul of the Post Office's branches, both in terms of how many, where and upon what terms the branches operated. It was not contentious between the parties that the Post Office was most careful to ensure that its SPMs were not seen as employees. Mr Green put to a number of the Post Office witnesses that this was a "sensitive subject", and those to whom the point was put agreed. SPMs were therefore not made redundant as part of the Network Transformation Programme or NTP. They were however entitled, if they so wished, to accept compensation and decide no longer to operate their Post Office branch on the same terms as before, namely under the SPMC. New SPMs were engaged by the Post Office, post the NTP, on an entirely different contract, called the Network Transformation Contract, after the Network Transformation Programme of which the new contract formed a part. The Post Office had two different types of these two contracts, one for Main and one for Local Post Offices. Only the one for Local Post Office is relevant to these proceedings. I shall refer to this Network Transformation Contract as the NTC. This document was rather different to the SPMC. Mrs Stockdale and Mrs Dar both contracted on the NTC, and not the SPMC. It had a preface and appendices. It also had a longer termination period.

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68. Both the SPMC (Standard and Modified) and the NTC are relevant in these proceedings. Each of the different types of contract makes provision for how certain losses are to be dealt with.

Mr Alan Bates

69. The first Lead Claimant, and the person whose name appears in the title of the litigation, is Mr Alan Bates. He was the SPM of Craig-y-Don, Llandudno in North Wales from 31 March 1998 to 5 November 2003. His first day in the branch was 7 May 1998, a day which I will refer to as Branch Handover Day, and his involvement ended on 5 November 2003 because he had his engagement with the Post Office terminated by them. He set up the group that became the Justice for Subpostmasters Alliance or JFSA. The parties are agreed that the date upon which Mr Bates became contractually bound to the Post Office was 31 March 1998.

70. Prior to becoming involved with the Post Office, he had 12 years' experience in project management from his previous career in the heritage and leisure sector, and had worked for 5 years in the Museum for Children in Halifax in Yorkshire in the 1990s. He had worked with a specialist software company who developed an electronic point of sale or EPOS system for the museum in this role, so although not an IT specialist, he had considerable experience of EPOS systems and had been trained himself, and overseen the training of staff, on this bespoke system at the Museum.

71. He and his wife began looking for a branch Post Office in different parts of the country. They were attracted to Craig-y-Don which had an associated haberdashery and general retail business alongside, and residential accommodation above. This was then being run by Mr Savage, the incumbent SPM, and his wife, and they wished to retire. Mr and Mrs Bates were given 3 years of accounts by Mr Savage. The accounting used at the Post Office was predominantly paper based, although the Savages used a computer programme purchased privately by them and approved by the Post Office called "Capture".

72. The agreement to purchase the business from Mr and Mrs Savage was on the following outline terms. This agreement was reached in December 1997, for a total of £175,000, and subject to Mr Bates being appointed the SPM.

    1. The freehold title to the property at a price of £80,000.

    2. The business goodwill of the branch and the associated business, at a price of £65,000. This was calculated on the basis of the annual Post Office remuneration with a multiplier of 1.5. Mr Bates understood this was normal for the valuation of goodwill of a Post Office branch.

    3. A figure for fixtures and fittings, which was £10,000. Fixtures and fittings included the counters and some other items.

    4. The stock was priced at £20,000.

73. There are some particular features of this transaction. Given the business model of branch Post Offices, there was a purchase by Mr Bates of the existing retail business,

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which as the above shows, included freehold title (and the premises included residential accommodation). If the transaction is considered as a whole, the purchase monies included property; business assets such as goodwill, stock and fittings of or for the non-Post Office business; and business assets such as goodwill and fixtures and fittings of and for the Post Office. The Post Office stock did not belong to Mr Savage, so he could not sell that to Mr Bates. Mr Bates told me that the business had the potential to grow, although the existing figures were what he described as "acceptable". The presence of the branch Post Office was an important factor, and the remuneration from the Post Office (which he was told by Mr Savage) was an important consideration for him. This was in the order of approximately £36,000 in 1993 and 1994, rose to £44,000 in 1995 and then fell in 1996 to £39,000. This was shown in Mr Savage's accounts as "Post Office salary". Mr Bates also took comfort from the fact that there was a large measure of security from running a branch Post Office.

74. A number of these features were broadly present in the cases of each of the Lead Claimants, and may well be present in all (or almost all) of the cases of all the claimants in the litigation, although not all premises had freehold title, because some had leasehold title. Not all premises would include residential accommodation either. However, the way in which the presence of a Post Office could assist in an associated retail business was appreciated by the incoming SPMs, and the existence of income from being a SPM was attractive. They were however required, as a component of everyday commercial life, to purchase (whether including a leasehold or freehold interest) the existing business, if they were taking over an existing Post Office. They also had to be approved by the Post Office.

75. So far as the dealings between Mr Bates and Mr Savage are concerned, the following points are notable. Firstly, Mr Savage did not provide Mr Bates with a copy of, or show him, Mr Savage's contract with the Post Office. There is no reason why he should have done so, or why Mr Bates should have expected this. I deal below with the particular facts of Mr Bates in terms of the way that the Post Office did (in terms of Mr Bates) and would (in terms of SPMs generally) behave concerning the SPMC, based on the evidence in this trial.

76. The other feature is that Mr Savage kept a tin in the safe for what he called "unders and overs". This was to deal with any shortages or "overs" in the cash accounting. Although Mr Bates thought this odd, it would undoubtedly (both on its own, and together with the examples given in interview by the Post Office with which I deal below) have given the impression to any reasonably diligent incoming SPM that such shortages would be of the order of the petty cash variety, in other words modest sums. One year of Mr Savage's accounts, namely 1993, had an entry "Post Office shortages" in the sum of £208. 1994 had no such entry, and neither did the years 1995 or 1996. The Post Office seemed to set great store in the cross examination of Mr Bates as to what the entry for £208 in that year represented. Mr Bates said that this was a "quite a small amount in there for a busy office and a busy business". Another way of expressing this – although these are my terms – is that shortfalls in accounting of this order were modest. In terms of percentage of the remuneration coming from the Post Office, the "shortage" in the account for one year was about 0.5% of that year's Post Office income of £36,341. It only showed in one year of the accounts, and the fact that Mr Savage could deal with the shortages by using a tin supports that any

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such items would be limited to a couple of hundred pounds over the course of a year at most, and more usually of a petty cash variety.

77. Mr Bates had to have approval from the Post Office, and had to apply to become a SPM. He was sent the application pack on 6 January 1998, and this explains, in the language of the Post Office which I will quote, the nature of what Mr Savage had described in his accounts as "Post Office salary":

"The remuneration at the office is determined partly by an Assigned Office Payment (A.O.P) paid in twelve equal instalments and partly by a variable volume related Payment (called a Product Payment) which reflects the work transacted at an office in an accounting period. The Product Payment is also paid monthly and is calculated two months in arrears.
By way of example, based on last year's traffic, the Product Payment would be £23410.47 per annum which together with the Assigned Office Payment of £14611.51 per annum equates to a total of £38021.98 per annum.
However, in recognition of the opportunity to operate a Post Office on behalf of Post Office Counters Ltd, the remuneration paid for the first 12 month period will be 75 % of the payment as above. The remuneration covers any attendance during normal scheduled hours."

78. The Post Office did not therefore term it a salary, and it can be seen to have had two components, only one of which is related to volume of business. Also, the Post Office would only, for the first year, pay an incoming SPM 75% of what would ordinarily otherwise be paid. The 25% deduction was not deferred or paid in other ways; it was simply the practice of the Post Office to deduct or keep that 25% in the first year. The rationale or economic justification for this is not entirely clear, but it was effectively a payment from the SPM to the Post Office (in Mr Bates' case, of approximately £9,500) to become a SPM. The ARS 44 below states it was to "reflect uncertainty and risk to" the Post Office.

79. Mr Bates filled in the application form and provided a business plan. Nowhere in the partial copy of the letter of 6 January 1998 disclosed in this litigation is there any reference to the SPMC. Prior to his interview he was sent a document with the title ARS 44 (SPO) from the Post Office (at that stage called Post Office Counters Ltd). This set out certain terms, and was sent with another document entitled ARS 43, which is a job description. Neither of them refers to the SPMC either.

80. Certain of the terms of the ARS 44 and ARS 43 should be quoted:

ARS 44

1. This states under "Status" that the SPM is "an agent of [the Post Office] who is given a contract to provide services on behalf of the Company. He is NOT an employee".

2. Under "Remuneration" the document states

"The remuneration at an office is determined partly by an Assigned Office Payment (A.O.P) and partly by a volume related Product Payment (called a product payment) which reflects the work transacted at an office. The product payments are normally

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reviewed annually and the result of the review communicated to the Subpostmaster at the time. The remuneration is paid in twelve equal instalments.

However, in order to reflect the uncertainty and risk to Post Office Counters Ltd in making a new appointment at an office which attracts a remuneration of £12,012.00 or more, the remuneration paid for the first twelve month period will be 75% of the payment warranted.

The assigned office payment is a stable payment which is not affected by future changes in the amount of post office business handled at the office.

The assigned office payment will not vary with changes in turnover. The level of the assigned office payment will be subject to annual review and any changes will be negotiated between POCL and the NFSP on a network-wide basis.

The product payments are paid, monthly*, two months in arrears, on the amount of post office business conducted at the office, generally on a "pence per transaction" basis. The product payments are designed to link the amount of business you do to the payment you receive. They help you clearly identify the extra pay you will receive for the additional business you do. They will also allow you more clearly to predict future income."

The asterisk refers to other arrangements "for offices £12,011 or below" and is not relevant to the Common Issues.

3. Under "Accounts" the following is stated:

"An account is prepared weekly after close of business on each Wednesday. The Subpostmaster is personally responsible for all losses or gains incurred to Post Office cash or stock. Losses must normally be made good immediately they are discovered. Gains are normally retained by the Subpostmaster."

81. Mr Bates was interviewed by Mr Idris Jones sometime in January 1998. Mr Bates cannot remember when he had the forms ARS 44 and ARS 43 sent to him, but he accepted that the contents "broadly aligned" with his own expectations of what would be required. He said that he thought it was a matter of common sense that he would need to submit accounts and for which he would have "a measure or responsibility". He did not think he would be taking on open-ended responsibility for all and any losses including those for which he was not responsible. He said the majority of the time at the interview was spent going through his business plan. The business plan formed part of the application, and Mr Bates attached to his plan the accounts he had been given by Mr Savage for the existing business. Part of the purpose of the interview was for the Post Office to satisfy itself that the business plan was viable.

82. It is in issue between Mr Bates and the Post Office whether he had a copy of the full terms of the SPMC on or before 31 March 1998, and if he did not, whether he was sufficiently on notice of its terms that the contract formed between Mr Bates and the Post Office incorporated the terms of the SPMC. Whether he did or not, there is an issue in the litigation generally because according to Mr Bates, a significant number of claimants are in the same position as he is regarding not having had a copy of the SPMC prior to contracting with the Post Office. Regardless of the exact number of

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claimants who are affected by this, the parties are agreed that I should deal with the contractual consequences on either basis. In other words, even if I find Mr Bates did have a copy and contracted on those terms on 31 March 1998, I should set out what the situation would be if he did not, and vice versa.

83. The Post Office practice at the time was that this was how an incoming SPM should obtain and consider this important document, and these details, in advance of Letter of Appointment being sent out. The rationale for this seems to have been one of administrative ease for the Post Office. It seems to have been considered that the easiest way for the incoming SPM to look at its terms was to leave it to the SPMs to sort out between themselves. However, there is no evidence that an outgoing SPM either knew or was told that that this was one of the things they were supposed to do; further, they may have lost or mislaid their copy (even if they had retained it); still further, they may have been in post for some years and hence may well have had an older version that then then-current one. Yet further, there was no step in the process whereby the Post Office either checked this had happened, or even addressed its mind to the incoming SPM being given notice of the terms of the SPMC at all. Such an approach would have been extraordinarily lackadaisical in my judgment in any event, but when it is combined with the lack of any written direction to the incoming SPM that this was expected or required, it goes beyond lackadaisical to being wholly inadequate.

84. Turning to the correspondence that was actually sent to Mr Bates in this case, on 30 March 1998 the Post Office sent a letter to Mr Bates which I will quote:

"I am delighted to inform you that your application for the Subpostmastership of Craig y Don Post Office, in the premises situated at 21 Queens Road Craig y Don Llandudno, has been successful.

The transfer of the office will take place on a mutually convenient date, normally on the half day closure, when a member of Post Office Counters Limited staff will attend to transfer the cash and stock to you.

The present Subpostmaster has been notified of your appointment and I would be grateful if you would write to the Agency Recruitment Manager at the address overleaf when the legal affairs connected with the transfer of the business/property have been completed.

Please find enclosed with this letter two copies of a list of the main conditions attached to your appointment. Would you kindly confirm your acceptance of these conditions by signing one copy and returning it, in the envelope provided, to the Agency Recruitment Manager. Please do not hesitate to ring if you need further information about your appointment.

May I take this opportunity of welcoming you to the ranks of our local subpostmasters and of wishing you every success in this venture. Post Office Counters Ltd will endeavour to support you through every stage of your appointment. The Helpline number below is your first point of contact and the staff in our Regional Office will be only too pleased to help and advise you on any matter.

Good luck!"

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85. This letter plainly refers to two enclosures, which are described as "two copies of a list of the main conditions attached to your appointment". One is 4 pages long and is headed:

YOUR COPY

MR ALAN BATES

CONDITIONS OF APPOINTMENT FOR CRAIG Y DON

SUB POST OFFICE

86. This had space for Mr Bates to sign and date at the bottom. It was curiously numbered. The terms were numbered as follows. I will only reproduce some of the terms:

"1) The remuneration at the office is determined partly by an Assigned Office Payment (A.O.P) paid in twelve equal instalments and partly by a variable volume related Payment (called a Product Payment) which reflects the work transacted at an office in an accounting period. The Product Payment is also paid monthly and is calculated two months in arrears.

By way of example, based on last year's traffic, the Product Payment would be £23,410.47 per annum which together with the Assigned Office Payment of £14611.51 per annum equates to a total of £38,021.98 per annum.

However, in order to reflect the uncertainty and risk to Post Office Counters Ltd in making an appointment to fill this vacancy, the remuneration paid for the first 12 month period will be 75% of the payment as above. The remuneration covers any attendance during normal scheduled hours."

"2) You will be required to attend 2 days training prior to your taking up the appointment. The training will also be offered to your spouse or partner. The Training Manager will contact you to discuss the arrangements."

3) dealt with opening hours, and was followed by 4) which stated "The following conditions will also be attached to your appointment":

The terms that followed were numbered 4.1, 4.2, 4.3, 4.4 and so on up to 4.7. That stated inter alia "we will provide all training necessary for yourself".

4.8 then followed and ran up to clause 4.12. 4.12 itself had the following text:

"4.12 Counters Club

Also at the six month stage, if product lines are being reviewed, consideration should be given at that time to joining the Counters Club, if the products are viewed to be compatible with the retail offer at Craig y Don.

5) As an incoming Subpostmaster there is an obligation for you to implement any Security recommendations made by our Regional security section. Any works should be completed no later than three months after your appointment, and

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may I remind you that no alteration to the Post Office accommodation should be made without first consulting myself.

6) You will be bound by the terms of the standard Subpostmasters Contract for services at scale payment offices, a copy of which is enclosed."

Mr Bates signed a statement that said "I fully understand and accept these conditions and agree to avail myself of the pre-appointment introductory training".

87. The other document was 2 pages long, had 13 numbered terms, and was headed:

"CRAIG Y DON – CONDITIONS OF APPOINTMENT"

88. The terms of the two documents were similar, but not identical. They are obviously different documents in my judgment.

89. The Post Office challenged Mr Bates' account generally, and in particular his evidence that no copy of the SPMC was sent to him before Handover Day. The length of time since the events in question was also relied upon by the Post Office as supporting this challenge to the accuracy of his evidence. The Post Office also submitted that Mr Bates could not differentiate between his evidence of fact (which he must have come to believe over the years as being true) and his motivation as a campaigner against the Post Office. I reject that criticism of his evidence. Mr Bates seemed to me to give his evidence honestly and carefully, and if he could not remember some details, he would accept this. The Post Office also made two points that, it was submitted, undermined Mr Bates' claim that no copy of the SPMC was sent to Mr Bates.

90. These were that there was evidence from the Post Office that its general practice was to send out the SPMC in the same envelope as the Letter of Appointment, and as a document of some 114 pages in length, it would have been noticeable to the person sealing the envelope had the SPMC not been included. Also, it was said Mr Bates was "a details man" and would have noted there was no document headed "standard Subpostmasters Contract" or "standard Subpostmasters Contract for services at scale payment offices" enclosed, and he could have asked for another copy had it not been included. It was also said that in later correspondence in August 1998 he must have had a copy because he referred to some of its terms as "wordy" and "tucked away" and that only made sense if he had received the actual SPMC. The Post Office did not admit that the 2 page document was enclosed at all, but stated that if it were, this was enclosed in error. Its primary case was that the contract with Mr Bates was concluded on 31 March 1998 (when he signed and returned one copy of the 4 page document); its alternative case was that the contract was formed on 8 May 1998 when he signed his Acknowledgement of Appointment.

91. I do not accept that the terms of his correspondence in August 1998 criticising the wording of Clause 4.1 entitled "Absence on Holiday – Holiday Substitution Allowance" means he had a copy of the full SPMC by that date, because exactly that title and clause appeared in the SERV 135 document he signed on Handover Day on 8 May 1998. Even if he did, this post-dated contract formation. I find that the contract was formed on 31 March 1998 on the terms of what was enclosed with the Letter of Appointment. A reasonably diligent person in receipt of the documents that Mr Bates

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says he received with the Letter of Appointment could quite easily have mistaken the reference to the "standard Subpostmasters Contract" as being either the 2 page document entitled "CRAIG Y DON – CONDITIONS OF APPOINTMENT", or the 4 page document entitled "CONDITIONS OF APPOINTMENT FOR CRAIG Y DON SUB POST OFFICE". Certainly the covering letter itself made no reference either to the SPMC (by any description). It also stated that enclosed were "two copies of a list of the main conditions attached to your appointment." It asked Mr Bates to "confirm [his] acceptance of these conditions by signing one copy". It did not make any reference to a fourth document, either by title, or by saying there was another important document enclosed, or by saying there was a fourth document included in the package. The Post Office put to Mr Bates that the letter made clear he should have received three documents, and he explained that he had. Two copies of what Mr Cavender referred to as the "main conditions" – the 4 page document, one of which Mr Bates had to sign and return – and another document which was 2 pages long. There is nothing to suggest that any reader of the letter would expect to find four documents in the envelope. Mr Bates therefore had no knowledge that there was another document the Post Office intended to include, which, given his evidence it was missing, he was on notice existed and which he should have requested specifically if it were not included. For the Post Office's case on this to have had any basis in reality, there would have to be something in the letter or the accompanying documents that suggested there should be four documents in the envelope.

92. Nor do I accept the line of argument advanced by the Post Office that because the two different documents comprising the 2 page document, and the 4 page document, were very similar in part (both of which the Post Office itself had produced) meant that a sensible reader of those documents would have concluded that the two documents were so alike they were really the same or one document, and that therefore there must be another different document, namely the SPMC. The Post Office, by what appears to have been a combination of historical evolution of the appointment of SPMs and the lackadaisical approach to formation of contractual relations to which I have referred, finds itself in the position whereby its own Letter of Appointment did not expressly refer to the SPMC at all, either by title, or by inclusion in the number of documents which that letter said were enclosed. Nor did the Letter of Appointment even use the normal approach of many business letters and state "Enclosures:" or even "Enc:" followed by the documents that were supposed to be included. I find that the 2 page document was enclosed in the envelope with the Letter of Appointment as Mr Bates explained to me, and even though the Post Office maintains that if this were done (which I find it was) this was in error, there was nothing in the documentation to bring that error (if error it was) to the attention of Mr Bates.

93. At 13-013 and 13-014 in *Chitty on Contracts* (2018) 33rd Ed. Sweet & Maxwell the following passages deal with necessary notice in such circumstances.

"13-013 **Meaning of notice** It is not necessary that the conditions contained in the standard form document should have been read by the person receiving it, or that he should have been made subjectively aware of their import or effect. The rules which have been laid down by the courts regarding notice in such circumstances are three in number:

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(1) if the person receiving the document did not know that there was writing or printing on it, he is not bound;

(2) if he knew that the writing or printing contained or referred to conditions, he is bound;

(3) if the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document but did not know it contained conditions, then the conditions will become the terms of the contract between them.

13-014 **Reasonable sufficiency of notice** It is the third of these rules which has most often to be considered by the courts. The question whether the party tendering the document has done all that was reasonably sufficient to give the other notice of the conditions is a question of fact in each case, in answering which the tribunal must. It is not necessary to look at all the circumstances and the situation of the parties. But it is for the court, as a matter of law, to decide whether there is evidence for holding that the notice is reasonably sufficient."

94. I find that, in the case of Mr Bates, based on the terms of the documents in fact sent to him, that the Post Office did not do all that was reasonably sufficient to give him notice of the terms of the SPMC.

95. As will be seen, the Post Office entirely changed its procedures in terms of contract formation when the NTP was initiated, and this included not only the terms upon which it contracted with incoming SPMs, but also the way that this was done. This was no doubt a sensible reform. I am not concluding that, simply because the system was reformed, that automatically means of itself that the prior system was inadequate. I have concluded that the prior system was inadequate due to the way in which this was done and also the terms of documents such as the Letter of Appointment to Mr Bates.

96. In oral closing submissions I used the word "haphazard" when exploring with Mr Cavender the system used by the Post Office for the formation of contractual relations with incoming SPMs for the years when the SPMC was in use. This term also applies to the way that SPMs were (effectively) unknowingly left to sort out between themselves whether, and if so to what extent, the outgoing SPM might (or might not) explain to the incoming SPM what the terms were upon which the latter would be contracting with the Post Office. He sought to persuade me that I was not being entirely fair. There are similar terms that have the same meaning as haphazard: chaotic; unsystematic; irregular; and random. I have carefully considered all the Post Office evidence on this subject (although I deal with the Post Office witnesses later in this judgment) and my conclusion is that I am not being unfair to the Post Office at all by describing it as haphazard. Indeed, any of these synonyms would apply equally well. Given communication and notification of terms is an important element for contract formation in this jurisdiction, the method being used at that time by the Post Office was simply not fit for purpose.

97. Yet further on the Post Office "system" or approach that an incoming SPM could and should have been expected to obtain such details, there is nothing on the face of the

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SPMC itself to suggest that this be done, even though other instructions are given as to what is to occur when the appointment comes to an end in the following terms:

"On the last day of the Subpostmasters appointment this contract must be handed to the officer conducting the transfer of cash and stock on behalf of Post Office Counters Ltd."

98. A process whereby the detailed terms of an SPM's appointment are dealt with in this way is fraught with the very significant risk than an incoming SPM simply will have no knowledge of what those terms are. The Post Office plainly realised this, prior to Mr Bates' appointment, because on Handover Day one of the documents he was given to sign expressly stated the following at the beginning:
"Recent findings by the audit teams have raised doubts in my mind as to how conversant Subpostmasters are with certain very important Post Office regulations. As a means of protecting the investment made by yourself and Post Office Counters Ltd in the business I would like to draw your attention to the following extracts, from your Contract."
(emphasis added)

This was in the document entitled SERV 135 to which I have already referred, which was from Mr Williams from whom I heard evidence. The "important Post Office regulations" can only mean terms of the SPMC itself, and the reason that there was doubt on the part of SPMs about some of these was probably because not all incoming SPMs received a copy of the SPMC. It is difficult to be conversant with terms or regulations if they are never brought to one's attention, and there is such confusion about their very existence. Indeed, even in the Acknowledgement of Appointment which was signed by Mr Bates on 8 May 1998, the SPMC is not even correctly or adequately described. I deal with the terms of that document below.

99. I accept Mr Bates' evidence, and I find that no copy of the SPMC was sent to him with any letter or otherwise from the Post Office prior to Handover Day, or even given to him, or made available on Handover Day. Even if it had been – and I find it was not – the circumstances on Handover Day were wholly inadequate for Mr Bates to be fixed with the entirety of the terms of the SPMC. Yet further, it is agreed by the parties that Mr Bates contracted with the Post Office on 31 March 1998 and the date after which he received the full SPMC was after that given my findings.

100. I deal with the consequence of this below in Part G, and also deal with the consequences of the terms that would have applied had he received a copy in the post with the Letter of Appointment, to enable the parties to know the consequences for other claimants.

101. The evidence from Mr Bates about Branch Handover Day was that it was an extremely busy day. The following took place on Branch Handover Day. The audit team from the Post Office arrived, and performed what was termed a Closing Audit for the outgoing SPM. This meant counting up all the cash and stock in order to arrive at a closing balance for the outgoing SPM. Normally that would be done, and the incoming SPM be given a number of documents to be signed, on the same day.

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102. One of these documents is headed "Acknowledgement of Appointment" and Mr Bates signed this on 8 May 1998, not being present in the branch on the day of the closing audit which was the day before. It stated:

> "I accept the Appointment as Subpostmaster at:
> Craig y Don
> and agree to be bound by the terms of my contract, the Personal declaration (p13) signed by me, and by the rules contained in the Book of Rules and the instructions contained in those Postal Instructions issued to me."

103. The phrase "the terms of my contract" does not alert the person signing to the existence of the SPMC in my judgment, and neither does the personal declaration, the Book of Rules, or Postal Instructions. There is no document entitled the Book of Rules. "The terms of my contract" is an accurate one, and Mr Bates accepted he knew he was entering into "a contract" with the Post Office – that is not in issue. The Acknowledgement of Appointment does two things, in my judgment. It does not advance the case being advanced by the Post Office that Mr Bates must have known of the SPMC, and it also makes clear that the Post Office mis-described its own documents in its own Acknowledgement of Appointment for the individual SPMs.

104. Mr Bates' evidence was that a limited amount of training was provided to him and his assistants in September 2000 in respect of Horizon, which was being introduced later that year. There was a day of training for all SPMs and assistants (he estimates 150 people were present) and thereafter ½ a day for the SPMs alone. There was no explanation for how to identify the cause of any shortfalls or discrepancies or how to dispute them. His evidence is that the trainers did not explain he would have liability for all shortfalls on the system, but even if they had I do not consider the trainers would have had the ability to impose such contractual liability upon Mr Bates in any event. He was given a 500 page reference guide to take back to the branch.

105. Horizon was installed in his branch in October 2000, and Mr Bates first contacted the Helpline that month. On the basis of the Helpline records disclosed by the Post Office, Mr Bates has provided a summary of difficulties that he experienced, and shortfalls and apparent discrepancies started from December 2000. Earlier, in September and October 2000 he had actually requested more training but was told he could not have any as two days was the maximum permitted. These difficulties persisted and increased, and although the Post Office later moved to balancing every four weeks (or monthly), in December 2000 Mr Bates was balancing on a weekly basis.

106. On 13 December 2000 Horizon showed an unexplained variance of over £6,000 in respect of Giro deposits. Mr Bates could not obtain all the information he felt he required in order to investigate this fully, but managed with the information he had to work out that some Giro items of approximately £5,000 had been wrongly duplicated on Horizon. He transferred this to something called the "suspense account". He felt this was caused by an overnight software update.

107. Mr Bates' evidence is that he could not get to the bottom of the remaining shortfall of just over one thousand pounds approximately. Nor could the Post Office staff who attended at his Post Office in an attempt to do so. Mr Bates pursued this matter constantly and said in his witness statement:

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"Due to the way that Horizon worked in practice, it was impossible for me, as Subpostmaster, accurately to track and understand transactions that had taken place and, therefore, determine whether an actual loss had occurred and satisfy myself that it had arisen due to my negligence, carelessness or error."

108. Mr Bates continued with this pursuit of discovering the reason for the discrepancy throughout the whole of 2001. Despite this amount being clearly the subject of a dispute from Mr Bates, the Post Office chased for payment from him on several occasions. One example will suffice. On 16 July 2001 he received a letter in the following terms:

"I have received correspondence from the Management Information Support Duty in Birmingham advising me that they now require repayment for the loss of £1041.86 currently held in Table 2a of your Cash Account.

Unfortunately neither the visits from Selwyn Berry and Ki Barnes nor the pension & allowance checks carried out for the problematic weeks, revealed specific reasons as to how the resultant loss of £1041.86 initially occurred.

I would therefore appreciate if, as a matter of some urgency, you could advise me of your proposals to now make good the loss."

109. This approach by the Post Office to the shortfall which Mr Bates was pursuing as disputed has the following three elements:

1. Notwithstanding the dispute, the Post Office was demanding the amount be paid by Mr Bates.
2. The Post Office had taken some steps – two people had visited the branch, and some unspecified "checks" had been carried out – but these had not revealed any specific reasons.
3. There was no consideration of the terms of the contractual obligation upon SPMs to make good losses, which requires negligence or fault on the part of a SPM.

110. Mr Bates did not pay this and the correspondence continued over many months. On 7 January 2002, over one year after the shortfall had occurred, Mr Bates wrote to Mr Chester of the Post Office, Mr Bates' line manager, copied to the National Federation of Subpostmasters:

"As you are aware the cash account for this office is still showing an amount of £1041.86 in the suspense account. This cumulative figure was placed in the suspense account towards the end of 2000 and I have no *(sic)* doubt at all that it was due to errors in the Horizon system over a number of weeks at that time. In my letters to Gerry Hayes dated 19th December 2000 and 16th July 2001, neither of which did I receive a written reply to, I gave further details on this matter.

I really do think that enough time has now passed for Post Office Limited to have resolved this issue and that unless I receive a written comment to the contrary by the end of this month I will take it that this matter is closed. When I signed my contract with Post Office Counters I did not sign to accept the liabilities arising from the shortcomings of a less than adequate Horizon system, all liabilities from such a system are clearly the responsibility of Post Office Limited or ICL Pathway.

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Allowing this issue to drag on not only continues the stress and strain of the original problems but I fear also continually casts doubt over my honesty and that of my staff. Therefore I would greatly appreciate it if you would bring this matter to a head in order that we can move on."

111. In another letter to Mr Chester dated 13 February 2002, Mr Bates wrote again, under the reference "Horizon Faults and Shortcomings":

"Having given your recent request for the office total to be reset to zero after each weeks' balance much consideration, my concerns are as follows.

Since I have been writing to you and your predecessors about my concerns over the Horizon System l have always maintained the position that I am unable to accept any liabilities shown by the system until such time as I am able to access the data to check it. I refer you to my letter dated 18th July 2001 where I clearly state my position and suggest a way in which this could be done, without any compromise to the security of the data.

However I am concerned on two points over your recent request about zeroing the system weekly by taking money out or putting money in. Firstly it is the liability I am accepting by default in agreeing to put money in if the system shows short, while there is no report writer package to assist me track transactions. Secondly is the concern that the system does not actually log what the weeks' shortage or over was or how it was arrived at anywhere on the documentation we print out and keep. Although at one point the information does appear on the screen, that information is lost the moment we 'roll over'. At least with the current way we are finishing our balance we can track from week to week our position and know where the office stands at any one time.

Related to the above concerns is the matter of error notices which at present are almost impossible to process as we are unable to retrieve the data about the transactions. Although some data is still accessible up to 30 days after the transaction most error notices are for transactions at least 10 weeks ago. Nowadays we are having to refer these error notices back to Chesterfield for more supporting documentation, but it would be so much easier and quicker to access the data at our office to help us track what had happened.

Referring back to your original request, I will gladly conform to your requirement but I must make it clear that my position with regard to Horizon derived figures has not and will not change until such time as I have access to the data and a report writer package with adequate training is provided."

(emphasis added)

112. By "the office total be reset to zero" Mr Bates was referring to the way in which the SPMs were instructed to deal with shortfalls, more detail of this being provided in Part G System and Shortfalls. This is relevant to Common Issue 13.

113. Eventually, the Post Office wrote off the amount, but did so in March 2002. Mr Bates was notified of this in a letter of 6 March 2002, over 15 months after this had occurred. That letter stated:

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"First of all I would like to apologise for the length of time it has taken to resolve this matter. It has been necessary to formulate a consistent approach for all such cases.

Post Office Ltd has received from you a short report setting out your reasons why you do not accept liability for the shortage of £1,041.86p at your post office.

After due consideration of the facts surrounding the loss and of your report, Post Office Ltd has decided to take no further action in respect of the loss at your post office which will be written off. This decision has been made without prejudice to Post Office Ltd's rights to recover any future losses at your post office for which you may be liable under the contract for services and does not affect any future liability you may have for such losses.

To enable me to monitor progress for all such losses could you please complete the section on the next page. Once the loss for £1,041. 86p has been cleared from your suspense account, you must return the whole letter to me in the self-addressed envelope provided. (A copy of this letter is enclosed, for retention at your office).

If I do not receive a reply from you by 22 March 2002 then it will be necessary for me to contact you to ascertain what the delay is."

114. The part that Mr Bates was to sign and return stated the following:

"I have received a Write Off Authority Voucher to the value of £1,041 .86p which has been cleared from my suspense account on (date) ..... and the voucher has been cleared in the appropriate manner in cash account week number ....."

115. Putting entirely to one side the fact that it had taken the Post Office a period of 15 months to finalise how it was to resolve this matter, and Mr Bates was given only 16 days to reply (which attitude appears to me to be symptomatic of how the Post Office regularly treated at least some of its SPMs), the following important points arise in respect of this letter.

1. It suggests that Mr Bates' experience was not an isolated one. The letter states "It has been necessary to formulate a consistent approach for all such cases." "All such cases" can really only sensibly mean that there were other cases, and the Post Office was explaining that time had been spent in deciding on a "consistent approach" for all these cases. The time taken was, in the circumstances, considerable. During that time Mr Bates wrote letters addressed to specific individuals who he had been told were dealing with the matter, and these did not even gain a simply acknowledgement. As far as he was concerned, they were being ignored.

2. The ultimate resolution for the £1041 in Mr Bates' case was to write that amount off, in other words he would not be required to make it good and pay that amount to the Post Office. I am satisfied that if he had simply paid the amount to the Post Office as demanded in the Post Office letter of 16 July 2001 which sought "as a matter of some urgency" that he "advise me of your proposals to now make good the loss" – in other words how he would pay Post Office that money which was at that stage demanded – this would not have occurred.

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3. No explanation was provided to Mr Bates as to how the shortfall had occurred. He was therefore none the wiser.

4. The writing off of that shortfall was made without prejudice to the Post Office's rights in future concerning other shortfalls that may occur "for which [Mr Bates] may be liable under the contract for services" and it also did "not affect any future liability [Mr Bates] may have for such losses."

5. The "consistent policy" – if indeed there was one – seems to have been that the Post Office would simply claim all such sums from the SPMs in question.

116. This shortfall occurred in the early days of Horizon, December 2000. Between that date and March 2002 therefore, it had been brought to the Post Office's attention by at least one SPM (Mr Bates) and potentially others (on the claimants' case) that there were shortfalls and discrepancies being thrown up by Horizon that the SPMs in question could not properly investigate. The Post Office's response, eventually, at least so far as Mr Bates was concerned, was to write off the amount that could not be explained in this instance only, but to say that this was effectively a one-off solution and move on as though nothing was amiss.

117. The full subsequent trial of Mr Bates' claim will show what, if any, consideration was given at the Post Office internally not only to this shortfall, but others (if there were others) in the period December 2000 to March 2002. If the Post Office did in reality do what Mr Bates suggests they did – namely bury their heads in the sand, press on regardless, and chase numerous SPMs for shortfalls and discrepancies caused by the Horizon system – then that would be behaviour of an extraordinary kind, and given the criminal implications for some SPMs, may be extraordinarily serious. On the other hand, Mr Bates' shortfall in December 2000 may, upon investigation by the Post Office, have been put down to early difficulties by SPMs in operating or understanding the new system and writing off the amount may have been decided upon as a pragmatic solution in the circumstances. I make no findings either way at this stage of the proceedings in this judgment.

118. Notwithstanding what happened to Mr Bates concerning this shortfall, Mr Bates had continued his correspondence with the Post Office both prior to, and following, this write-off. He took the view that the ability of the SPMs in branch to interrogate Horizon was too limited, that there ought to be report writing functions that were not available, and that the solutions suggested by the Post Office were not acceptable. He therefore rolled over losses from one trading period to the next, and did not pay funds of his own into the branch to remedy shortfalls shown by Horizon, which he considered were shortfalls caused by Horizon.

119. The Post Office personnel dealing with Mr Bates changed over time. His retail line manager became Mr Wakley. On 14 April 2003 Mr Wakley sent the following letter to Mr Bates:

"Further to our conversation, you confirmed that you have been rolling over losses and gains for the past two years or more. I was unaware of this practice taking place at Craig Y Don and acknowledge your comment that you wrote to the Post Office regarding Horizon, losses and gains over two years ago and that to date you have not received any reply or acknowledgment.

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I am now instructing you, that with immediate effect, you are required to make good the outstanding loss and to cease with this current practice of rolling over any losses and gains.

Please be advised that Subpostmasters are responsible for all losses caused through their own negligence, carelessness or error and also for losses of all kinds caused by their assistants. Deficiencies due to such losses must be made good without delay. With regard to gains, surpluses may be withdrawn provided that any subsequent charge up to the amount withdrawn is made good immediately."

120. Mr Bates was threatened with having his contract with the Post Office terminated if he did not comply, in other words start to make good these losses by paying in his own funds to cover them. He refused to do this. Eventually, in a letter dated 5 August 2003, he was given three months' notice by the Post Office who terminated his contract with effect from 5 November 2003. Curiously, disclosed e mails about this decision internally to terminate his contract are not only heavily redacted, but even the sender and addressee of these e mails have been redacted so it is not possible to see from whom they were sent, or to whom. I do not understand how the identity of the sender and recipient of e mails, parts of which are accepted by the Post Office as not being privileged, can be said to be privileged. The identity of the sender of an e mail that is accepted as being partially non-privileged cannot itself be privileged. Neither can the identity of the recipient. However, I deal with the Post Office's approach to privilege and secrecy elsewhere in this judgment.

121. In the Common Issues trial the Post Office cross-examined Mr Bates, and made submissions about the quality of his evidence, in robust terms, as it is entitled to do. No litigant is obliged to accept the factual evidence against it, and is entitled to test and challenge that evidence when it is in dispute, and that is what the Post Office did. Mr Bates' evidence that he did not receive a copy of the SPMC with the Letter of Appointment was described as implausible, and his assertion in this respect was said to be wholly unconvincing. Because he was a details man (he had once complained of a modest under-delivery of stamps) it was said he would surely have noticed the SPMC was not in the same envelope. Other terms used by the Post Office to describe his evidence were risible, meaningless, nonsensical and weak. It was said he was giving evidence that was plainly wrong, but had convinced himself of the truth of his own account after years of campaigning.

122. One specific example of this attack upon him as having a campaigning approach related to non-receipt of the SPMC. Mr Bates' evidence was that his experience was not out of the ordinary, and there was a large number of SPMs who fell into the same category. He said approaching half of those who participated in the Second Sight Mediation Scheme (before the Post Office withdrew from it) had the same problem. He had been on the Working Group and they had been given regular updates. It was put to him that this "was just not right". His answer was rather precise, and he is no doubt a man with a considerable grasp of detail. He said from memory that about 62 of the 137 or 139 SPMs still involved in that scheme by its end had not received the full SPMC. Although this was initially challenged by the Post Office as being mere campaigning on his part, it was (after some research) accepted that 62 of the number of participants (which was either 137/138 or 150) ticked a box that said "Issues with contract", which may amount to the same thing.

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123. I reject the criticisms made by the Post Office of Mr Bates and his evidence. I find that his evidence was careful, and he was an honest, thorough and reliable witness. Where he could not remember he would say so, and he would accept sensible points put to him if they were factually correct. Many of them were not, for example the number of SPMs in the Second Sight scheme who had problems with their contract. He is undoubtedly committed to resolving this dispute, and given the length of time he has been involved, he must have a degree of stamina and endurance that most people would not possess. The Post Office subjectively might view him as unreasonable or stubborn, as he simply refuses to let this matter drop and has obviously over the years involved himself in the campaign to resolve these issues. Mr Bates has, from about December 2000 onwards, proved himself to be a considerable irritant to the Post Office so far as the Horizon affair is concerned. He was an irritant to them in 2001 when he simply refused, point blank, to pay the £1,000 odd demanded of him (that sum ultimately being written off by the Post Office the following year). He had undoubtedly continued to be an irritant to the Post Office from then on, both from the establishment of the JFSA onwards. He is persistent and no doubt possesses what might be termed staying power. There was nothing unreasonable or stubborn in his evidence before me, and none of the pejorative terms deployed by the Post Office to describe his evidence are justified, in my judgment. The Post Office must have decided to attack him because the whole case of the Post Office requires an assumption or acceptance that the predominant, or only, cause of shortfalls is fault (or worse) on the part of SPMs. The case by the Post Office is that careful and/or diligent and/or honest SPMs and/or their assistants do not experience shortfalls. Therefore, so far as the Post Office is concerned, in each branch where such shortfalls occurred, either the claimants and/or their assistants must have at least some, and potentially all, of those characteristics. If it were otherwise, the Post Office edifice would collapse.

124. Whether that edifice is justified will be finally determined later in 2019. So far as Mr Bates is concerned, I found his evidence before me reliable and I accept it. That is not to say that, when his case comes to be fully tried out, his evidence on all the other issues still to come will be wholly accepted. I will judge all those other issues on all the evidence before me on those issues. In particular, the Post Office cross-examined Mr Bates upon the estimate of his loss of earnings in his Amended Schedule of Information. This subject did not form part of the Common Issues, and had not formed part of Mr Bates' evidence in chief. Although, as a result of the questions put by the Post Office and the answers given by Mr Bates, this subject technically formed part of the evidence in this trial, I make no findings in respect of that topic which will be dealt with in a later trial.

Mrs Pamela Stubbs

125. Mrs Pamela Stubbs' branch was Barkham, Wokingham in Berkshire. She had been a teacher in Twickenham, and her husband Martin was an Assistant Bank Manager. In 1986 Mr Stubbs took early retirement and the two of them decided to look into obtaining a Post Office branch. They purchased the branch in Barkham in February 1987 for £185,000, which included a general store (which was the associated retail business) and residential accommodation, as well as the Post Office. Mr Stubbs was the SPM there for 13 years, and for 12 years of that period Mrs Stubbs worked as an assistant to him in the branch. There was also another assistant who worked two days

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per week. Mrs Stubbs is now retired. She was a district councillor prior to her cessation as a SPM, which occurred in the circumstances which I describe below. She became the SPM at Barkham from 4 August 1999 in circumstances described below, and was in that role until 8 June 2010.

126. Mr Stubbs died on 3 August 1999, and prior to that from September 1998 he had been ill in hospital. Mrs Stubbs, together with the assistant, ran the branch together during that period, although Mr Stubbs remained the SPM. Weekly stock and cash balances were done by Mrs Stubbs and her assistant in the same manner as Mr Stubbs had done. Mr Stubbs had used Capture, the same system that Mr Savage (who sold his business to Mr Bates) had used. There was an audit by the Post Office in April 1998 and this had shown a shortfall of £13.69 and a surplus of 21p. Mrs Stubbs' evidence was that "disparities of this nature happened on occasion"; she also told me that her husband was meticulous. His time at the bank was such that balances were done every day, and if a single teller was a single penny out, the whole banking floor would have to remain until the shortfall was reconciled. Rather than keeping a tin for "unders and overs" – which was Mr Bates' evidence concerning his predecessor – the Stubbs used an envelope in the safe for any "overs", although given Mr Stubbs' experience he (and also Mrs Stubbs) tried to avoid such disparities at all. During the illness of Mr Stubbs, Mrs Stubbs was to all intents and purposes running the branch herself.

127. It should be said that Mrs Stubbs became the SPM in distressing circumstances, and on the very day after her husband had died. She had a vivid recollection of taking over the branch, as well she might, given the circumstances. The Post Office's challenge to the quality of her recollection started in her cross-examination in the following way:

"Q. The questions I am going to ask you about mainly today are events occurring in around 1999.
A. Yes.
Q. So some 19-odd years ago. It is fair to say your memory of the details of those events is probably pretty vague, is that fair?
A. No, I don't think so.
Q. In terms of -- these are everyday events. They're not -- in terms of receiving this document, that document. They are not particularly stunning events, are they, like a car crash or something of that kind that would particularly attach it to your memory, is that fair?
A. If you are talking about August 1999 then, yes, they are very similar to a car crash."

128. Unsurprisingly, Mrs Stubbs rejected the suggestion put to her by counsel for the Post Office that the signing of documents and formally taking over as the SPM the day after her husband had died were "everyday events". I find that she had a clear recollection of the events of August 1999, as well she might, given the seismic nature of that month in terms of her life in general.

129. There are issues between the parties about the terms upon which Mrs Stubbs was appointed to be the SPM at Barkham. The Post Office has no record of Mr Stubbs being appointed at Barkham in 1987. The Post Office put to Mrs Stubbs in cross-examination that she must have had access to her husband's copy of the SPMC, which approach suffers from three major difficulties, in my judgment. Firstly, it assumes that the outgoing SPM at Barkham in 1987 complied with the unwritten, and potentially

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misunderstood and ad hoc procedure I have explained already, whereby the Post Office could simply assume that the outgoing SPM would comply with the unexpressed desire of the Post Office to do this in any event in respect of Mr Stubbs when *he* became the SPM. Without that, there would no reason to suppose that a copy of the SPMC was provided to Mr Stubbs, explained or referred to in his appointment, or that one would necessarily be in the branch at all. There is no evidence to suggest that Mr Stubbs had a copy of the SPMC in the first place. Secondly, it assumes that Mrs Stubbs would and should (and could) be expected to have familiarised herself with the contents of the SPMC simply because her husband may have had it some years earlier, and thereby it must have been available to her. Not only is there no evidence that she did or that it was, but her specific and direct evidence was directly to the contrary. Thirdly, in something of a patriarchal attitude from another age, the Post Office attempts to fix a married lady with imputed knowledge of detailed terms and conditions simply because of something attributed to her husband.

130. Mrs Stubbs' evidence in terms of her contract formation was clear. Her husband died on 3 August 1999, and the following day she opened the branch, as her assistant had offered to work that day to avoid having to close it due to her bereavement. A number of people called to see Mrs Stubbs, including Mr Colin Woolbridge, the Post Office area manager. He did this to be supportive. She had an informal discussion with him about continuing with the branch and becoming the SPM herself. He did not discuss any legal details with her, nor did he refer to any potential entitlement she may have to "Death in Service" benefits due to her husband's death. He did not refer to her responsibility for losses. He suggested increasing the opening hours, which she politely declined, as she wished to continue what was the traditional half day closing on Wednesdays. She remembers signing a single document that day, and believes that it was one which provided her bank details, as she recalled the Post Office did commence paying her, but with incorrect PAYE deductions as though she were an employee. This latter point took some months to rectify. There was no deduction of 25% during the first 12 months of her service, the only deductions from the amount she was expecting were the incorrect PAYE ones.

131. She did not see the SPMC itself until much later on, namely in the autumn of 2010 when she went to a Citizens' Advice Bureau in Wokingham after her appointment had been terminated.

132. She had effectively been the acting SPM prior to that date due to her husband's illness, but he had remained responsible as the SPM to the Post Office until he died. Her case contractually is that from 4 August 1999 she became the SPM and that is the date contractual relations were formed between her and the Post Office. The Post Office has no copy of any documents signed by her husband in any event, so the terms upon which he was engaged are somewhat unclear, and the Post Office does not have any copy of the document she signed on 4 August 1999 either. The Post Office relies upon a letter dated 23 September 1999 said to be from Mr Woolbridge to Mrs Stubbs to justify its case that her date of contract was 23 September 1999. The date her husband died is not in dispute, and it is not in dispute that Mrs Stubbs continued operating the Post Office immediately after his death. The letter of 23 September 1999 has the footer: "KW:T:\HR_RECRUITMENT_AGENTS\RECRUIT LETTERS\New appointment letter.doc" printed on it.

133. This is plainly, in my judgment, a standard form letter. It stated:

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"I am delighted to inform you that your application for the Subpostmastership of Barkham Post Office, in the premises situated at 50 Bearwood Road Wokingham has been successful.

The transfer of the office will take place on the half day closure, when a member of Post Office Counters Limited staff will attend to transfer the cash and stock to you.

Please find enclosed with this letter two copies of a list of the main conditions attached to your appointment. Would you kindly confirm your acceptance of these conditions by signing one copy and returning it, in the envelope provided, to the Agency Recruitment Manager. Please do not hesitate to ring if you need further information about your appointment.

May I take this opportunity of welcoming you to the ranks of our local subpostmasters and of wishing you every success in this venture. Post Office Counters Ltd will endeavour to support you through every stage of your appointment. The Helpline number below is your first point of contact and the staff in our Regional Office will be only too pleased to help and advise you on any matter.

Good luck!"

134. It is in almost identical terms to Mr Bates' letter. It does omit the passage that was in Mr Bates' version that stated "The present Subpostmaster has been notified of your appointment and I would be grateful if you would write to the Agency Recruitment Manager at the address overleaf when the legal affairs connected with the transfer of the business/property have been completed". Given "the present Subpostmaster" had been Mr Stubbs, and he had died, this must have been deleted by whoever drafted the letter. Mr Woolbridge did not give evidence before me, and his signature is not on the letter, although his name is. The letter refers to matters such as a "transfer of the office" when a member of the Post Office staff would attend to transfer the cash and stock to her. It also refers to her application being successful, but she made no such application; all that happened was the conversation on 4 August 1999 to which I have referred. Nor was there any such transfer; she simply continued to operate the branch from 4 August 1999 onwards.

135. Mrs Stubbs' evidence is that she has no recollection of receiving such a letter or its enclosures (either the SPMC or otherwise) and her takeover of the branch did not have a closing audit as of 4 August 1999, or such an audit at all. Th letter of 23 September 1999 has a disclosure reference of POL-0030957 and has 8 pages. Mrs Stubbs was to sign and return one copy. Not only is there no evidence she ever did so (and her evidence is directly that she did not), the 8 page document disclosed by the Post Office includes two copies of a 2 page document headed, with a space for her to sign that states:

YOUR COPY

MRS PAMELA JOAN STUBBS

CONDITIONS OF APPOINTMENT FOR BARKHAM

SUB POST OFFICE

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136. It looks very similar to the 2 page document sent to Mr Bates, which the Post Office maintained in his case (if it turned out to have been sent to him, which the Post Office did not accept) was sent to him in error. Mrs Stubbs said that the page headed "Remuneration Bank Credit" did seem to include the details that she remembered providing on 4 August 1999 in respect of her bank details, and this also required a signature by her, and she did remember signing a single document of that nature. Mrs Stubbs also said she did not remember receiving and would not have signed an ARS 110, and did not receive any of the forms with the identifiers ARS 44, ARS 43 or SERV 135 either (and saw those documents for the first time during these proceedings). Nor did she receive a copy of something called the Operations Manual, another document that the Post Office maintains she either had, or had notice of and should have requested.

137. The Post Office submits that she was "sent notification that her application to take over the branch formerly run by her late husband had succeeded". It submits "she would have signed and returned this document". It maintains that "in accordance with its ordinary procedures, she would also have been sent the SPMC" as well as the other documents. It also says she would have signed an Acknowledgement of Appointment on transfer day, together with the ARS 110 and SERV 135 forms. It explains the inability to produce copies on the passage of time. It submitted she "understood she would be bound by (and very probably physically signed her agreement to be bound by) the terms of the SPMC", and "very likely had a copy, and in any event had every opportunity to obtain a copy".

138. In my judgment these submissions by the Post Office are bold, pay no attention to the actual evidence, and seem to have their origin in a parallel world. It is unclear to me how someone can be expected to ask for a copy of something that they do not know exists. I am aware that there are many SPMs across the country, and some of them will have been in post for many years, but documents signifying their acceptance of terms and the contracts upon which they are engaged should not simply become "lost" because they are a number of years ago. I reject this explanation. Further, on the evidence that emerged before me in this trial concerning the SPMC, the procedure adopted by the Post Office was far from organised or even, I regret to say, particularly competent. Even the letter of 23 September 1999 upon which the Post Office relies refers to events that simply did not happen. Mrs Stubbs did not submit an application, and there was no transfer of cash and stock to her on 4 August 1999. Even if she had received the letter of 23 September 1999 – and I find that she did not – that sought express notification of acceptancy by asking "would you kindly confirm your acceptance of these conditions by signing one copy and returning it" and Mrs Stubbs did not do this.

139. I accept Mrs Stubbs evidence, and I find that the only document she was given or signed on 4 August 1999 was in respect of her bank details. There was no reference to her on 4 August 1999 orally, or in any document provided to her, of other more detailed terms that were to come later, or that were said at the time by Mr Woolbridge to govern her appointment. It is unnecessary to consider Mr Woolbridge's motives in acting as I have found he did on 4 August 1999, and it would not be fair to him to do so without further evidence, including from him if that were to occur. He may have acted as he did out of a desire to keep the paperwork for Mrs Stubbs to an absolute minimum given her husband had died the day before, or it may have been lack of

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administrative competence, or any number of other possible explanations. I am surprised that he thought it appropriate to ask someone whose husband had died the day before to increase their opening hours, but he may have been under instructions to do this. The date of the letter with his name on, which I have found was not received by Mrs Stubbs – in addition to her evidence on this, there is no version available actually signed by him either – does not much help the Post Office's case in any event, as it is dated so many weeks after Mrs Stubbs became the SPM. I find that the contract between Mrs Stubbs and the Post Office was formed on 4 August 1999, when Mr Woolbridge (who plainly had the authority to bind the Post Office in this respect, as shown from the fact that the letter of 23 September 1999 was to come from him) agreed on behalf of the Post Office that she would become the SPM at the Barkham Sub Post Office, and would be paid for doing so. She was not told she would be an agent of the Post Office. She was aware of her responsibility for losses. I am surprised that, if Mrs Stubbs was entitled to any Death in Service benefits, these were not explained to her, but it may be that is or is not contentious, and this is or is not explored further in a later trial.

140. I find that, in the case of Mrs Stubbs, based on the terms of the documents provided to her and (by a greater margin) those that simply were not, that the Post Office did not do all that was reasonably sufficient to give her notice of the terms of the SPMC. Mrs Stubbs was therefore, on my findings, appointed without knowledge on her part of the actual terms of the SPMC or its existence. I deal with the significance in terms of her contractual terms below. Her annual level of remuneration was approximately £30,000 depending upon the volume of business.

141. When Horizon was introduced to her branch in 2001, it represented a fundamental change to the information that she had available to her in the branch. Information that fed into the balance of her branch accounts was inputted by the Post Office (she does not know whether automatically or manually) and to use her expression, "she could not see data relating to back office processes, such as changes to local suspense accounts and other transactions or entries put in by Post Office". She lost the ability to go back and check transactions to see if or where any mistakes had occurred. Cash remittances were accounted for somewhere at the Post Office by entries that she would not have seen. Other changes were the trading period became 4 weekly rather than weekly, and the trading statement (which is the Branch Trading Statement referred to in the Common Issues) simply had totals and not itemised information, so that it was not possible to identify any underlying mistakes in the figures that may have arisen.

142. Her training on Horizon took place about two weeks before its installation in her branch, and was one day in duration. It took place in a pub in Sonning, Berkshire. She had two assistants at the time and they each had half a day's training. There were about 12 to 15 other SPMs at the training, which comprised how to work through example customer transactions. The training did include balancing, but did not include shortfalls, how to get to the root cause of them, or how they should be disputed. She was told she should contact the Helpline for any help or advice on any issues experienced at the branch. She was disappointed with the quality of the training and did not request any more. It was not explained to her that she was responsible for training her assistants, although she did so in an "on the job" manner.

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143. Shortly after installation in 2000 and 2001 there was an electrical installation fault at her branch that caused power issues, with numerous short circuits and power outages to the shop, the branch and her home. On one day alone there were 36 power outages. Fluctuating shortfalls and gains started to occur and overall there was an unexplained loss of £1,000. Mrs Stubbs paid these to the Post Office. Disclosure in these proceedings has led to some internal e mails from this period becoming available in the following terms. On 1 November 2000 Frank Manning from the Post Office sent the following to Sue Locke, his superior, subject "Horizon matters – Barkham SPSO". He stated:

"We talked about this case when I was in St. Albans last month & it is still on-going. I visited there today & was too scared to accept a cup of tea in case the Horizon system crashed cos the electricity supply is still a live (excuse the pun) issue.
The balances are a mess (in pre Horizon times - the Postmistress virtually achieved a clean balance every week) & I've got the RNM going in there next Wednesday to see what actually happens on the ground but I worry that something like 25 re-boots in one day is having an effect overall.
Need your best offices to get this case to a proper solution - she keeps getting promises of attention - but nothing is actually being done now to clear up the problem. It is Horizon related - the problems have only arisen since install & the postmistress is now barking & rightly so in my view.
Help please."

144. He was asked by Sue Locke whether he confirmed that "the office have had an independent electrician visit it and that the problems are due to the electrics input by Horizon?" (my emphasis) and he stated "Answer is YES to both points".

145. However, that did result in the following from Sue Lock to Kevin Cox on 2 November 2000:

"Kevin
Frank came to see me about this office and we discussed it with Sanjay and said that she needed to prove that it was Horizon that was causing all these power failures in the office (I think Remedy records this). Can you tell us please how we can now get this resolved as it appears now it is a direct consequence of the installation and not anything that has happened in steady state.
Many thanks"
(my emphasis)

146. This situation was however resolved by Mrs Stubbs personally paying the shortfalls. The Post Office did not tell her that one of their own personnel, Mr Manning – who actually visited the branch and seems to have done his best to investigate it, so far as he could – had concluded it was Horizon related. She did not find out the contents of these internal communications until this litigation.

147. The running of the branch settled down after this, apart from a burglary which led to a small loss, until 2009. This was when Mrs Stubbs made a decision to carry out extensive works to the branch as it was in poor condition and required overdue renovations. She was approaching retirement age and wanted to sell the property, and considered she would gain a better return if she did these works first. She wanted the branch and shop to remain open, so disregarded the prospect of selling the site purely

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for development. She promised her customers she would remain open during the works and therefore arranged with the Post Office that they would provide a single counter position portacabin (although she had wanted a double counter position). She was proposing to spend £125,000 on the works to the branch (excluding other works she was doing on the site). She paid for the Post Office equipment to be moved to the portacabin, and the weekly charge for that was £125 plus VAT. The Horizon equipment was removed from the existing branch counter and relocated in the portacabin, but as this had only one position the other terminal was stored. In the Activity Schedule sent by Craig Knowles the Post Office Network Change Adviser to Mrs Stubbs on 14 September 2009, this was to be done by a Post Office contractor called Romec NPG. In a Contribution Form which calculated her contribution as being in the region of £3,000, the following was stated:

"I confirm I am in agreement with the planned arrangements for the proposed works at this office. I have read and understood the attached letter detailing the required lead in times and proposed schedule of works. I also understand that a minimum of three weeks notice is required if the proposed date of opening is not going to be met.

I agree to pay the sum detailed below towards equipment related costs incurred by Post Office Ltd in relocating / modifying post office equipment in my branch."

148. The branch thereafter commenced business from the portacabin. The move did however coincide with what could neutrally be described as an avalanche of issues. Shortfalls began to occur. Mrs Stubbs could not work out how or why these were occurring.

149. At her first full balance on 11 November 2009 there was an apparent shortage of £388.88. When she took the Helpline's advice she was told "that it was probably because some paperwork had gone missing in the move and that it would probably right itself in time." This did not occur, but believing what the Helpline told her, she put the cash in to cover the apparent shortage. The next trading statement on 9 December 2009 showed a shortage of £2,584.65. Again the Helpline was contacted but she was told "there was nothing they could do, and I had no option to make a payment to Post Office by cheque. I was not advised that I could dispute the shortfall.

150. During December 2009 she closed the office for three days before Christmas for her daughter's wedding and the branch was closed over Christmas and New Year. Nonetheless, the trading statement on 5 January 2010 showed a shortage of £9,033.79.

151. She stated said that this was entirely unexpected as she knew that there had not been this amount of cash unaccounted for in the Branch during the trading period and the Branch had been closed for a number of days. She immediately reported it to the Helpline, who she said "gave no assistance apart from to inform me to double check my figures, which I had already done. As I mentioned above, the Helpline marked this as 'low priority' ".

152. She believed she had accurately accounted for the cash and stock held at the Branch, but the Helpline told her that unless she "had formally declared that I wished to dispute a shortfall, then it would not be considered disputed. I had not been informed

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of this before, either. I naturally assumed that I had a right to dispute any alleged losses and that calling Helpline to question an apparent shortfall would give rise to an investigation."

153. What then occurred in terms of the Post Office chasing Mrs Stubbs for the shortfalls appeared, on the evidence before me, to be fairly standard, at least so far as these Lead Claimants were concerned. On 27 January 2010 she received a letter from the "Current Agents Debt Team Leader" which stated:

"I am writing to you in respect of the recovery of outstanding debts in the accounts at the above post office. According to our records the sum of £9,033.79 is overdue for payment.

Since you are contractually obliged to make good any losses incurred during your term of office, please call the debt recovery team on the number quoted above to settle this amount via credit/debit card.

Alternatively forward a cheque for the amount due to be received by the Debt Recovery Team within 7 days of the date of this letter.

Failure to meet these repayment terms may lead us to deduct the outstanding debt from your future remuneration payments. This statement excludes any items currently in dispute or held awaiting transaction correction. Should you have any queries regarding this account do not hesitate to contact me."

(emphasis added)

154. There are two important points to note about this letter, and the many others like it that were aired during the trial of the Common Issues in respect of the Lead Claimants. Firstly, it expressly misstates the extent of contractual responsibility of an SPM whose appointment is governed by the SPMC. Even on the Post Office's own case, that liability does not mean that an SPM is "contractually obliged to make good any losses incurred during your term of office". The statement in these letters overstates the extent of an SPM's contractual obligation.

155. Secondly, Mrs Stubbs had already disputed this amount and had telephoned the Helpline about it. Despite this, she received this demand, which threatens to deduct "the outstanding debt" from her future remuneration.

156. Further, this demand was followed up by yet more, including one dated 8 February 2010 which stated:

"Please see the attached "Request for Payment" for the specific amount shown which has been "settled centrally" at your Post Office and despite previous reminders is still outstanding.

Failure to meet the repayment terms by the 18th February 2010 will lead us (with approval from your Contract Manager) to deduct this outstanding debt from your future remuneration payment.

NB Please could you make any cheques payable to Post Office Limited."

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(Bold present in the original)

157. Mrs Stubbs was careful and thorough in her explanations about this. Following a detailed e mail from her to one Mr Kellett (who did not give evidence before me), he replied on 11 February 2010:

"Dear Mrs Stubbs,

I can confirm that this matter is being investigated, so we have put the request for payment on hold until a conclusion is reached."

158. One might sensibly conclude from that communication, that so far as this sum of £9,0333 was concerned at least, the Post Office was investigating it fully and would also not seek to pursue recovery of that sum from Mrs Stubbs. Each conclusion would be wrong.

159. She received dated 15 February 2010 a further demand from the Post Office, showing the sum of £9,033 due as "balance brought forward" and also a further sum of £8,636 as "new transactions", hence the total claimed by the Post Office from her was now £17,670.65. She was asked to settle the account by cheque or debit/credit card.

160. It was put to her that there had been an investigation. The results, such as they were, of that investigation, such as it was, could best be summarised by the text of internal e mails that show that the Post Office asked Fujitsu about this.

161. On 12 March 2010, Chris at Fujitsu (who may be Christine Powell) stated:

"We have sent this call to SSC several times now and they are insistent that there are no software issues at this branch. Therefore, the conclusion they have come to is that it must be down to user error and there isn't really any further investigations that we can carry out.

However, if you are able to detail what checks have been carried by the NBSC to rule out user error and can clarify this for us - we may be able to attempt to push this further with SSC."

162. This is a classic case, in my judgment, of "passing the buck". This was sent to Alistair Garrett of the Post Office (who did not give evidence before me). He sent a response that said it was not good enough for FS (which is Fujitsu Support) to "shrug your shoulders" and that it was a serious issue. The duty manager, Rebecca Goddard (who did not give evidence before me) said on 26 April 2010:

"I'm not sure where to go with this one, Fujitsu have confirmed that there aren't any issues with the kit? Regards"

163. The next entry in the e mail chain, again from Rebecca Goddard, which stated:

"I believe the Post Mistress has been contacting the NBSC and has had a further discrepancy last night of £3000.00. I believe this has been ongoing since October, Fujitsu have confirmed that there are no errors with the kit. Can you confirm what action will be taken? will the branch be offered any support with balancing."

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(emphasis added)

164. The final entry in the chain states:

"The above branch is incurring unexplained losses which the spmr asserts is down to the Horizon system but has no evidence to support this.

We now have losses of over £20k so the branch needs auditing as a matter of urgency."

165. Mrs Stubbs has, since leaving the Post Office, involved her Member of Parliament, The Right Honourable Sir John Redwood, who is now a backbench MP but has previously been a cabinet minister in the Government of Prime Minister John Major. Mrs Stubbs says she has never seen the outcome of any investigation into these matters; and her MP who intervened on her behalf, whom Mrs Stubbs said was promised "a full investigation" by the Post Office, has never been provided with any results either. It might be thought that if there were any proper investigation which actually reported on this, it could and should have been put to Mrs Stubbs, but if what was put to Mrs Stubbs in this trial is said by the Post Office to amount to such an investigation, then it is telling. The "investigation" appears, on the material deployed in this Common Issues trial, to have consisted of no more than Fujitsu asserting that there was "nothing wrong with the kit". That is not, in my judgment, an investigation under any normal understanding or meaning of that word in society generally. The Post Office's way of dealing with this wholly ignores the provision in the SPMC and a SPM's liability for losses in that document (which on the Post Office's case is what applied). There was simply a blanket assertion by the Post Office that she had to pay these sums.

166. Mrs Stubbs was told by the Post Office that they would not market her branch unless and until she resigned, which she did on 12 May 2010. The Post Office still considers that she owes a sum in excess of £30,000 for shortfalls. These include the sum of £9,033 which was the subject of the email of Mr Kellett of 11 February 2010 saying it was "on hold". The temporary SPM who replaced her in the immediate term told her that the Post Office had instructed him to destroy all paperwork that was in the Branch that related to her appointment.

167. At her insistence, a Post Office auditor, Mr Gihir (who did not give evidence before me) went to her branch on two occasions, 19 May 2010 and 25 May 2010. He observed all the transactions and inspected her records. Shortfalls occurred during his first morning of £190. He could not identify the cause of these either.

168. Mrs Stubbs was then audited on 8 June 2010 for a closing audit by someone who said she was being suspended. As she put it, she was locked out of her own post office. I will not dwell upon the effect on Mrs Stubbs, which was profound. She sold her branch Post Office.

169. A degree of common sense has to be brought to bear upon the issues in these proceedings generally, and Mrs Stubbs' experience is a good example of how common sense assists in everyday life. She operated this branch together with her husband for 12 years, and discrepancies were, if they occurred at all, measured in single pounds or even pennies. She operated this branch as the SPM for over ten

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years, and the only times there were discrepancies of a higher order were when there were electrical power issues in 2000 which personnel at the Post Office concluded were caused by Horizon. She was not told this, and made up the shortfall herself. She then operated for another nine years perfectly satisfactorily, until the move to the portacabin. From November 2009 losses appeared. Not only did losses then continue, they appeared in sizeable amounts and accumulated to staggering levels. Over the Christmas and New Year period, when the branch had been closed for some days, they jumped up to over £9,000, when she knew that this amount of cash unaccounted for could not be possible. She obtained all the information she could, including from Horizon, and prepared hand written accounts to investigate. She could not get to the bottom of it, and in the period during 2010 until she resigned (having been told she had to do so in order to market her branch) these losses climbed higher and higher.

170. Mrs Stubbs simply could not resolve these shortfalls, or explain them. She showed a degree of restraint and forbearance when giving her evidence, as she was pressed on such matters as there had been an investigation, there was nothing to suggest Horizon was at fault, and Fujitsu said there was nothing wrong with the system. As Mrs Stubbs explained in her written evidence:

"I investigated matters as far as I possibly could. However, I was unable to ascertain the possible cause(s) of the shortfalls without assistance from Post Office. I was able to review the data printable from the Horizon system, but I could not interrogate it without access to the data that Post Office held or had access to. When you are looking for a reason for an error, you need to have all the information. I explained to Post Office on a number of occasions that I needed to be able to compare the data held on my Horizon system, with the data held at Fujistu / Post Office's head office. However, as I mention above, it was not until I saw some limited ARQ data, that I realised it contained some entries that were not accessible or viewable by a Subpostmaster. There is simply nothing you can do if you do not have sight of the other end of the transactions - particularly if the person who does is requiring you to find and prove the cause of the problem. The transaction logs gave me no more information than was showing on the Horizon system so I was unable to investigate further."

171. The Post Office's case is that Horizon does not cause such shortfalls and the honesty of SPMs and/or their assistants is the usual explanation. Mrs Stubbs was adamant that she would not let matter this drop. She explained in her written evidence that:

"Post Office's attempt to impose liability upon me was a matter of obvious significance to me both financially and as a matter of principle. My unwillingness to let this go reflects the understanding I have always had that Post Office was obliged to carry out a fair investigation into it and only require me to pay where losses had occurred and were my fault."

172. In my judgment Mrs Stubbs is a careful and honest witness. She did her best at the time to try and work out what was happening, the reasons for it, and also notified the Helpline on numerous occasions, as well as keeping her own separate paper records in an attempt, or more accurately numerous and concerted attempts, to work out precisely how these shortfalls could have arisen. None of the Post Office personnel involved at the time with Mrs Stubbs, who attempted to obtain some input or explanation from Fujitsu were called as witnesses, so it is not possible to know what

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their full involvement was, the extent of their knowledge of the background matters, how many other SPMs they knew of who may have had similar issues, nor the degree to which they considered Mrs Stubbs' good record of over two decades (including her involvement when her husband was alive) to be relevant. I make it quite clear that I do not speculate on any of that. Nor is it possible to know what the outcome of the trial of the Horizon Issues will be later this year. Mrs Stubbs ran the branch perfectly satisfactorily for many years, with the exception of the periods that coincided with the electricity supply problems in 2000, and the move into the portacabin in 2009. On the evidence before me in this trial, and upon my assessment of Mrs Stubbs as a witness, I consider that she is reliable, thorough and honest.

Mr Sabir

173. Mr Sabir was the SPM of two branches in Bingley in West Yorkshire. He became the SPM of the Cottingley branch on 9 September 2006, and SPM of the Crossflatts branch on 12 October 2006. His appointment was summarily terminated by the Post Office on 2 October 2009 for both branches.

174. Mr Sabir was previously employed in his native Pakistan, where he also studied and obtained a degree in English, Islamic studies and Arabic from Azad Jammu and Kashmir University. He was an accounts clerk in Pakistan for 10 years before moving to the UK in 2000, where he was employed as an assistant accounts clerk in Huddersfield. He also obtained further qualifications by attendance and study at evening courses. He had also used a computerised payroll system before.

175. English is not his mother tongue, although he speaks and understand English well. The Post Office submitted that Mr Sabir understood English perfectly well, but would from time to time decide not to do so (or pretend not to do so) to assist him during his cross-examination. I reject that criticism of Mr Sabir. There were occasions when he did not fully understand a question, and he would sometimes ask for it to be repeated, or state that he did not understand it. This was not in any way his fault, nor do I consider it to be a device. His vocabulary is simply not as comprehensive as that of Leading Counsel for the Post Office. It is easy to forget that most people do not use language, and are not exposed to language, in the same way as those who spend their professional life in court. Further, commercial practitioners spend an enormous amount of time reading and construing detailed commercial instruments, and drafting detailed submissions. Their sentence structure and use of language is sophisticated, and not the same as those whose use of vocabulary is more everyday in nature. One phrase Mr Sabir had difficulty with was when asked if he was "commercially naïve". There are many people, for whom English is their only language, who might not understand that expression, although it is regularly used in commercial cases. Ironically, the origin of the word is French, *naïve*, the feminine form of *naïf,* and not English. In my judgment Mr Sabir did his best to answer all the questions put to him, and the occasional difficulties in language, understanding and expression were for precisely the reason explained by Mr Sabir at the time, namely because English is not his mother tongue.

176. Mr Sabir and a partner called Mr Ahmed became interested in running their own branch, and although it was a major change in career, Mr Sabir felt the investment

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would be worthwhile. He considered that the Post Office was very respected in the community and would be good to work with and for. He also wanted to run his own business. He asked a friend called Mr Zubair who ran a post office as a branch manager about prospects and other details, and he decided to invest his savings in acquiring one (his expression was "I used all of my stake", which means he used all his savings). He also had experience of assisting in preparation of the accounts of other branches, but the losses or shortfalls there were tiny. As a married man with young children he thought running a branch would be a stable, long-term role with social opportunities and a good quality of life.

177. He did some research and prepared a business plan. He became interested in both Cottingley and Crossflatts, and visited the areas, and concluded they were good opportunities. He thought Cottingley in particular had the potential for retail growth. The income from the Post Office there was in the region of £36,000 per annum. Crossflatts had less potential for retail growth but the incumbent told him there was planning permission for 850 new homes to be built nearby. He did not ask either Mr Rooney (at Cottingley) or Mr Taylor (at Crossflatts) for their copy of the SPMC, and did not think to ask. He did not know whether the Post Office contracted on standard terms. He was not given and did not ask for any manuals. He made an offer on Cottingley which was rejected, then had an offer on Crossflatts accepted, then Mr Rooney changed his mind and accepted the offer for Cottingley. He paid a sizeable deposit on each.

178. Horizon was already in use when he became a SPM. The 4 page letter he received from the Post Office in response to his expression of interest told him he would have to apply and stated in part the following:

"All costs, liabilities and expenses incurred in connection with an application for a Subpostmaster's appointment are at the applicant's own risk. Post Office Ltd reserves the right not to make any appointment to such vacancy.

Subpostmasters hold a contract for service with Post Office Ltd; consequently they are agents, not employees of the company. As such, Subpostmasters are responsible for the provision of their own staff and premises. If the property is leased, or if you have or are purchasing the freehold from the existing Subpostmaster, then as part of your application you will need to produce documentary evidence to show you will be able to provide the premises. Any lease agreement should enable you to comply with the contractual obligation to give three months notice of resignation of appointment."

179. This letter does not refer to the SPMC or to a set of other detailed terms. It states that there is a contractual obligation to give three months' notice if the SPM wishes to resign. Some details of the services are given, for example on page 3:

"The Key Products and Services provided at Post Office® branches are currently; letters, parcels and packages services of any kind and related services; services for the payment of bills, collection of payment or collection of revenue; National Lottery products; banking services, including bureau de change; financial services; National Savings and Investment products; money transfer services; postal orders; savings stamps; benefits' distribution and Government services; motor vehicle and driver licensing services and other motorist services; telephony products and services; travel ticketing and travel passes; and television licensing services. Some products and

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services are only available at certain Post Office® branches. All products and services are subject to change at any time. There is no entitlement to compensation for loss of business if products are ceased, but Subpostmasters must undertake any other business or duties not currently undertaken at the branch, if required to do so by Post Office Ltd."

180. The letter also stated:

"Proposed conditions of appointment

In order that you may complete your business plan accurately, the Contract & Service Manager would like you to consider the "Proposed Conditions of Appointment" appended to this letter. These will be discussed in full if your application leads to an interview."

181. He completed an application form and sent in a business plan, including sending in copies of trading accounts for Cottingley for years ending 31 March 2002, 2003, 2004 and 2005. All the information he submitted was considered and on disclosure Mr Sabir now realises that an analysis was done on the figures by the Post Office that considered cash flow, including making a provision for losses of £1,500. He did not know this at the time.

182. The letter inviting him for interview stated:

"I also attach a brief summary of the conditions of the Subpostmasters Contract, for your attention. Please note that the summary does not represent the complete terms and conditions of the Subpostmasters Contract, and may not be relied upon, for any purpose, by a subpostmaster."

It also stated that the summary "should not be used in place of a thorough review of the Contract. You will receive a full copy of the Contract if you are successful in your application, as part of the appointment process."

183. Mr Sabir did not raise questions about contract terms at the interview, which was essentially to go through the information he had provided to the Post Office about the economic future of the business, and was in all senses the same as a job interview (even though the status was not to be one of employer/employee). He was borrowing a sizeable sum of money, £60,000, from Lloyd's Bank and these details were also provided. He was accompanied to the interview by Mr Ahmed but no questions were asked of Mr Ahmed, only of Mr Sabir. The Post Office accepted him as a SPM and his letter of acceptance was sent to him dated 13 July 2006 and stated:

"I am delighted to inform you that your application for the position of Subpostmaster of Post Office ®, Cottingley branch, in the premises situated at 4 The Parade, Bingley, BD16 1RP, has been successful.

Your appointment will be subject to:

1. Your written acceptance of the Subpostmasters Contract and other terms and conditions set out in Appendix 1 to this letter.

2. Confirmation of bank account details for remuneration purposes.

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Appendix 1, which is attached to this letter, sets out the Conditions of Appointment that will apply to you and requires you to provide your bank account details. One copy of Appendix 1 should be signed by you and returned to the Agent Recruitment team in the envelope provided. A further copy should be retained for your records. Post Office Ltd cannot proceed with your appointment until it has received this document from you. Please return this document within one week of receipt.

Appendix 2 lists the documents in the Appointment Pack and gives full details of the actions required of you and the timescales within which you must complete them. In particular, the Appointment Pack contains a copy of the Subpostmasters' Contract, setting out the contractual relationship with Post Office Ltd, a general introduction to the business and to the role of a Subpostmaster, and a Resource Guide to help you with the recruitment and training of assistants. Please give these documents your utmost attention."

184. Appendix 1 stated:

Mr Mohammad Sabir

CONDITIONS OF APPOINTMENT FOR

POST OFFICE ® COTTINGLEY BRANCH

"1. You will be bound by the terms of the standard Subpostmasters' Contract for Services at Scale Payment Offices."

185. This was followed by other terms, such as the remuneration and painting the exterior. Mr Sabir had to sign one copy of Appendix 1 and return it with his bank details.

186. Appendix 2 came at the end, after next of kin and ethnic classification documents. It stated, set out as below:

Documents contained in the appointment pack — Appendix 2

FORM	No.	ACTION REQUIRED	TIMESCALE
Subpostmaster's Contract	1	Read before signing and returning Copy of Appendix 1	IMMEDIATE

187. Appendix 2 was therefore a short appendix. It had one document, the SPMC, referred to within it. The recipient was required to read it before sending back Appendix 1, and was asked to do so immediately. Appendix 1 was *not* the SPMC itself. It had provision for a signature that stated "I, Mr Mohammad Sabir, fully understand and accept these terms and conditions and agree to avail myself of the pre-appointment introductory training. I hereby request you to pay all sums of money now due or which may become due to me in respect of my remuneration for credit for my account with…." After a place for the provision of such bank details, there was a signature required. Mr Sabir did sign Appendix 1 and he returned it.

188. Mr Sabir said that he did not know what the document referred to in Appendix 1, "the standard Subpostmasters' Contract for Services at Scale Payment Offices" was, and

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he has seen no document with this title. He also said that he thought "conditions of appointment" meant the shorter document requiring him to paint the exterior, which would mean Appendix 1, not the document referred to at Appendix 2 (which is the document referred to in these proceedings as the SPMC). I will reproduce his cross examination about whether he received Appendix 2 and/or the SPMC verbatim:

Q. I suggest to you that you did receive appendix 1 and appendix 2, and you did receive the subpostmasters contract [ie the SPMC] at that time.

A. I can't remember it. I can't say no but I can't remember it.

Q. You also would have received appendix 1 to this letter, we see at {E3/64/5}. If you read paragraph 1 of that, it says:

"You will be bound by the terms of the standard subpostmasters contract for services at scale ..."

You would have read that at the time, wouldn't you?

A. As I explained before, I was thinking that these are the conditions which have been put on us to do within one month, three months or six months."

189. Mr Sabir, in my judgment, could not remember whether he had received the document identified as Appendix 2, which identified that he had to read the SPMC. He said as much himself. There is a difficulty in that the Post Office, although it had undoubtedly improved its procedures compared to the experiences of Mr Bates and Mrs Stubbs, was still using confusing terms for different documents. Just in these two letters alone, the following different words and expressions are used, almost interchangeably, to refer to different documents:

1. "the conditions of the Subpostmasters Contract";

2. "the complete terms and conditions of the Subpostmasters Contract"

3. "the Subpostmasters Contract and other terms and conditions";

4. "the Conditions of Appointment that will apply to you";

5. "the Subpostmasters' Contract";

6. "Conditions of Appointment for Post Office Cottingley Branch";

7. "the standard Subpostmasters' Contract for Services at Scale Payment Offices".

190. The different ways of expressing references to what are, in fact, two different documents – the SPMC, and the conditions of appointment which were Appendix 1, together with the terms of Appendix 2 - are regrettable and apt to confuse in any event. They would particularly confuse someone such as Mr Sabir who was operating in a language not his mother tongue, but I find they would be liable to confuse anyone whose mother tongue was English. Why such interchangeable words were used by whoever drafted these letters is wholly unclear to me.

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191. So far as contract formation is concerned, I make the following findings in respect of Mr Sabir.

1. The Post Office had improved its procedures from the time of Mr Bates and Mrs Stubbs. Applicants were at least supposed to be sent the SPMC. They were also told – in Appendix 2 - to read it before Appendix 1, which included the branch specific conditions, was signed and sent back. However, this improvement, such as it was, on the evidence before me, still did not amount to requiring an incoming SPM to sign the actual SPMC itself and therefore clearly acknowledge it had been received. Mr Sabir does not know if he received it, and the Post Office cannot produce a signed copy. This is because the Post Office never expected to receive a signed SPMC. It was not part of the procedure for it to be signed.

2. Even if the SPMC was not included in the envelope (a possible scenario for any applicant, given the Post Office approach to applicants) there were, however, at least sufficient references to it as an important document that did exist that Mr Sabir was put on notice of it. I accept Mr Sabir's evidence that he did not receive it, but it was referred to and he could have asked for it.

3. Numbered item 1 of the Conditions of Appointment stated that Mr Sabir would be bound by its terms.

4. The letter of acceptance asked Mr Sabir to give "these documents" – which must at the least have included Appendix 2 – the "utmost attention". It also stated that "in particular" the pack included "a copy of the Subpostmasters' Contract, setting out the contractual relationship with Post Office".

5. Appendix 2 identified that something called the "Subpostmasters Contract" should be read immediately. This could not refer to the Conditions of Appointment for Cottingley Branch because that was Appendix 1.

192. The SPMC therefore governed the contract between the Post Office and Mr Sabir. However, in terms of whether this contained any onerous and unusual terms and whether these were brought to his attention such that they were incorporated, depends upon the answer to Common Issue 5. None of the actual terms of the SPMC were brought to his specific attention with the exception of the notice period for resignation. Therefore, the answer to Common Issue 5 in his case depends upon the nature of the terms themselves, how and if they were incorporated, as well as considerations of reasonableness if they were. These are dealt with in Parts O and P of this judgment.

193. Thereafter Mr Sabir accepted the appointment and received training, although it was not as detailed or comprehensive as he was expecting and he considered it was insufficient and very general. It was however useful. Nobody in the classroom training "balance was OK when we came to do the final thing". He also had training in the branch, but again he did not consider this enough and the trainer stood behind and observed. During the first week he was in the branch, on balance day the branch stayed open late until 9.00pm due to the National Lottery, but the trainer left at lunchtime (self-evidently well before the end of the day) and said "just follow the procedure and do it". Mr Sabir's evidence on this, which I accept, matches the other evidence from other Lead Claimants about in-branch training. Whatever the intentions

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of those who designed such training, which one supposes was to supplement and build on the classroom training, in practice for these Lead Claimants it was rather different. It is characterised by the trainers observing rather than training, and also by early departures from the branch itself by the trainers.

194. On 15 August 2006 Mr Sabir had his interview for the Crossflatts branch, which application was a little out of step with that for Cottingley. On branch transfer day, which was 8 September 2006 for Cottingley, the auditors came in to do a closing balance. Documents were not explained to him by the auditors, and he was neither offered nor asked for more time to read any of them. He was given no explanation of them and was just provided documents to sign, which he did. The auditors did everything, counting, balancing, including counting stamps and tickets. Mr Sabir was satisfied that they were "on his side" and doing everything for his benefit, but he not involved in performing the audit. He signed the Acknowledgement of Appointment on 8 September 2006. This stated:

The Subpostmaster's Contract

Acknowledgement of Appointment
I accept The Appointment as Subpostmaster at:
Cottingley
and agree to be bound by the terms of my contract,
and by the rules contained in the book of rules and
the instructions contained in those postal
instructions issued to me.

195. The bold emphasis above were present in the original. It will be noted that both the Book of Rules and Postal Instructions in Mr Bates' Acknowledgement of Appointment, with capitals, have each become the book of rules and postal instructions in Mr Sabir's version of the same document. Not one witness, including the 14 from the Post Office, could point to a document or book that had ever been the Book of Rules or book of rules. The best (or only) explanation was that there must have been, long ago, an actual document called the Book of Rules, and this description remained in the actual Appointment document.

196. The document plainly states that the incoming SPM agrees to be bound by "terms of my contract". Mr Sabir's cross-examination on this was as follows:

"Q. It says you agree to be bound by "the terms of my contract". Pausing there, what do you say you understood your contract to be? On your case, you are not sure whether you received the SPMC at this stage.

A. As I explained before, these were -- the conditions which they put on me to do in one, three and six months, I thought these are the things which I have to do about this letter.

Q. You are saying, are you, at this stage you thought the entirety of your relationship with the Post Office involved painting within a certain time and taking down posters,

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which is paragraphs 5 and 6 of the document we were looking at before? Is that your evidence; you thought that that was the entirety of your written agreement with them?

A. No, every postmaster knows that he has to run the business efficiently. He is responsible for his losses and his assistants' losses. As far as I understand I am telling you truth right now."

197. This shows that notwithstanding my findings above about Mr Sabir and the SPMC, he accepted that he knew he was "responsible for his losses". His evidence about lack of recollection of receipt of the SPMC itself was not a device in order to construct a different scope of responsibility for losses at his branch.

198. My findings on the contractual situation prior to Brach Handover Day are not affected by any of the documents signed on that day, including the Acknowledgement of Appointment. These documents included the SERV 135 document given to him by the auditors for his signature which included extracts from the SPMC.

199. Thereafter, Mr Sabir was interviewed to be the the SPM for Crossflatts too in the same manner, although this was a shorter process as he had already passed selection for Cottingley. Mr Ahmed was to be the manager in Crossflatts and Mr Sabir was full-time in the Cottingley branch. Mr Sabir was notified of his success in being appointed for Crossflatts in a letter dated 7 April 2005, although this is plainly incorrect, as his interview for this was not even until August 2006. It is another example of shoddy paperwork by the Post Office. That date is plainly incorrect by at least 16 months. Branch transfer day for Crossflatts was 11 October 2006. Given my findings regarding the references to the SPMC for Cottingley, the same documentation that was provided in the same terms for Crossflatts would lead to the same conclusion, but in any event Mr Sabir was already on notice of the SPMC from his appointment at Cottingley.

200. Crossflatts was not as profitable as Mr Sabir expected and so on 6 November 2008 he gave three months' notice of resignation. This was acknowledged by the Post Office in a letter that stated:

"I note that you have a prospective purchaser for your private retail business/premises who is also interested in applying to be the new subpostmaster at those premises."

This was not accurate as Mr Sabir did not have a prospective purchaser. Again, this letter must be a standard one and did not take account of the facts of the branch in question.

201. On 10 July 2009 Mr Sabir gave notice on Cottingley as well.

202. Mr Sabir had two problems in terms of accounting and shortfalls. Only one relates to Horizon, but the other is relevant to his credit and also to the way that Post Office dealt with him. His branch was subject to a fraud whereby a customer deposited some funds and falsified an entry in the paying-in book, by persuading or hoodwinking his assistant to stamp the next page in the book, and using this with his bank to claim he had deposited £2,548 that had not been credited by him. The Post Office simply told Mr Sabir that he would have to pay this money. He felt he had no support or assistance in trying to challenge this with the customer's bank.

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203. The second problem does relate directly to Horizon. Mr Sabir's assistant made a mistake with National Lottery scratch cards. As most people will know, these are purchased by those interested in games of chance, and panels on the cards are "scratched" off. If the symbols revealed are of the same type or of a particular combination, the purchaser wins a prize of varying value depending upon the symbols. Mr Sabir found that he repeatedly had discrepancies, with Horizon showing what he described as "an apparent surplus of stock" in his accounts. He eventually found that although his assistant should have been clicking "stock in" on the Horizon terminal when scratch cards were activated, she had been clicking "stock out" instead. This meant that Horizon was recording a different number of scratch cards than were actually present in the branch.

204. When Mr Sabir realised what had happened, he contacted the Helpline. He also regularised the situation by taking the money out that matched the surplus stock and bagged it separately labelled in the safe. He explained that

"When I realised what had been happening it wasn't possible for me to go back and correct the situation, I needed Post Office to help me with this. I called the Helpline to ask for assistance, and explained what had happened. I said I needed someone to tell me exactly what I needed to do, how to correct my stock and pay the money in. I was given a reference number and told someone in the lottery department of the head office at Chesterfield would contact me. In fact, I never received this contact before my appointment was terminated. I explain what happened at the audit in relation to this below….. The way this situation was handled was very different from what I expected when I entered into the contract with Post Office. I expected effective help to get to the bottom of the problem."

205. This discrepancy relates, on his evidence, to Mr Sabir being unable to correct the error that he had discovered himself. I shall set out the sequence of his cross-examination on this subject.

"Q. On 10 August 2009 the auditors went in and conducted an audit?

A. Yes.

Q. And they found a deficit, a shortage in the branch of £4,878.36, of which £5,000 -- that's the net figure, but they had found a difference in stock figures of some £5,117, we can see on that page, can't we?

A. Yes.

Q. If we look at the comments on the audit report over the page…. second paragraph:

"During the audit it was quickly established that the office was showing large amounts of lottery scratch cards and on counting it was found to be short by some £5,000 approx. At this point I spoke with Mr Sabir to establish the cause of the shortage and was told that the error relates back to 2007."

Then you refer to a letter and things of that kind. Then we go through what they did, they telephoned et cetera. I think you would agree that a deficit of £4,878 is a serious matter, do you agree with that?

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A. No, I didn't agree. I told them everything what was the problem.

Q. Do you agree that a shortfall of £4,878 on your account is a serious matter?

A. The money was in the safe, this is not -- have you read all the statements which I submitted to support this one?

Q. Do you accept in principle a deficit of £4,878, if one is found in your accounts, is a serious matter? Just generally.

A. If that was due to my mistake, that is acceptable. If I have done the fraud, that is not acceptable. So when auditors came there, when they found out this discrepancy, I showed them in my notebook, this is the reference number. I spoke with the Helpline, and I also showed the receipts in which she was doing the mistakes. The girl, she has also been through lottery training. But what happened, instead when she remmed in the -- it mostly comes in cards 50 and 25. Instead of clicking "rem in", she was clicking "rem out". And this was the surplus according every day, 50, 60. But when we do end of the day balance, we can't check that day what is the problem. It can be postage stamp or anything else. And because I thought -- I gave her training but I started investigating what is the problem."

206. The expressions "rem in" and "rem out" were also referred to as stock in and stock out. He continued.

"When I found that, and after that suddenly the Post Office showed in their system that I am short so much stock. I rang the Helpline, I requested that "This is the problem I have, and can you please let me know -- I have got money in the safe written on those that this is the spare cash, and if somebody can please help me from lottery side so I can balance the stock. I have already resigned from the Post Office branch as well, and if I have found somebody I have to balance everything. So when they came, I showed the details, the receipts in which she was used to rem out instead of remming in. I said that this was the problem. I could not find how many scratch cards I am under, so can you please ask somebody -- I told the Helpline to ring me, and if they tell me, the money are already in the safe and I can balance my stock. But nobody rang me after that. Then suddenly they came and they suspend me."

207. I would add that reading the answers in cross-examination on a page does not always, or even necessarily, always capture the nature of a witness' oral evidence. Mr Sabir demonstrated, during these questions, an air of incredulity at what was being put to him, as well he might. His evidence was that he had discovered a discrepancy shown on Horizon with Lottery scratch cards, and worked out himself why this was happening. He could not correct the entries himself and so he sought help from the Helpline. He ringfenced the money shown, put it in the safe and labelled it, and waited to be given advice on how to correct the entries. An audit was performed, the auditors found this discrepancy of scratch cards (which Mr Sabir had already reported himself to the Helpline) and he told the auditors exactly what he had done, and had a reference number from his call and also had notes in his notebook.

208. There is no doubt that the operation of the incorrect entry for Lottery scratch cards by his assistant was a mistake, or a number of mistakes. Mr Sabir himself discovered this mistake. However, Mr Sabir notified the Post Office of this as soon as he discovered

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what had happened. Mr Sabir corrected the situation in physical terms by making sure the money was put in the safe, and plainly knew himself there was a discrepancy on scratch cards. He had reported this himself to the Post Office and had a reference number for this, and also expressly asked for and was awaiting help. That help simply never came. The auditors confirmed that was this discrepancy, which is just a different way of saying that they discovered that what he had already notified the Post Office was true. However, this was counted against him at the time and used as a reason for suspending him, and was put to him in cross-examination as amounting to a deficit in his accounts which was a serious matter.

209. The next part of Mr Sabir's cross-examination demonstrates how inconsistent the Post Office's case is concerning accounting by SPMs. I am going to reproduce it extensively because of this, although it is lengthy. An element of this case that arises in the Common Issues is the accounting performed by the SPMs, and this is included within Common Issues 11, 12 and 13. In order, for example, to commence a new Trading Period an account has to be closed off for the existing period. If there were a Transaction Correction a SPM would eventually reach a point in the flow chart where to proceed the SPM would have to select a box that stated "Accept Now". This would have to be done in order to move into the next Trading Period. Appendix 3 to this judgment shows that a dispute to such a Transaction Correction, if it were disputed, could be raised by telephoning the Helpline ("NBSC" in the appendix). However, this would occur *after* clicking "Accept Now", which effectively means that disputed items would still form part of the Branch Trading Statement, which is what the Post Office maintains is the agent's account.

210. At the end of a Branch Trading Period, Appendix 4 makes it clear that the Flowchart in Appendix 3 has to followed first to deal with all Transaction Corrections. Thereafter, the SPM prints from Horizon a "stock unit balance snapshot" which allows the SPM to check the stock/cash which is in the branch against the stock/cash which Horizon states should be in the branch. This process is called balancing the stock units. Transaction Corrections were brought in, in 2005. Prior to that they were called Error Notices, but there was only limited evidence about these and the Common Issues trial concentrated upon Transaction Corrections.

211. If Horizon shows a discrepancy after all the stock units have been balanced, then the next box in Appendix 4 makes it clear that the SPM has to address this discrepancy. This can be done by paying cash into the branch (to cover a shortfall); removing cash (for a gain); making good a shortfall by cheque; or if the amount is more than £150, settle centrally. The options are therefore "making good" or "settle centrally".

212. The final textual entry in Appendix 4 makes it clear that "If the SPM wishes to dispute a discrepancy (whether it has been settled centrally or made good), the SPM may contact NBSC to lodge a dispute (before, at the time of or after submitting the [Branch Trading Statement])." This "lodging" of a dispute is done by telephone to the Helpline.

213. Mr Sabir's clear evidence, both in court before me and at the time to the auditors, was that he had indeed telephoned about the discrepancy concerning Lottery scratch cards. It was put to him (as it had to be, given it was the Post Office's case) that he had mis-accounted for his stock because the number of scratch cards he was stating he had, was a different number to the ones he actually had in his branch. Given that this was

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rather Mr Sabir's point, the degree to which the Post Office concentrated upon it was surprising. I do not now quote every single question and answer, but enough to show the way that the Post Office viewed this matter.

"Q. Yes. As at 10 August [the date of the audit] you were telling Post Office through your signed accounts that you had £4,878 more in stock at your branch in relation to scratch cards than in fact you did have?

A. I have spare cash in the –

Q. In terms of your accounting to Post Office ... It was a net figure. The gross figure in terms of stock obviously is the £5,117.40, but you were significantly in your signed accounts inaccurately accounting for the stock you actually had. You were telling them you had £4,000 plus, more in stock than in fact you did.

A. I have already raised this complaint before signing the accounts, and if we don't sign the accounts and don't roll over you can't clear the next day. And when the auditors came on the spot he rang somewhere, I don't know, he rang on his mobile and he came to know in five minutes how many scratch cards are short. And we, as subpostmaster, we should have got some sort of help if we are struggling, we contact the Post Office and they resolve our problem. This was my concern.

Q. Mr Sabir, this was Post Office's money you were mis-accounting for. You were saying you had 5,000-odd more scratch cards than you did. There's nothing complicated about it. From the accounting point of view that is what you were telling Post Office, yes?

A. The cash was in the safe. The complaint was already made –

Q. When you do your monthly accounting you have to declare to Post Office your stock figures, don't you, including your stock for scratch cards?

A. Yes.

Q. When you do that you make a certification, is this right, that says: "I certify that the contents of this balancing and trading statement is an accurate reflection of the cash and stock at this branch." Do you see that?

A. Yes.

Q. So when they see your stock declaration for scratch cards that you had made in the previous months, it would be wrong to the tune of 5,000, wouldn't it? The stock of scratch cards you were declaring would be wrong by some 5,000, yes, do you accept that?

A. The stock was short, but I have got the cash in the safe and I have already made the complaint about that, that this is the problem I am facing, and if you don't roll over the trading period it don't allow us to work next trading day. So I can't close the Post Office.

Q. So why couldn't you simply have put the cash in? Because on the day of the audit, or soon after, the cash was put into the system, wasn't it?

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A: They did put the cash in the system.

Q. Why didn't you do that beforehand? If you had this cash that has erroneously been generated in the way it has because of a stock problem, why didn't you simply put it into the system?

A. I was waiting for somebody to ring me and tell me what is the actual figure I need to put in the system, whatever I -- coming above that was going in the Post Office system, not in my pocket or anywhere else and they took the cash out of –

Q. When do you say you first contacted Post Office about this stock problem in relation to scratch cards? When in the chronological run? You have the audit in August 2009. The audit report says you say this error relates back to 2007. So presumably it had been a year or more earlier you had reported this to the Helpline, is that what you are saying?

A. No, I think you did not understand what I told you how this has been happening. This has been happening over months and months. She may be activating one or two in a week and the surplus will be about £40/£50. So whatever was coming we are putting in the safe. When -- I can't remember everything, but when Post Office on their side, when they did the balance, the stock, how much scratch cards -- I don't know how their system works, that is why I was asking to somebody, when they showed in their system that I am short of so many scratch cards, that time I can remember I rang straightaway to Helpline, "Please ask somebody to ring me and I can resolve this problem". As and when they put stock in my system that "You are negative in stock", I state "Please, I have got cash in the system. I was already finding this problem and if somebody please ring me and resolve this problem".

214. The evidence continued in very much the same vein.

"Q. If you put the cash in your safe, your £5,000-odd into the Horizon system, yes? You'd acknowledged it existed. Then that would have created a surplus?

A. Yes.

Q. And if Post Office had seen the surplus of £5,000-odd, that would have triggered an audit, wouldn't it? Post Office see you running a surplus of £5,000, they would want to know what is going on here and they would have an audit, wouldn't they?

A. I reported to Post Office soon after I received the stock is showing short in my system. I straight away reported to them, "Can please somebody ring me and tell me how much cards I am short. I have got money in the safe. I can put the money in and balance my stock".

Q. How long do you say you let this run for? How many months did you mis-state your stock of scratch cards?

Q. Because there was no need to falsify your accounts in this way and mis-state your stock, was there? All you had to do was put the cash in and in fact that is what happened. Look at the bottom of [the audit report], part of this audit report. Cash was in fact -- actually a balancing cheque was put in to make good the error. So you didn't need to mis-state your accounts in this way, did you?

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A. Which I requested before. I did not falsify anything. This was a genuine mistake, and what I'm -- what my concerns are, if an auditor came on the spot, if he knew in five minutes how much actual stock I should have, so subpostmasters should have this sort of access so these things don't happen. This was my concerns."

215. The basic point was that the auditors could and did establish very quickly how many scratch cards Mr Sabir was supposed to have in his branch, to compare against how many were actually there.

"A: …..Nobody rang me from Post Office. Nobody contact me from Post Office to resolve this problem. So as regard accountants, we have to put the figure what are told to us. We can't falsify information for somebody or anybody else, you know.

Q. But that is exactly what you were doing. Look at [the audit report] at the top. Look at the second paragraph. What did you do in the audit? Was it complicated? No.

"During the audit it was quickly established that the office was showing large amounts of lottery scratch cards and on counting count, it was found to be short by 5,000 approx."

So all you had to do, which in fact was done, is to put the cash in representing the shortage of the stock you were carrying. There was no magic to this, was there?

A. How can I put the cash in if I don't know how much scratch cards I am short?

Q. You count them. What you do is what happened in the audit --

A. This was the main problem. I told that they were wrong, entries that were done in the Horizon system. The Horizon system is not designed by me and is complicated. As we were told at the training, this is best system we have got, we have got the best Helpline in the world, and we will be always alongside you if you have any problem. But when you go practically on the ground everything is the other way round.

Q. It's very straightforward. You were obliged to declare the true stock figure, that is all you had to do, and you didn't. You refused to do it. And you declared it was true and honest and it wasn't. All you had to do was count, as the auditor did….. count how many you were short and put that in the Horizon in the till?

A. I requested the Helpline before the auditors came. If auditors came before, and if they have found that I have not done anything, then this was my mistake. But I have already requested Helpline, "Please ask lottery people to ring me. I can resolve this problem".

216. It was then explained by the witness that he had no separate way of knowing how many scratch cards he should have, against the number that he did have, namely those that were physically in the branch, given the mistake that had been made in terms of inputting and outputting these cards.

"MR CAVENDER: The simple point that still arises, though, is you were -- you were in a position at the time of the audit to accurately declare the real stock in your

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branch, whatever that was. You were capable of counting the number of scratch cards that were in fact in your branch, yes? You were capable of doing that?

A. I was not able to find out how many scratch cards should I have and how many I have. This was the enquiry I was doing with the Helpline. This was my problem. A very simple problem. Money I have in the safe. I was asking "Give me the figure". I put in the system and my stock will be balanced then. If we don't sign the – the monthly accounting -- accounts we can't roll over in the next month, and if you don't roll over we can't operate the system.

Q. I think even you would accept the certification you put on your monthly balancing accounts was inaccurate, at the very least? It didn't accurately reflect the cash and stock at your branch, did it?

A. Yes, that was not right. That is why I am ringing the Helpline to resolve this problem.

Q. So why are you signing certification which you know to be wrong?

A. We can't roll over unless -- we can't run the branch unless we roll over the previous trading period."

217. The principal points that arise out of this are that:

1. Mr Sabir reported the problem caused by his assistant's mistake. He knew the number of scratch cards shown on the Horizon system would not be the number physically present in his branch, because for each one that assistant had activated, she had pressed the wrong button. In simple arithmetic terms, if the total number she had activated was x, the stock would be incorrect by 2x. Instead of each one activated and sold reducing the total stock by 1, it would increase the total by 1, a difference or discrepancy of 2 for each time she did it. The difference between the two figures would depend upon how many times she had done this, over a period of time.

2. Mr Sabir had no separate record, and no access on Horizon, to the number of scratch cards he *should* have had. He requested this information from the Post Office, who did have it. It was not provided. He used the Helpline to notify the Post Office of the problem. This is the way the Post Office maintain disputes should be notified.

3. Mr Sabir also had no way of identifying or recording this on the Branch Trading Statement.

4. Unless the Branch Trading Statement was completed, the system would not permit trading to commence the next day. The branch would have to close.

5. The same mistake(s) led to a surplus of cash, namely the money paid by customers for their scratch card. Mr Sabir separately kept this in the safe.

6. When the audit was performed, the auditors obtained the figure for the correct amount of scratch cards he should have had in his branch. This took a 5 minute telephone call.

7. Due to this discrepancy, Mr Sabir was suspended.

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8. The Post Office's case is that Mr Sabir falsified his accounts and misstated his stock by completing the Branch Trading Statements from the period he discovered the mistake.

218. Mr Sabir's account is substantiated by the audit report itself, prepared by the auditors two days after the audit. The report is dated 12 August 2009 and the audit took place on 10 August 2009. It states in part:

"I then telephoned yourself at 09.30am to report a preliminary suspected shortage of approximately £5000.00 and that I would ring you back with the final figure once I had completed the audit. At this point you advised me to contact Andrew Carpenter as you would be unavailable. However I was unsuccessful contacting Andrew Carpenter but was able to speak with Paul X Williams. This I did at 11.45am to report an overall shortage in the branch of £4878.36.

I also notified Lisa Allen Fraud Team Manager at 13.00pm to relay these findings.

A decision was taken by Paul X Williams to precautionary suspend Mr Sabir at 12.00pm and that the branch would be transferred to a relief Postmaster the (Newrose group), the assets were secured in safe and the keys taken by myself Mark Buller along with the alarm code that had been changed.

The audit and subsequent transfer of the branch was concluded at 15.00pm the following day 11/08/2009.The branch was rolled into TP 05, BP 03 and a Final Account produced.

Cash was presented to the value of £4780.00 and a cheque for £98.36 to make good the discrepancy on the day of the audit 10/08/2009, and this was put through Horizon and despatched the same day."

219. That cash was the very cash that Mr Sabir had been keeping in the safe. I accept Mr Sabir's evidence and I found him to be a reliable witness. When he could not remember something, he would say so. When he did not understand a question, he would make this clear. Any findings as to specific breach or breaches must await a later trial. I do however take this evidence into account in reaching my conclusions on the Category 2 facts that are disputed by the Post Office. I deal with that at the end of my review of all the evidence, both for the Lead Claimants and the Post Office.

220. Mr Sabir appealed. This failed, and he was notified of this on 23 November 2009. This letter stated:

"I have now completed my investigation into the circumstances leading up to the summary termination of your contract for services at Post Office® Cottingley branch and Post Office® Cross Flats branch.

Having carefully considered all of the information in the case papers along with the evidence you put forward at your appeal interview, I have concluded that the decision to summary terminate your contract for services should stand. It is clear from the evidence available, and from your own testimony, that you did indeed inflate the value of National Lottery Instants holdings in your branch trading statement This was a conscious act on your part and meant that the associated loss was not declared in the

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branch trading statement. You must have been aware of the seriousness of producing a false account due to your experience as an accountant and I can find no mitigation in your favour. I am satisfied that the contracts manager's decision is correct and that you have been treated fairly."

221. Mr Sabir was chased by letter, and then a letter before action, in the early part of 2010, for £360 said to be due. Both these letters mis-stated the contractual obligation upon SPMs under the SPMC. A letter of 10 January 2010 told him that "you are contractually obliged to make good any losses incurred during your term of office for up to six years after your last day of service (Limitations Act 1980)". The period under the Limitation Act is correct. The claim that he had to make good "any losses incurred during your term of office" is simply wrong in fact and law, and does not even represent the Post Office's case on liability for losses in the SPMC. The letter before action of 1 March 2010 stated that "under the contract for services you are responsible for all losses occurring as a result of the acts or omissions of yourself or your assistants." This, again, is wrong, and this letter specifically threatens legal action as the next step.

222. There can be no excuse, in my judgment, for an entity such as the Post Office, to mis-state, in such clearly wrong terms, in letters that threaten legal action, the extent of the contractual obligation upon a SPMC for losses. The only reason for doing so, in my judgment, must have been to lead the recipients to believe that they had absolutely no option but to pay the sums demanded. It is oppressive behaviour.

223. In my judgment, the attack on Mr Sabir's credit which I have identified above fundamentally ignores the reality of the situation, the fact that he had contacted the Helpline and sought assistance, and the fact that the vital piece of information he needed (the number of scratch cards the system was showing that he *should* have) was so readily accessible to the Post Office auditors, but never provided to him. It is also notable that he used the Helpline, which is the mechanism that the Post Office itself maintains is the correct way for a SPM to pursue matters of this nature.

Mr Naushad Abdulla

224. Mr Abdulla was the first of two Lead Claimants who had to be told, during their evidence, that under the Civil Evidence Act 1968 they were not obliged to answer questions; this was called in discussions with counsel giving the warning against self-incrimination. This Act provides that that any witness or any person who is in legal proceedings, that are not criminal proceedings, is entitled to refuse to answer a question if they think that to do so would tend to expose them to proceedings for a criminal offence or recovery of a penalty. It is more a statement and reminder of a person's legal rights rather than a warning in the strict sense of the word, but I satisfied myself that Mr Abdulla fully understood. He could, if he chose, invoke this privilege against self-incrimination by declining to answer a question put to him during his cross-examination by Mr Cavender. The reason for making it clear to Mr Abdulla that he had this right was because of the extent of his evidence, and the points which the Post Office wished to challenge. The Post Office had interviewed him in 2009 about serious matters, leading to his suspension and termination. These were namely misuse of Post Office funds and false accounting. Both of these are criminal

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offences, potentially having been committed by Mr Abdulla (on the Post Office's case), and he was cross-examined about the interview. Mr Abdulla did however answer all the questions put to him, and did not decline to answer any, even though he was entitled to do so and understood this.

225. Mr Abdulla was the SPM at Charlton Church Lane, London SE7 between 24 January 2007 and 8 May 2009, when his appointment was summarily terminated. From 2000 he had been a medical sales representative for two different companies until he became an SPM. He had been successful in this field, but had been previously made redundant, and considered his existing career as a sales representative not to be stable. There was discussion about potential redundancies at his second medical sales employer in 2006, and he did not want to go through that experience a second time. He was familiar with basic sales and marketing software, as well as Word and Excel, which are Microsoft Office programmes (or as they are now sometimes called, applications). His parents had run a Post Office in the early to mid-1990s and had been successful. They had experienced no problems in doing so, and had made a good income, nor had they encountered difficulties dealing the Post Office. He described himself during that period as ambitious, self-confident and motivated, which I consider are qualities often found in successful sales people. He obviously must have felt he could succeed in running his own business, and he wished to do so.

226. At the time that Mr Abdulla became involved with the Post Office – which was from the application process in September 2006 through to branch transfer day on 24 January 2007, the Modified SPMC was in use for SPMs (rather than the earlier version of the SPMC which had been used for Mr Bates and Mrs Stubbs).

227. On one particular point, which was explored and challenged extensively, his account turned out to be very similar to the eventual position reached by the Post Office in Appendices 1 and 2. This concerned the options available to him as SPM to dispute transaction corrections and moving the branch over to the next trading period, including how the Horizon system presented a SPM with certain options.

"Q. But what you do, don't you, if you don't want to accept a transaction correction, you settle it centrally and then ring to dispute it?

A. You dispute it if you want to dispute it.

Q. Yes.

A. But there is not an option when you are accepting it. So you accept it straightaway or you accept it centrally. There is not an option of accepting centrally and disputing.

Q. No, you don't accept it centrally, you settle it centrally –

A. That is what I mean.

Q. You move it in, in order to allow you to roll over into the next period. Yes? So you settle it centrally, don't accept it, and you then ring to dispute it --

A. No, that is not correct.

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Q. Can I finish? Just to put to you what I suggest the system is. Then that enables you to roll over?

A. No. You need to accept it centrally. You settle it centrally. What that really means is you are accepting it centrally. It's the same thing --

Q. I suggest to you it is not –

A. So when you accept it centrally --

MR JUSTICE FRASER: Just hold on. I want to hear the explanation. You explain your choices.

A. Okay. So say a transaction correction pops up, you have two options, two boxes. So you have either one is to accept it now straightaway and put whatever it is, put the money in or take the money out, whatever, and then the other box says "settle centrally".

MR JUSTICE FRASER: What does that mean?

A. What that does, it saves that shortage or loss or whatever, it saves it in -- I don't know how it works but it saves it somewhere and then, when the branch transfer period comes around at the end of the month, so that -- that shows up. So even if you forget about it, before you roll over to the next branch trading period for the next day, that will pop up and it will not go away until you accept it there and then; you have to put the money in there and then if it is a loss or take the money out, whatever it is, you have to make good that situation before you actually roll -- you don't dispute it at that time. You cannot because -- if you want, you can but then you will be there -- you ideally should dispute it as soon as you get the transaction correction. But at that stage you have to accept it and then roll over to the next trading period, so you can open the next day.

MR CAVENDER: Whatever your understanding, you understood that you could dispute it? That you had to do something to facilitate the rollover, yes? Whatever that thing was --

A. Why would you --

Q. Can I finish? Whatever that thing was that would – it would effect a rollover, so you have a zero balance in the next trading period. But the issues over the transaction -- any you had would still be live and be for you able to contest. You understood that much, didn't you?

A. Sorry, can you just repeat that?

Q. We are disagreeing about whether you had to accept or settle and what settle meant. Just leave that aside. You understood that, by following the procedure we have talked about, about moving into the suspense account, yes --

A. It is not really a suspense account.

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Q. -- whether it is accepting or settling centrally, whatever that is, that would allow you to do two things: one, roll over and go to zero in the new trading period, yes?

A. If you have -- if you have dealt with that matter.

Q. You have dealt with it. But you have "settled" it in a way which keeps open your possibility of arguing about it?

A. No, no. Even if it is open, even if it is in dispute, you cannot roll over until you have sorted it out before branch transfer period.

Q. I suggest you are wrong about that.

A. No, I suggest I am right.

(emphasis added)

228. Appendices 1 and 2 makes it clear that the agreed position, as at the end of the Common Issues trial, was that a SPM had to click the "Accept Now" button *before* the options of settling by cash, settling by cheque, or settling centrally were reached by the SPM, or as identified in the flow chart. If settled centrally, Appendix 1 also makes it clear that "(1) A credit or debit entry for value of the TC is made in the SPM's branch account; and (2) A corresponding debit or credit is made in the SPM's customer account with Post Office." Raising a dispute is entirely separate, and is something that each of the final three boxes on Appendix 1 shows is done by telephoning the NBSC Helpline and lodging a dispute. It is not done on the Horizon terminal at all, and importantly, that point is only reached *after* the SPM has clicked "Accept Now". Further – and this is something that I address in greater detail with when dealing with the evidence of Mrs Van Den Bogerd, the most senior Post Office witness who appeared before me – it is *not* the case, on the evidence before me, that telephoning the NBSC Helpline to lodge a dispute suspended the debt collection process. All the agreed wording in Appendix 1 states is that this "should suspend collection until the dispute is resolved." In terms of what in fact happened to these Lead Claimants, the actuality is rather different. It is also made clear in the first box including text in Appendix 2 that "the process in Flowchart 1 is followed until all TCs are either made good, or settled centrally to the SPMR's customer account". Each of these choices – making good, or settling centrally – can only be reached after clicking "Accept Now".

229. Indeed, Mr Abdulla's evidence on this – which was challenged as being wrong - matched in general terms, items 32 and 36 in the Factual Matrix. These , which fell into Category 2, namely facts the relevance of which the Post Office did not accept, and/or matters which the Post Office did not accept were in fact true. These were:

32. Claimants seeking to dispute apparent shortfalls did not have an option within Horizon to do so, and were required to contact the Helpline to seek assistance.

36. A branch cannot enter (or "roll over" into) a new trading period without the Subpostmaster declaring to Post Office the completion of the Branch Trading Statement.

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230. The substance of both of these are now also dealt with in Appendices 1 and 2 on an agreed basis. I deal with these further when I come to deal with the Factual Matrix at the conclusion of my review of all the witnesses, but it can be seen that Mr Abdulla's account which I have reproduced is extremely close both to these two items (32 and 36), and the contents of Appendices 1 and 2, yet it was put to him by the Post Office that he was wrong. In my judgment, he plainly was not wrong. He was right.

231. Turning to contract formation, the Charlton branch was operated by one Mr Sandhu and Mr Abdulla received a brochure about it by e mail, that e mail being dated 21 August 2006. He expressed interest to the Post Office formally, and this was acknowledged by a letter from the Post Office dated 6 September 2006 explaining that he had to make a formal application, which he did later in 2006. In yet another example of the Post Office's shoddy document management at the time, the Post Office in disclosure in this litigation produced a letter telling Mr Abdulla he was successful in his application, that is dated 7 April 2005. That is plainly and obviously wrong. It is also not the first document in these proceedings related to important matters that has a date on it that defies explanation. It is at least 17 months too early, even compared to the timeline from other Post Office documents, well over a year before Mr Abdulla even received the brochure, and 19 months before the Post Office even invited Mr Abdulla for an interview. Not only that, but the letter of 6 September 2006 acknowledging his expression of interest is supposed to be 4 pages long, but only pages 1 of 4, and 2 of 4, are available. The other two pages, 3 of 4 and 4 of 4, are missing. Again, there is no cogent explanation for this. I do not understand how half of a letter can go missing, particularly when it is dated from only 2006.

232. Mr Abdulla submitted his formal application, including a long-term business plan on the standard form provided, and agreed a sale with Mr Sandhu for £80,000 plus stock at valuation, conditional upon his being accepted by the Post Office. He was going to introduce a retail side to the business, basically a convenience store. As it was a leasehold property it was also agreed that the annual rental would be £14,500 for a 12 year term. The estimated remuneration from the Post Office, provided in the letter of 6 September 2006, was £106,000 approximately. Mr Abdulla was funding the purchase with two interest free family loans and a 10 year loan from Barclay's Bank.

233. Only a partial copy of the Post Office's Financial Assessment of that business plan is available. This was assessed as medium risk by the Post Office in terms of the financial viability of Mr Abdulla taking over the branch. In the Post Office's calculation of the financial viability of the proposal, under "Other Cash Impacts", there is a figure of £1,500 for "Provision for Losses". Mr Abdulla does not believe he included this in his business plan, although neither he nor the Post Office any longer has a copy of that business plan. Whether he did or not, the Post Office obviously considered it was sensible to include a figure for losses in this amount, which is less than 1½% of the annual remuneration. Mr Abdulla did not receive a copy of this calculation by the Post Office.

234. He was not given or shown any formal documents by Mr Sandhu regarding Mr Sandhu's contract with the Post Office. Mr Abdulla was invited for interview in a letter dated 9 November 2006. That letter stated:

"I also attach a brief summary of the conditions of the Subpostmasters Contract, for your attention. Please note that the summary does not represent the complete terms

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and conditions of the Subpostmasters Contract, and may not be relied upon, for any purpose, by a subpostmaster. It only covers certain sections of the Contract, to give you an idea of what to expect, and should not be used in place of a thorough review of the Contract. You will receive a full copy of the Contract if you are successful in your application, as part of the appointment process."

235. The summary stated under "Losses":

"The subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for all losses caused by his assistants. Deficiencies due to such losses must be made good without delay."

236. Under "Branch Trading" the summary stated:

"Subpostmasters are required to produce a branch trading statement each trading period after close of business (unless otherwise directed by Post Office Ltd)."

237. At the end of the summary the following note appeared bracketed and in italics:

[Note: The above paragraphs summarise certain sections only of the Subpostmaster's Contract. They are by no means a comprehensive description of the Contract, and should not be used in place of a thorough review of that Contract. A subpostmaster may not rely upon the points made in this summary, as they are for reference purposes only.]

238. At the interview there was no discussion about losses and gains. On 12 December 2006 Mr Abdulla signed and returned a document headed Appendix 1M Return copy, together with his bank details. It started:

Mr Naushad Abdulla

CONDITIONS OF APPOINTMENT FOR

POST OFFICE®, CHARLTON BRANCH

6. You will be bound by the terms of the standard Subpostmasters' Contract for Services at Modified Payment Offices.

239. There is no realistic explanation for why the first paragraph of this form was numbered 6 rather than 1. However, it clearly states that what the parties before me call the Modified SPMC will apply.

240. Mr Abdulla denies that he received, in what the Post Office called the "Appointment Pack", the actual Modified SPMC itself. He said that he never received it in that pack, was never given a copy, and never saw it until the proceedings. He said he would have taken legal advice had he received it, and he thought it was confusing, and that nobody in their right mind would have signed it given its terms, particularly concerning notice. He also said he would not entered into the commitments he made in respect of purchasing the branch and entering the lease had he known of the detailed terms. He used a solicitor for the legal mechanics of acquiring the lease.

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241. He did know he had a contractual relationship with the Post Office. I will produce this section of his evidence verbatim as it gives a good illustration of his evidence generally.

"Q. Yes. And you were responsible, you understood you were going to be responsible to account to Post Office for what you did with that money and that stock, am I right?

A. It was the Post Office's money, that is correct, and it was the Post Office's stock. But I was responsible and ... I was trained, I was responsible for the stock and the cash, yes, that is correct. But going into the actual office and the position, I was not aware of -- I was not aware of the lack of support that I would be receiving if there was a problem. Everything was fine regarding training, classroom training, and so on, but it is only -- the only problem I have is when you have a problem there is no support. You have the Helpline which is useless, to be honest. The Helpline -- I have heard about this second tier, and maybe they didn't think I was important enough to put me to the second tier, but what I experienced from the Helpline, it was just useless. And I don't believe that all helplines do have a second tier because -- again from some experience I have. But why do you have a first tier if they are useless? Just have a second tier then.

Q. Mr Abdulla, can we go back to the question, please.

A. Sorry.

Q. In terms of the written contract you expected to be provided with, you would have expected that to contain detailed terms, wouldn't you, regulating your relationship with the Post Office?

A. I don't know because I didn't receive any. All I received was a welcome pack and a 1M document and I had to send my bank details and the actual contract was not there. So I don't know what I was -- what -- sorry, what was the question?

Q. You have accepted that in principle you were expecting a contract, and what I am putting supplemental to that is you would have expected such a contract to contain the detailed terms governing your relationship with Post Office?

A. To tell you the truth, I -- I was really happy at the time of -- when I was accepted, so I just signed everything and sent it off the same day. Because I didn't want to be made redundant if it was going to be the case with my job, so I wanted to have this, as I said before, more secure position."

242. My findings in relation to this are as follows. They are similar, but not identical, to those in relation to Mr Sabir.

1. The letter inviting him to interview put him on notice that there was "a full copy of the contract" which required "thorough review". Although I have explained above that the Post Office had improved its procedures from the time of Mr Bates and Mrs Stubbs, the procedures were such that there was still not requirement for an incoming SPM to sign the actual SPMC itself and therefore clearly acknowledge it had been

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received. Thus, for any particular SPM, there is no way of knowing whether it was even received in terms of documentary record.

2. The summary of terms included with the invitation to interview stated that it did not replace a thorough review of the contract, which meant the Modified SPMC.

3. The invitation to interview letter was a standard one, as shown in a Post Office internal e mail to the Contracts Advisor in Leeds who was told "I would be grateful if you would arrange the interview yourself, using the standard invite letter, included in the 'Interview Pack'."

4. Even if the Modified SPMC was supposed to be included in the envelope for the Appointment Pack, it may not always have been. It is necessary in each case to consider the evidence and find whether it was sent to a particular SPM or not. There were however sufficient references to it as a separate document that did exist in this instance that Mr Abdulla was put on notice of it. I accept Mr Abdulla's evidence that he did not receive it, but it was referred to and he could have asked for it.

5. Numbered item 6 (the first item) of the Conditions of Appointment stated that Mr Abdulla would be bound by the terms of the Modified SPMC.

243. The Modified SPMC generally therefore governed the contract between the Post Office and Mr Abdulla. However, in terms of whether this contained onerous and unusual terms and whether these were brought to his attention, this depends upon Common Issue 5. The actual terms of the Modified SPMC were not brought to his specific attention with the exception of those in the summary. Therefore, the answer to Common Issue 5 in his case depends upon the nature of the terms themselves.

244. Even if I am wrong about that, the extent of Mr Abdulla's liability for losses was included expressly in the invitation to the interview which stated that "The subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for all losses caused by his assistants. Deficiencies due to such losses must be made good without delay." This accurately summarised that part of the Modified SPMC. Therefore, even if the Modified SPMC did not govern his appointment, the extent of his liability for losses would be exactly the same as the invitation to the interview made clear that the appointment would be made on the basis that losses would be subject to this contractual regime.

245. I do not consider that the fact that the invitation to interview stated that the summary could not be relied upon by SPMs affects this analysis. The invitation made it clear that the detailed terms in the contract were the ones that applied, not the summary. If those detailed terms were never communicated nor supplied (putting to one side my findings that the existence of the Modified SPMC was notified to Mr Abdulla) then the only place that there was any explanation of the obligation upon an SPM for losses was what was contained in the summary. I do not consider that this amounts to the "an SPM relying upon the summary".

246. The branch transfer day was 24 January 2007. Prior to that he received classroom training. This did not occur balancing in any detail, if at all. Branch transfer day occurred and the closing audit for Mr Sandhu took most of the day, during which period Mr Abdulla had to wait outside. He described the day as hectic, and various

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documents were presented to him by the auditor as a formality for signature. None of these documents were provided in advance, or explained to him. He signed an Acknowledgement of Appointment in similar form to the previous three Lead Claimants, which stated:

The Subpostmaster's Contract

Acknowledgement of Appointment
I accept The Appointment as Subpostmaster at:
Charlton
and agree to be bound by the terms of my contract,
and by the rules contained in the book of rules and
the instructions contained in those postal
instructions issued to me.

247. Both the bold and increased font size for the title were present in the original, and this is in like terms to the one signed by Mr Sabir. Again, as with Mr Sabir there was no book of rules. Mr Abdulla's experience of the in-branch training was far from satisfactory from his point of view. This included conducting a balance. He was told he had to make good any losses and he was not told how to investigate or resolve discrepancies or apparent shortfalls. He was simply told to contact the Helpline.

248. Turning to Mr Abdulla's operation of the branch, I have already identified his account of how even disputed Transaction Corrections had to be dealt with, at some stage prior to the next Branch Trading Period, by clicking a button "Accept Now". He would contact the Helpline about 6 or 7 times a month, and was shocked at the inadequate support. He would often experience apparent shortfalls on the days when he would perform balances, but could rarely get through to the Helpline on these occasions. He thought the advisers were ill informed and would often give the impression of reading off a script. Even his area manager could not help, and he was told by his area manager that he should pay shortfalls and wait to see if a Transaction Correction was issued in his favour.

249. Apparent shortfalls began appearing in his accounts soon after the branch transfer and continued regularly. He could not resolve these through the Helpline. In these proceedings he has considered information available in disclosure that he did not then have available for the period March 2009 to April 2009. This shows 94 Transaction Corrections during this period. Some columns on the spreadsheet of Post Office report of all these (to assist the parties, at bundle reference {E4/92/1}) contains some text which Mr Abdulla believes were what would be shown on the Horizon terminal. Many of the entries relate to the National Lottery, either sales or prizes. Many of them relate to cheques which were said to have been lost. If the receiving bank (which usually appears to be the Alliance & Leicester) said it had not received the same number and amount of cheques Mr Abdulla sent from the branch, the difference would be claimed from him. He considers that the Post Office would always accept what the bank said and debit him for the amount. Some of these amounts were sizeable. Some have no text at all. Some say "evidence to follow" or that the evidence will follow in the post. Some say "the evidence has been posted today and should arrive in the next few days. Although telephone disputes are not allowed, if you have a query about this transaction correction you can contact" and then a telephone number is given. The statement "telephone disputes are not allowed" is somewhat

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different to what the Post Office explained to me should have been done if a TC were challenged, which is by telephone.

250. There is one particular example where the amount that is plainly intended to be a credit (which requires a negative or minus sign before the figure) for £1033 has been entered without that, which means it would be treated as a debit. This relates to a National Lottery cheque on 14 May 2008. If it has been entered as a debit rather than a credit, the financial impact upon the branch would be £2066. None of this detail was available to Mr Abdulla at the time, and it is only due to these proceedings that he has even seen the report. Another example is three successive Transaction Corrections for £1092 regarding the National Lottery, each debiting Mr Abdulla with an identical amount but for different periods. He believes the same one has been entered more than once in error. If these points are correct – and specific findings on items such as this on any individual case must wait until a later trial – the effect is obvious.

251. The reason for identifying these items of his evidence is they all go to what the Branch Trading Statement is; another way of expressing it, is they all go to the mechanics by which a Branch Trading Statement was generated by each SPM, something which had to be done by them in order to rollover into the next 4 week period so the Post Office could continue operate. All these TCs had to go through the step "Accept Now", that "acceptance" by the SPM being on the basis of the information they had at the time, and *not* on the basis of the type of information available to the Post Office in a report such as this.

252. Finally, Mr Abdulla says that he came not to trust the Horizon system at all, and was not confident that any of the figures shown on it were correct, or that apparent shortfalls were in fact real losses. He adopted a procedure which he said he had been told by one of his assistants Mr Sandhu had adopted, namely keeping a cheque in the till to cover apparent shortfalls where it was thought likely a later transaction correction would be issued. This cheque was undated and was for £2,500.

253. He was first audited on 14 June 2007 and there was a shortfall of £304.14. It was made clear to him that he had to pay this which he did immediately in cash that day. The next audit was on 6 April 2009, when he was not present as he had gone to Dubai on holiday. The Post Office knew this, and he explained that he thought auditing the branch whilst he was away was wrong. A shortfall of £4,905 was found and he was immediately suspended and locked out, not being allowed to enter the branch. This suspension led to his termination. The auditor on that occasion in fact accepted a TC in the branch without his knowledge and whilst he was evidently not present.

254. He was invited to an interview in a letter dated 14 February 2009. This stated in typewriting:

> "I have now received the necessary papers relating to this case and, after reviewing them. I should advise you that I will have to consider the summary termination of your Contract for Services on the grounds of loss at the time of audit of £4398.32, also at the time of the audit an undated personal cheque for £2500 was found in stock unit AA and *the mutilated notes were understated by the same amount.* You have accepted transaction corrections, and in doing so indicated that you had made this amount good, when in fact you did not. This is misuse of Post Office funds and false accounting. This is in breach of your Contract for Services."

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255. The italics have been added by me for this reason. In the phrase I have italicised a change was made by hand in the letter. The word "under" in "understated" was changed by handwriting to read "over" so that it became "overstated". The whole phrase therefore read, if one considers that text with the change, that "the mutilated notes were overstated by the same amount." The complaint therefore appears to be that mutilated notes were overstated by the amount of the cheque, namely £2500. Given the largest denomination banknote is £50, this means at the very least (if they were all £50 notes) that 50 notes were wrongly stated to be mutilated.

256. The letter ended, having recited various terms:

"Should you choose a personal interview, you may be accompanied at the interview by a friend, who must be a Royal Mail employee. a registered Sub Office Assistant or a Subpostmaster, who may also be a representative of the National Federation of Subpostmasters."

257. Mr Abdulla attended this interview. This was done by Ms Ridge for the Post Office. Ms Ridge was the same person who had interviewed him to be a prospective SPM. He was questioned extensively about this and the records of it in evidence before me by Mr Cavander. By the time of the interview the amount had changed, as a TC had been issued in Mr Abdulla's favour in the sum of £978.88 due to an error at the Alliance & Leicester regarding crediting of cheques. There is minimal information on the document at the time that recorded this, but it is undoubtedly a credit in Mr Abdulla's favour. It stated "The attached paperwork is evidence of an error received from Alliance & Leicester."

258. At the interview, a transcript of which was prepared by the Claimants' solicitors from the Post Office taped record, Mr Abdulla was accompanied by Michael Darvill, an experienced SPM who was also a representative of the NFSP. Mr Abdulla specifically raised that there was no way there could be a shortfall of £1,092 on the Lottery, which is the amount of one of the three entries I have identified above shown on the records now available. The interviewer, Ms Ridge, said "there is no TC for that" when the records produced by the Post Office in this litigation show not only that there clearly was such a TC, but there were in fact *three* TCs for that amount. Ms Ridge said she would go back to Camelot, but it is unclear if that ever happened. She also told Mr Abdulla he had been accounting incorrectly for Lottery cheques and prizes, although he said that he had always done it that way and that was how he had been trained. At one point she said:

"Ms Ridge: These errors and the £1200 error is caused by your mistake, it's not the Horizon system it's what you've, and going back to your contract again -
Mr Abdulla: I don't believe it is a mistake because I was, this is how I was trained to do
Ms Ridge: Of course it is."

259. After discussion about the Helpline and Camelot, and an interjection from Mr Darvill, this passage of the interview continues:

"Ms Ridge: If you say you do lottery cheques quite often then I've got to believe that most of the time you are accounting for them correctly on this time, on this occasion

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and possibly one other on this list that I've got here, you have not accounted for it correctly you've made a mistake
Mr Abdulla: The thing is, this is how I've been doing it, I've not changed anything for that one there, that's how I've been doing it all the time
Ms Ridge: You've got two lottery cheque prize payments on here that are errors yes?
Mr Abdulla: There's one for £1,092
Ms Ridge: £1,030 that one just says Camelot TC doesn't actually say cheque, this one here says National Lottery cheque this is going back to May last year
Mr Abdulla: Is this all the transaction corrections for the office?
Ms Ridge: Yes all, for under your name yes
Mr Abdulla: For the whole office
Mr Darvill: Well there's an awful lot for Camelot
Ms Ridge: Yeah but they're not all for cheques, they don't all say cheques
Mr Darvill: No I know but I mean that can be, but what I'm saying is that there's an awful lot for Camelot which indicates there's something wrong with the accounting system on Camelot to me."

I have underlined part of this exchange because the evidence in this trial shows that the list Ms Ridge had were not all the TCs for the office, although she believed at the time that they were.

260. Ms Ridge later said "I've got two choices here I either call it an error or I say its's theft". At another point in the interview Mr Abdulla stated "Ok yeah it's my mistake but I was told how to do it, this is how I was told to do the lottery". Mr Abdulla said that Ms Ridge gave him the impression that if he paid off the then-figure for losses, he would be re-instated. This was when she said:

"I would appreciate if you could send me a cheque for the outstanding debt as it stands at the moment, that doesn't take into account any errors that might come. Up until yesterday morning it was £3926.31, that doesn't take into account that there may be errors in your favour or against 'cos they do come through. If you can send a cheque to me at the Maidstone address which is on my original letter. All right and as I say I will then write out to you and make my decision and write out to you."

261. He did pay this sum immediately, believing this would either help or lead to his reinstatement. It did not, and he was not. Whatever the result of any further investigation by Ms Ridge or the Post Office in terms of "going back to Camelot" – and whether any even happened at all - Mr Abdulla had his appointment as an SPM summarily terminated by her.

262. He appealed against this decision. The appeal was heard by Mr Mylchreest the Appeals Manager on 23 June 2009. Mr Abdulla was again accompanied by Mr Darvill. Mr Abdulla's understanding that Ms Ridge was investigating further with Camelot was obviously shared by Mr Darvill, because the latter stated "Of the total loss, approximately £1,000 was related to an error in the lottery which was being investigated. Mr Abdullah expected this to generate a transactional correction."

263. On 29 June 2009 in a letter signed by him, Mr Mylchreest wrote to Mr Abdulla and dismissed his appeal, saying:

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"I have now completed my investigation into the circumstances leading up to the summary termination of your contract for services at Post Office® Charlton branch on the grounds that you misused Post Office® funds and falsified your branch trading statement.

I have carefully considered all of the information in the case papers and the evidence you put forward at your appeal interview. I have concluded that both charges against you have been proven."

264. It is not clear if "my investigation" included any further information from or investigation of the situation regarding Camelot, either by Ms Ridge or even Mr Mylchreest. Given the time scale, this appears unlikely. It was made clear by Mr Mylchreest that he did not accept Mr Abdulla's explanation regarding the undated cheque. However the losses that were held against Mr Abdulla following the audit undoubtedly included the various items shown subject to some of the TCs that I have described, so the issue of the cheque was not the only point being held against him and relied upon to reach the decision both summarily to terminate his appointment (by Ms Ridge) and to dismiss his appeal (by Mr Mylchreest).

265. There is also a copy of the same letter, although the page break is in a different page, again actually signed by Mr Mylchreest, dismissing the appeal, but this time dated 29 May 2009. This is before the appeal hearing had even occurred. Mr Abdulla believes that this shows that the appeal hearing was a formality in the sense that a decision on the appeal had been taken even before the hearing had taken place. Mr Mylchreest did not give evidence before me so it is not possible to know what his explanation for this was.

266. There are two other specific matters which I will deal with because they took up a great deal of time, and are relied upon by the Post Office. The first is the extent of Mr Abdulla's computer experience. In one of his previous jobs he had attained the title of "Computer Champion". The Post Office relied upon this to demonstrate a high degree of expertise on his part in dealing with IT, and hence with Horizon. He explained it was just a title, and did not mean he was an IT expert. He was responsible for making sure colleagues in his previous sales job collected information and logged it correctly on the Voyager system then being used in that company, for relying information to the head office. I accept his evidence on this point. In any event, there is nothing to suggest that the Voyager system is even approximately similar to the Horizon system, and everything to suggest it is wholly different, given it was used for pharmaceutical and medical sales. The second is Mr Abdulla's belief that the auditor present on branch transfer day, Christine Stevens, was the same person who was his area manager, Christine Adams, but she had changed her surname when she became married. The Post Office's case is that these are two entirely different people, and they relied upon this as further demonstration of his unreliability. Neither of the Christines appeared before me, but this is a point of utter superficiality and of no relevance whatsoever. Mr Abdulla's mistaken belief in this respect goes nowhere, and it is an understandable mistake in the circumstances.

267. Mr Abdulla described his whole experience with the Post Office as traumatic, which, given how he appeared in the witness box, for him it obviously was. He said that the termination had caused him not only a significant financial impact, but also affected his health significantly. He evidently felt an extremely strong sense of personal

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grievance. This seemed to become increasing pronounced the longer he was cross-examined, and led his answers to become somewhat longer. His evidence increasingly became statements of his position, rather than answers to questions, and somewhat lengthy statements of position at that. Some of the questions inadvertently encouraged these expositions from Mr Abdulla. It was necessary, from time to time, to try and keep Mr Abdulla on track in terms of answering Mr Cavender's questions.

268. In my judgment, Mr Abdulla was trying to assist and give clear answers, but he increasingly could not keep himself within the confines of the actual questions on many occasions. When he did, his evidence was persuasive and useful, but these times were matched by times when his point of view simply spilled over. After one particularly lengthy answer, for example, he told me he was trying to paint a picture. This way of answering questions meant that he was not a wholly satisfactory witness, as he did need to be kept on track rather more than was ideal.

269. The Post Office's case was put very squarely that he was lying, the submission being that he "lied frequently and brazenly" and that some of his evidence was "new and obviously untrue". He was challenged as having falsified his statement of truth of his witness statement in the same way as he had falsified the accounts he had submitted to the Post Office. I make no criticism of the way that Mr Cavender put this to Mr Abdulla, as it is an inherent part of the Post Office's case that there are no such things as Horizon generated shortfalls, and SPMs who had discrepancies in their branch accounts were either extraordinarily careless and/or they and/or their assistants were probably stealing or losing the money. The necessary points were put to Mr Abdulla entirely correctly and Mr Cavender was professionally bound to do this.

270. However, I do not accept the challenge mounted by the Post Office to the content of Mr Abdulla's witness evidence before me. I do not find that he was lying, or that his evidence was untrue. However, his evidence must be viewed in the light of someone who acted as he did with the undated cheque and the potential misstatement of damaged bank notes. Horizon issues, and the TCs concerning the lottery, were not the only issues uncovered on the audit of his branch. He was, also, so convinced that he had been treated badly by the Post Office, and his point of view became so extremely subjective, that he was not an entirely satisfactory witness. On matters concerned with his contracting with the Post Office, what he received by way of documents, how the Horizon system was operated and his experience of how it worked, I find his evidence reliable and I accept it. On factual matters concerning what occurred when the audit happened, how his suspension and termination occurred and were dealt with by the Post Office, I accept his evidence. So far as the actual substantive issues that were uncovered in the audit that led to his termination, namely the shortfalls and the undated cheque, express findings will have to wait until a later trial. There may be more to come so far as Mr Abdullah is concerned, as he had (potentially, as I make no findings on this) incorrectly entered the amount of damaged banknotes in the branch. His accounts were however prepared in the way he explained; that is, regardless of his view concerning any of the Transaction Corrections, he had no option but to "Accept Now" to reach the point of preparing or returning a Branch Trading Statement in order to open the next day. I make it clear that I make no findings in relation to the issues to be dealt with in later trials, namely Horizon Issues, breach, causation and loss. It should therefore be clear that I make no findings on whether he falsified his

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accounts to the Post Office at the time, and if so how, because that is not an issue before me in this trial.

271. Given the last two sentences of the preceding paragraph, the Post Office may ask why all of the evidence given by Mr Abdulla was admissible in this trial. The Post Office certainly tried extremely hard and expended considerable expense, in advance of this trial, to prevent this evidence from emerging into the public domain, and issued an application seeking to strike out most of it as not being relevant. The answer to this, and any ongoing challenge to admissibility, is very simple. The terms upon which Mr Abdulla contracted with the Post Office were factually in issue. The operation of the Horizon system in terms of generation of a Branch Trading Statement, and the options available to a SPM at the end of a Branch Trading Period, and whether losses had to be accepted by a SPM (even if disputed) by clicking "Accept Now", were also factually in issue. These steps go to the very essence of what a Branch Trading Statement was, or is, and the way in which a SPM accounted to the Post Office. The presence of unexplained shortfalls, and how these were dealt with in the context of an agent accounting to his or her principal, are factually in issue. The functions of a SPM are said in the Defence lodged by the Post Office, and included in the Common Issues, to include effecting and recording Post Office transactions, maintaining proper and accurate records, and preparing and rendering accounts. It is part of the dispute between the parties that SPMs owed a duty to account to Post Office and whether the SPMs, as a matter of construction, have to bear the burden of proving that any Branch Trading Statement they have signed and/or returned was or is incorrect.

272. In those circumstances, I do not see how it can sensibly be maintained by the Post Office that those passages of Mr Abdulla's evidence which were sought to be struck out are irrelevant. I am not making specific findings on whether the shortfalls he experienced were caused by Horizon or something else, whether his suspension and/or termination were justified, whether either Mr Abdulla or the Post Office were in breach to another and if so how, and if so, what the consequences were in terms of loss that was caused. I must, and will, guard against hindsight when construing contract terms, and this is a well known legal principle. But Mr Abdulla's evidence is not irrelevant.

273. In his written witness evidence Mr Abdulla said:

> "I think that Post Office's practices in relation to apparent shortfalls and transaction corrections is a good example of the relative difference in access to information between us. When I was faced with apparent shortfalls, the Helpline advice and advice from my area manager was that I should pay them back and I had to wait to see whether a Transaction Correction would then be issued in my favour. It was Post Office which had the information to decide whether to do this."
>
> (my emphasis)

274. This evidence is relevant and the parties are – by the end of this trial - agreed that the *only* way that a SPM could raise a dispute was by telephoning the Helpline. I accept Mr Abdulla's evidence that this is what the Helpline told him at the time.

Mrs Elizabeth Stockdale

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275. Mrs Stockdale was the SPM of the Sandsacre Post Office, a branch in Bridlington, East Yorkshire from 8 May 2014 to 16 September 2016. She was the second recipient of the reminder (or warning) under the Civil Evidence Act 1968 in the same terms as Mr Abdulla, because the Post Office case against her was that she was guilty of false accounting, which is a criminal offence. Unlike Mr Abdulla, she did elect, in respect of a single question, not to answer.

276. The factual situation with Mrs Stockdale in terms of contract formation was greatly simplified compared to the four previous Claimants. Mrs Stockdale (in common with Mrs Dar, who was appointed slightly later than her in November 2014) contracted on the terms of the NTC, and not the SPMC. This form of contract started being used for SPMs following what was called the Network Transformation Programme which had started in pilot form in 2011. NTC is shorthand for "Post Office Limited Standard Conditions for the Operation of a Local Post Office Branch" and the contract which was, by 2014, being used extensively. It will be remembered that "Local" is one of the types of branch that the Post Office established under the Network Transformation Programme.

277. The way that the documents under the NTC used for Mrs Stockdale (and Mrs Dar) is, by comparison with those of the SPMC in the years from Mr Bates onwards, and as identified above for each of the first four Lead Claimants, far more straightforward and conventional. The SPM is described as the Operator, and there is document which states "The Operator and Post Office Ltd hereby agree to enter into the Agreement as defined above" and this was signed by both parties prior to Branch Transfer Day. Mr Stockdale signed hers on 17 February 2014. This had the added advantage that she had to be actually sent the documents in advance, and there is no dispute that she had (given her signature).

278. In the letter that notified her of her success in her application, dated 14 February 2014, headed "Subject to Contract" she was told the following:
"I am delighted to confirm that you have successfully completed the application process to establish a Local Post Office branch at the above premises and I now need to explain the next steps to you.
There are three things that need to happen:
1. Signature by you and Post Office Limited, on a conditional basis, of the contract documents (these are contained in the pack enclosed with this letter).
2. The existing subpostmaster giving us his conditional notice of resignation from his subpostmaster contract for the existing branch.
3. You need to obtain a valid property interest (as defined in the documents enclosed with the pack) in the premises above, and provide evidence of your interest in the premises to us, by 28th March 2014.
Enclosed with this letter is a pack with the documents needed to achieve the first of these steps.
Full instructions on what to do with the documents are included with the pack. Please make sure you read the information in the pack carefully.
Only some of the documents in the pack need to be signed by you and returned to us. The documents that you need to sign and return are explained in the pack (we call them "relevant documents"). All relevant documents must be signed by you and returned to us at the same time, within the time limits specified in the pack".

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279. It is as though the Post Office had finally realised, or been given advice, based on some basic principles of English contract law, not least those of offer, acceptance, and notice, for the new NTC as opposed to the SPMC. Without trivialising any of the issues in this case, an awareness of a contracting party of at least the existence of terms of a written document are clearly required, in order to fix a party with notice of that document's terms. Willingness and awareness of terms are some of the basic building blocks of the law of contract. As can be seen from the analysis of the four earlier Lead Claimants, the Post Office's procedures in terms of the SPMC went from the sublime to the ridiculous. The approach in 2000 was simply to assume the outgoing and incoming SPMs would sort the SPMC out between themselves, because the SPMC was supposed to be kept in the branch (or not kept, depending upon each branch). This approach was wholly unsatisfactory for a number of reasons, not least there is no evidence that either an incoming or outgoing SPMs was ever told that is what was expected or required. The documents had also used confusing and interchangeable terms for different or the same document(s), as well as referring to documents which did not even exist such as the Book of Rules (or book of rules in later versions). It should be noted that the Acknowledgement of Appointment Mrs Stockdale signed on Branch Transfer Day still, however, referred to the non-existent "book of rules". Initially the SPM was not provided with the SPMC in advance from the Post Office at all (or was, depending upon who put what in different envelopes), added to which on Branch Transfer Day a whole raft of documents were produced to an incoming SPM to be signed by them with no opportunity to read or study them (still less to take any advice on their contents). The amount of time available to read them in any event would depend upon the length of time it took the auditors to do the closing audit on the outgoing SPM, but it would certainly be far less than a day, or even half a day. By the day of the transfer, an incoming SPM would have completed their purchase or lease of the business and the property where the branch was located, and would actually be moving in. Additionally, there was no differentiation between documents such as the operating manuals, which went to the practice of dealing with the business of running the branch and dealing with customers, and those of a different level of importance, such as the SPMC, which governed the relationship between the SPM and the Post Office itself.

280. At the conclusion of Mr Abdulla's evidence, I called for a hard copy of the Operations Manuals Volumes 1 to 5 that were provided on Branch Transfer Day in his case (they obviously changed over time). This was to give me an idea of the volume of paperwork presented to an incoming SPM on that day. They were produced by the Post Office and comprised 6 full lever arch files. In my judgment, there is simply no possible way that this material alone could be read, sensibly digested and understood in a single day (still less ½ day, if a closing audit could be done in the first half of Branch Transfer Day) even by a specialist judge or commercial silk, still less the incoming SPM. Although during the life of the SPMC this improved very slightly – for example, Mr Sabir and Mr Abdulla were at least supposed to have been sent the SPMC and Modified SPMC respectively – the Post Office's practices in this respect left a great deal to be desired.

281. The terms and the way that the SPMs were provided with the contract changed over time, and particularly so with the introduction of the NTC. There are four features that are very notable in my judgment in terms of the difference between the NTC and the SPMC (including the Modified SPMC). Firstly, the NTC was provided to an

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incoming SPM well in advance of Branch Transfer Day. Secondly, the NTC expressly states that the SPM is to sign it, and that this represents an offer from the SPM to the Post Office to contract on its terms. That offer will be accepted by the Post Office signing it and returning it to the SPM. This is conventional contract formation. It is markedly different to how the Post Office conducted itself in respect of the SPMC as has been seen. The third feature is that under the NTC the SPM was expressly told in writing that he or she should take legal advice and only sign the NTC if content to be bound by the terms. Both of these lead into the fourth notable feature. Prior to the NTC, the way in which an incoming SPM was provided with the detailed contract terms upon which he or she was supposed to be contracting was, based upon the evidence for this trial and in my judgment, haphazard to say the least, if not wholly deficient. The Post Office also expected them to access and discuss the SPMC through the outgoing SPM. This is because the Post Office considered the SPMC would and should be kept in the branch, along with other documents such as Operational Manuals. That situation simply could not arise, on the evidence before me for Mrs Stockdale and Mrs Dar, regarding the NTC, as the procedure adopted by the Post Office of sending the document, requiring a signature from the appointee, and sending it back signed by the Post Office, means that Mrs Stockdale's was signed by Mr Padget for the Post Office on 20 March 2014 and returned to her. This is far more satisfactory, for everyone concerned, as the scope for confusion, doubt and argument over contract terms becomes far narrower in scope.

282. There was also no identifiable written way – at least so far as the four SPMC Lead Claimants (Mr Bates, Mrs Stubbs, Mr Sabir and Mr Abdulla) are concerned – in which they were told to obtain any independent legal advice. This was clearly done for the NTC.

283. It is therefore clearly the case that the Network Transformation Programme, and the NTC, therefore improved immeasurably the Post Office's procedures in terms of the mechanics of contracting with incoming SPMs. I will deal with the changes in the terms themselves below. It is a matter of considerable surprise to me why it took so long for the Post Office to streamline and improve its contractual formation procedures. Mr Beal, with whom I deal in more detail below, worked for the Post Office from 1987 when he started as a counter clerk. He eventually became, in 2010, the Network Relationship Manager, and in 2011 Head of Network Development. One of his three main areas of responsibility was developing and implementing the terms of SPMs' contracts. If so, he may well have been involved in implementing the basic but rather important improvements in contract formation for the NTC to which I have referred above. I doubt that these improvements occurred by accident, or without the Post Office realising that their existing procedures were deficient. However, if that is the case, none of the Post Office's witnesses told me such a realisation had occurred, and so it remains a moot point. In any event, it may not much matter.

284. However, notwithstanding this improvement so far as the provision of the detailed terms in advance, and their signature by the incoming SPM is concerned, the Post Office insists in these proceedings on adopting what could not even be categorised as highly as a DIY approach to contractual matters for the SPMC. It is more accurately described as an inference of DIY or do it yourself. The Defence of the Post Office to Mrs Stockdale's individual claim states:

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"Save that it is denied that Post Office required the Branch to be converted into a Post Office Local branch, paragraphs 3 and 4 are admitted. Under the Network Transformation scheme subpostmasters had the option of either converting their branches, with a contribution from Post Office towards such costs, or leaving the network with the Network Transformation leavers payment. It is to be inferred that, prior to and during the process leading up to the appointment referred to below, the Claimant would have obtained information about the way in which Post Office ran its business and about the business relationship it had with its Subpostmasters / Operators. Further, the Claimant would have obtained information regarding and considering the turnover of the businesses, their profitability, and their terms of trading such as:

(1) the contractual terms of Ms Collinson's appointment as Subpostmaster at the Branch;

(2) the Operations Manual and other instructions that Ms Collinson was required to follow and keep up to date with, as and when they were changed or issued;

(3) the fact that Post Office would change the remuneration it paid in respect of the Branch from time to time;

(4) the fact that Post Office would change the products and services it offered at the Branch from time to time;

(5) the fact that Ms Collinson was responsible for the operations of the Branch, including the operations conducted by the assistants who worked for her;

(6) the fact that Ms Collinson was responsible for losses and gains disclosed in the branch accounts that she was required regularly to produce in a form prescribed by Post Office; and

(7) the fact that Ms Collinson's contract was terminable for cause on breach and terminable at will on notice."

(emphasis added)

285. In my judgment, there are no grounds for these inferences in this case. Taking the one at [284](1) first, the most suitable entity from whom any incoming SPM would obtain such information would be the Post Office itself, particularly in circumstances where that person had to make an application to, and be approved by, the Post Office. The others are all vulnerable to such similar observations, which lead to a contrary inference. In so far as inferences are required or appropriate, I find that the correct inference is that the matters at [284](1) to (7) would be (and should have been) dealt with by the Post Office and notified to Mrs Stockdale (and any other incoming SPM) by the Post Office itself. Further, Ms Collinson, who was selling the business to Mrs Stockdale, would not give these details to her, and the Post Office specifically knew this by at least the interview stage as this was the reason Mr Carpenter, who interviewed her, assessed her application as high risk. It is also unlikely any person selling a business to someone who would be investing substantial sums, and basing their financial projections and decision on Post Office remuneration, would wish to highlight to the purchaser that this could be changed and the purchaser could have

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their contract terminable for cause on breach or terminable at will on notice. These alleged inferences are, in my judgment, wholly unrealistic in the circumstances of an outgoing SPM selling their business (including a branch Post Office) to an incoming SPM. It is also unrealistic to suppose that a seller of a business of this nature, a major element of which was a Post Office, would draw to the purchaser's attention points (6) and (7) in the list above of inferences, because they would draw specific attention to very unpalatable features of the relationship with the Post Office. It must also be remembered that the sale of a branch Post Office is not a highly sophisticated business transaction, with warranties provided by the seller and so on, in the way more complicated and substantial businesses are sold.

286. Mrs Stockdale had previously managed a clothes shop and also had responsibility as the administration manager for 13 other stores. She wanted to run her own business, and she also wanted to become a SPM. Her son told her in late 2013 that the nearby newsagent/Post Office was coming up for sale so she enquired for details. By this time, the world of online documentation had become widespread so she downloaded what she needed from the Post Office website and this included guidance on how to complete the relevant documents. She agreed that she was not commercially naïve.

287. She submitted her application and detailed business plan. The branch was to be converted to a Local NTP branch, which is what not at that stage already. This meant that the existing SPM would exit the branch (he would have been engaged on the SPMC) but Mrs Stockdale's branch would be a Local NTP branch. One of the documents she was sent was "Modernising your Post Office, Your journey starts here" which stated at page 5

"If the financial assessment is approved - and you're happy to proceed - we would send you the full contract for you to review and sign if you want to go ahead."

288. She was therefore given advance notice that this would be happening. The draft contract was included with a watermark through it stating "COPY". One of the documents she was sent was entitled "Modernising your Post Office branch - The contract". This document was probably drafted for an existing SPM under the SPMC who proposed changing to the NTC, which included modernisation works. It stated:

"Congratulations on reaching this milestone in the Network Transformation journey. We're delighted you've continued with your modernisation plans.
This pack contains some important documents, but before you get to them, we recommend you read through this guide.
On the back page you'll find a checklist that you can complete to make sure you send back everything and have ticked all the boxes.
There is a list of some of the most frequently asked questions (right) with some answers. If you have any further questions yourself, or need support with any of the documents, get in touch with your Field Change Advisor as soon as possible and they will be able to help.
We've also provided you with a handy table in this pack that highlights some of the main differences between your old contract and the new one."

289. Frequently Asked Question 6 stated:

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"**What should I do if I'm not happy with the financial obligations attributed to me? For example, they might be in excess of what I verbally agreed to.**

If you're not happy to accept the financial obligations in the contract. you shouldn't sign it. Once you do sign the contract then you will be responsible for all of the obligations, so it's important you read it very carefully. If you have any concerns, it's important you contact your Field Change Advisor as soon as possible to tell them, so we can hopefully try to resolve them and proceed with the conversion of your branch."

(bold present in original)

290. Mrs Stockdale was not having her branch converted; it was not her branch. Nor would she have had a Field Change Advisor, nor would she have an old contract to compare its terms with the new proposed NTC one. However, the passage states not to sign the contract if she is not happy with it; and it also tells her "it's important to read it very carefully". However, she said she had read this, and she would not have signed the NTC had she not been happy to do so. She did not take any legal advice.

291. She attended an interview, conducted by Mr Andrew Carpenter, which was predominantly concerned with her presentation. Shortfalls were not discussed and she was not told that the Post Office would consider her to be responsible for shortfalls on a potentially unlimited basis, or that she would have to make them good immediately. Mr Carpenter did give evidence before me, but could not remember this interview at all. His evidence consisted of what he said was his standard practice, together with a checklist document, but he had no copy either of the specific one, or one he used in that period (they are now online documents but were not in 2014). He produced a partial one relating to her 5 year work history, which showed that she had satisfactorily passed that stage of the interview.

292. Overall he said she had submitted a sound financial application, but she could not produce three years accounts and so it was assessed as high risk, which it almost always was if such accounts were not available. Mrs Stockdale had not done this as the person whose business she was obtaining, Karen Collinson, would not give them to her.

293. This interview was recorded, as was Post Office's practice at the time. Rather oddly – if not, entirely surprisingly – that recording is not available. This is because the recording is encrypted, and even though Mr Carpenter said he had not password protected it, and he had no password, the encryption key has been lost. I was somewhat sceptical when I was told this explanation. Given both parties have IT experts acting for the Horizon Issues trial, and Post Office itself has instructed a digital forensics consultancy to assist with e-discovery and technical assistance, I ordered an explanation by witness statement concerning this. This was provided by Dr Tristan Jenkinson in an 8 page statement. The recording exists, the Post Office and its specialists possess it, and it is encrypted with Symantec Endpoint Encryption. This file has been encrypted to a Certificate, a conclusion Dr Jenkinson has reached due to the code within it he has been able to view. Symantec uses for this programme a 2046 keypair for certificates, which means the total number of 2^{2048} binary combinations are present. For anyone with any grasp of mathematics and exponential function, the understatement is that this is a very large number. The certificate would have been

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actually installed on Mr Carpenter's computer at the time. The explanation for why Post Office cannot encrypt its own recordings is as follows:

"31. **Original Computer –** I understand from Womble Bond Dickinson that Mr Carpenter does not have access to the original computer on which the File is believed to have been encrypted. I understand that Mr Carpenter's computer was replaced as part of a refresh programme.
32. I also understand, from Post Office IT, that for Post Office to locate a copy of the certificates in use during 2014, or to rebuild a copy of Mr Carpenter's computer so as to replicate the circumstances in which the File was encrypted would require approximately 2 weeks of work and cost approximately £14,000. Since it may not be possible to locate the certificates and there may still be a requirement to enter a pin / passphrase, there is no guarantee that this method would be successful.
33. **Current Computer –** I understand from Womble Bond Dickinson that Mr Carpenter has not been able to access the content of the File on his new computer. I understand that this was despite Mr Carpenter following the steps provided by Symantec for decrypting such a file, as provided in their "Getting Started with Removable Media Encryption 11.2" document, which is publicly available and is provided as Exhibit TJ1.
The above document indicates that when an encrypted document is copied to the computer, it should prompt for a password. Alternatively, right clicking on the file should give an option to decrypt the file. I understand that neither of these options was available for Mr Carpenter to decrypt the file."

Neither the last sentence of 31, nor the last sentence of 33, complies with the rule for witness statements in CPR Part 32.9 and Practice Direction 32. Dr Jenkinson does not say who told him that Mr Carpenter replaced his computer (at 31) and did not have these options available to him (at 33), which means he has not identified the source of his belief or "understanding". Even when he does make an attempt to identify the source, he should state the person and not simply "Post Office IT".

The statement continues:

"34. **Workgroup Key –** I understand from Womble Bond Dickinson that Post Office have sought to obtain a copy of the Workgroup key from 2014 but have not in the time available been able to confirm if a Workgroup key was in use and, if so, still exists. To the extent that a Workgroup key does exist this is believed to be in the control of Royal Mail Group."

Again, he does not say who has this belief, whether it is him himself, or whether someone has told him this, and if so who that person in fact is.

294. I would only add that nowhere in Mr Carpenter's written witness statement did he say that he had recorded his interview with Mrs Stockdale, or that it was his common practice to record interviews, or that he had lost the ability to access that recording, or even that his computer had been replaced. He was asked about this in cross-examination and said "we are not able to open the actual file", again without reference to a replaced computer. That cross-examination took place before the witness statement from Dr Jenkinson was ordered to be produced.

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295. It therefore remains the case that notwithstanding that Mrs Stockdale's interview was recorded, that the recording undoubtedly exists, and that she became a claimant in these proceedings as long ago as the issue of the first claim form on 11 April 2016, Mr Carpenter's computer is said to have been replaced, and the ability to access the actual recording is said by the Post Office to have been lost. If that replacement took place after April 2016, and if it is because of the replacement that this recording is not available, then that means that the Post Office has failed properly to deal with an important record directly relevant to the litigation during the proceedings themselves.

296. Where the evidence of Mr Carpenter conflicts with that of Mrs Stockdale concerning what he covered in the interview, I accept her evidence. This interview represented a major step for her, and she was very clear in her recollection. He conducted many of these; he averages 80 per year in a typical year, and has been doing them since 2005 (although there were a couple of years when he did none). This is therefore a total of very approximately 900 interviews, and he cannot be criticised for having no recollection at all. Initially, he said it took place at the branch, when it fact it took place in the Post Office offices in Leeds. These features, together with my finding as to her reliability generally, mean that in this case he cannot have followed the procedures that he told me he followed generally.

297. Mrs Stockdale was accepted and had some training. She attended the classroom training with her son. She did not have all the training she was told she would receive because the premises were subject to building works necessary to transform it into a Local branch, and also because one of the trainers who attended in the first week after her branch had opened, a lady called Lina, attended for only one day and had to leave unexpectedly; another person called Daniel, did not really know what he was doing (according to Mrs Stockdale) "and stayed in the back mostly" . This included moving the position of the counters and other internal works, including signage and so on, although her husband actually did some of the building works himself. Her father is a former police officer and he was acting as her guarantor for the lease. He considered some of the documents and she trusted him to check he was happy with it. She expended considerable sums to invest in opening the branch.

298. Mrs Stockdales' understanding of the options available to her, after she had received her classroom training, were as follows.

"Q: You understood that, that when you had a transaction correction or something like that you could either accept it or you could settle centrally and dispute it?

A. No, because I think from what I understand from the questions, a transaction correction has got nothing to do with you balancing at the end of the week or at the end of the month. The transaction correction is what is sent from the Post Office to try -- to put right a mistake that has been made.

Q. No, I am not disputing that, that it's to put it right. But it is what you do with them, if there are outstanding ones when you do the monthly balance at the month-end, what you do with the outstanding ones. The question is what you do if you have one that is open, when you are about to roll over in the next trading period at month-end, did you have to accept it and pay it or were you able to "settle" it centrally and then dispute it?

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A. At the end of the month you could settle it centrally, but I could never dispute it. I was never told that I was able to dispute it.

Q. We can go to this in a moment and go to the manuals, but you could settle it centrally and ring up?

A. Yes, which is what we did.

Q. Yes.

MR JUSTICE FRASER: Would you not have to pay it if it was settled centrally?

A. Yes.

MR JUSTICE FRASER: You would have to pay it?

A. Yes."

299. Mrs Stockdale entirely correctly understood how the Horizon system operated. There was no option for an SPM *either* to accept an item, *or* to settle it centrally and dispute it. This matches the way in which Appendices 1 and 2 to this judgment demonstrate Horizon works. An SPM could not dispute an item within the Horizon system. Disputing an item was done by telephoning the Helpline. This was made clear by the a slightly later passage of this cross-examination.

"Q: There is a caveat to that, that if you settle centrally and you want to dispute it, then you can ring and dispute it.

A. Yes.

Q. And if you do that, you are maintaining your rights to dispute it going forwards?

A. Yes.

Q. Yes. And that was your understanding?

A. Yes."

300. Slide 3 of the training materials being used at this time by the Post Office made this clear. This slide stated that the SPM's options were:

"•'Make good' your cash;

• **Immediate** - physically add or remove the relevant cash amount to achieve a nil balance

• **'Settle centrally'** (£150+) – transfers the amount into a 'holding account'. A statement will be issued to you to settle by Debit/Credit Card."

(emphasis in original)

301. This evidence made it yet further clear that all that "settling centrally" did was transfer an amount of a shortfall into a "holding account", which would then be

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charged to the SPM. They could pay it the Post Office by debit or credit card. It was an alternative to that SPM immediately physically adding the cash amount to make up the shortfall that way. It was not an alternative to a SPM "accepting it" – as has been seen, "settle centrally" was an option reached on the Horizon terminal only *after* the button "Accept Now" had been clicked. The phrase "settle centrally" was used by the Post Office for the majority of the Common Issues trial at least, as though it was synonymous with disputing a transaction correction in some way, or otherwise connected with a process on Horizon when an unexplained shortfall and the SPM wished to challenge it. This is incorrect. Whatever the origin of that phrase when the Horizon system was designed, and who chose the words, does not matter. What the phrase means, in the context of the Horizon system and the way that the Post Office and the SPM transacted their business, is transferring a shortfall on the account into (as the training slide stated) a "holding account" which would give the SPM time to pay.

302. Her experience was not a happy one. Unexplained shortfalls would appear on Horizon when she was completing a weekly balance or submitting a trading statement. There were no explanations for these, and there was no way available for her to get to the bottom of them either. She found it very difficult to obtain any details from the Post Office, and did everything she could think of to keep the most detailed records within the branch itself. Her first shortfall was £172.50 in the very first balance that she did in the branch on 21 May 2014. One of the Post Office auditors was there, Mr Longbottom. This is because this was the final part of her training, and he is an auditor and trainer. He was also the auditor who had done the transfer audit from Ms Collinson to Mrs Stockdale. I deal further with his evidence below. Mrs Stockdale said that even he could not get to the bottom of the shortfall either, and he also told her that she had to settle the shortfall by cash or cheque, or settle it centrally. This matches the way the Horizon system presented options to SPMs. As has been seen, and shown by Appendices 1 and 2, this requires a SPM to "Accept Now".

303. These shortfalls continued. On 15 October 2014 there were unexplained shortfalls of over £3,500. When she phoned the Helpline she was told that this was "only £3,000, that's a drop in the ocean compared to some people's problems". This contradicted an earlier statement from the Helpline when she had been told she was the only SPM experiencing these problems, which just made her feel inadequate. I will track this particular shortfall through. She phoned the Helpline again on 21 October 2014 and again asked for assistance, as well as further training in relation to the balancing problems. She felt that a sum of over £3,000 was a lot of money, notwithstanding the views of the Helpline operator when she first called. Mr Longbottom came to her branch on 29 October 2014 to try and work out what was going on, and she let him have access to her records. He printed out various documents but he could not get to the bottom of it either. He said the problem would be referred to the Horizon Technical Desk. I accept this evidence. There can be no doubt that this shortfall was clearly in dispute, even on the Post Office's understanding of how disputes were to be raised.

304. Mrs Stockdale heard nothing further about resolution of this of what the view of the Technical Desk was. Rather to the contrary, she received a letter of demand from the Revenue Protection Senior Manager dated 3 November 2014. This stated:

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"Please find the attached statement that confirms the amount you owe to Post Office Ltd. The statement provides a breakdown of how you have incurred the total owed amount.

There are a number of ways you can repay the money to us; you will find all the details of the different methods of payments on the reverse of this letter.

If you would like to repay the money by debit/credit card or arrange for the amount to be deducted from your remuneration/fees please contact us on the telephone number above and a member of my team will be happy to help you.

We look forward to hearing from you within the next 7 days to arrange payment.

If you have any queries regarding the content of this letter, please contact one of my team or drop us an Email at agents.accounting.team@postoffice.co.uk and we will do our best to help you."

(emphasis added)

305. The attached statement was for £3,640.52 as it deducted a credit of £173 from a figure of £3,813.52. This was said to be a "Branch Discrepancy". The ways to pay included credit or debit card, direct debit, BACS or cheque, or "arrange deduction from remuneration or fees by calling one of the team or e mailing us".

306. Mrs Stockdale did contact the Post Office by e mail. Mrs Stockdale obviously trusted the text of the letter she received from the Post Office, which stated that the letter "confirms the amount you owe the Post Office". She assumed that because she had received the letter, this meant that the investigation Mr Longbottom said he was passing to the Horizon Technical Desk had been resolved. She stated on 5 November 2014:

"Dear Sir/Madam,

I would like to arrange to repay you the money owed to yourselves through my branch. I am assuming the investigation that was going on has now been done, hence the letter.

Please could I arrange for a payment each month to be taken from my fees until the account is cleared.

Please reply, letting me know how much would be taken each month."

(emphasis added)

307. The reply told her the following:

"If you're able to tell me what product caused your loss I would be able to chase that particular team for you.
If not I am happy to arrange deductions over 8 months*, i.e. £455.00 per month.
*On the understanding that you're not allowed to settle any further losses until a year after this has been repaid."

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308. Mrs Stockdale therefore had the following choices in respect of a sizeable sum that she had clearly disputed:

1. Tell the Post Office what product had caused her loss.

2. If she could not do this, pay the amount immediately by credit/debit card, direct debit, BACS or cheque.

3. Alternatively pay by instalments out of her fees at £455, but without being able to "settle any further losses" for one year after the amount had been repaid.

309. Mrs Stockdale was obviously in an extremely difficult position. She did not know what product had caused her loss. This was part of the problem. She had sought assistance for this problem and even a Post Office auditor could not help. She wrote back and said that Mr Longbottom was looking into it. Her e mail stated:

"I had Dave in to investigate the problem and he said the transactions were all ok at this end but was referring the problem to the Horizon Technical Desk to see if they could find any cause for the discrepancy.

Not had a response as yet but if there is a problem I am willing to pay as per your email but hopefully someone will get to the bottom of it."

310. She felt she had no choice but to agree. I find that on the options presented to her at the time, she indeed had no choice but to agree. She also considered that this instalment agreement meant that she could not settle any further unexplained losses for the period specified. Mr Longbottom revisited the branch on 18 November 2014 and a subsequent e mail from him shows that he discussed with Mrs Stockdale "a large loss that the branch had reported." A further Post Office employee also visited her branch, he could not get to the bottom of it either, and recommended to her that she sack all her staff.

311. Mrs Stockdale then took very sensible and extremely thorough measures. She introduced a robust paper recording system for all cash movement in the branch. She required all staff to complete manual till and safe logs, what had been paid in or paid out, and even the denomination of notes. She could therefore do a complete cash reconciliation in and out. She installed CCTV so she could monitor her staff at all times. She trusted them but she wanted to be able to have tight control of all cash, in and out, and to be able completely to rule out theft by her staff. She explained that she spent hours with the records, including her own paper records, trying to investigate. These shortfalls simply kept occurring and she could not work out why. Even thoroughly interrogating her records and viewing the CCTV footage, she could not explain how this was occurring.

312. On 29 April 2015 unexplained shortfalls of £2,692.80 showed on her branch accounts and she opted to settle it centrally. One was a National Lottery Transaction Correction in the sum of £512, and the other was a more sizeable branch discrepancy. This led to a letter of demand from the Post Office on 12 May 2015 which stated

"We wrote to you previously requesting payment of the amount you owe to Post Office Ltd.

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We are concerned that you have not contacted us to arrange payment.

Payment is now overdue and needs to be made within 7 days of this letter

As previously mentioned, there are a number of ways you can repay the money…"

313. Further visits were made by Mr Longbottom, and further calls to the Helpline were made by Mrs Stockdale regarding these matters. Mr Longbottom did not tell her what he was doing, but told her the Lottery TC was correctly issued, and also led her to believe that such problems with Horizon did not happen very often, and gave her the impression she was the only SPM having such problems. A further unexplained shortfall occurred on 27 May 2015 in the sum of £2,451.08. The overall sum was now climbing to worrying levels for her and had reached £5,655.

314. She then telephoned Mr David Southall of the Post Office, the Agents Contracts Manager. He did not give evidence before me. He told her that his colleagues in the Finance Service Centre would look into the issue. She told him that she thought at least some of the sum could be caused by the Lottery TC and also an issue with stamps. He sent her a letter dated 1 July 2015 which stated:

"I write further to our recent conversations in connection to the branch discrepancy totalling £5655.88.
I have liaised with my colleagues in the Finance Service Centre who, along with the stock team, have gone back to last summer and aligned all the remittance ins recorded at your branch against the quantities recorded as being despatched from Swindon stock centre and can find no anomalies recorded. Similarly no anomalies can be found for the small quantities remitted out from the branch.
I am aware from our most recent conversation that you believe there are specific instances that may account for a proportion of the branch discrepancy. In order for us to investigate these further I'd be grateful if you could provide a written submission detailing these instances and in that letter include as much detail as possible, including dates, amounts involved and any other detail you feel may be relevant. Once in possession of this Post Office Ltd will be able to make a full investigation of your dispute. I have enclosed an envelope and ask that this information is provided by Friday 17 July 2015.
As already mentioned whilst your dispute is investigated no action will be taken in respect of making good this loss."
(emphasis added)

315. However, the Post Office investigation into her stock could not discover any discrepancies. In a letter dated 18 August 2015 she was told by Mr Southall:

"Further to your letter received 6 July 2015 I again asked my colleagues in the Finance Service Centre to review its contents and investigate the points you raised. Following a thorough investigation the stock cannot identify any corrections outstanding and any sales reversal receipt would generate a gain rather than a loss. In theory the losses could have been caused by a range of errors in your branch that have only come to reality when the stock levels have been correctly aligned.
It is now appropriate that this amount is made good and I'd be grateful if you could confirm to me wither in writing (I have enclosed an envelope if you require it) or contact me via the NBSC helpline to confirm how you intend to settle this amount. I

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note that you have recently had a deduction from remuneration in place and normally we would not allow a further payment by instalments to be set up within 12 months of the completion of an existing plan however would be willing to accept repayment over a 12 month period if required. I'd be grateful if you could confirm your intentions by no later than Tuesday 25 August 2015."
(emphasis added)

316. The stock investigation could not find anything wrong in terms of corrections outstanding. The "theory" was that the losses "could have been caused by a range of errors in" her branch. Accordingly the Post Office required her to pay the money; the ability to do so in instalments was being presented as a concession to her. She could not do so immediately and decided to pay it in instalments, making it clear in a letter dated 23 August 2015 that she had no option but to do so, and was doing so "under duress".

317. These instalments were then paid by her, and the problems simply continued. The sequence in spring of 2016 was as follows. On 11 April 2016 the first claim form in these proceedings was issued. This meant that Mrs Stockdale was a claimant. The extent of her losses had risen to £18,000 by that month and these were declared in her balance of 27 April 2016 in the amount of £18,891.47. On 3 May 2016 she received a letter stating

"Please find the attached statement that confirms the amount you owe to Post Office Ltd. The statement provides a breakdown of how you have incurred the total owed amount.

There are a number of ways you can repay the money to us; you will find all the details of the different methods of payments on the reverse of this letter."

318. By this stage Mrs Stockdale knew there would be yet a further shortfall as a sum of approximately £5,000 had occurred. On 13 May 2016 the Post Office performed an audit. One of the auditors was Mr Longbottom. The shortfall by then was £7,917.09. She was immediately suspended and the branch immediately closed. The Post Office suspended her remuneration immediately and made a unilateral deduction (to which she had not agreed) of £1,352 to her pay for the period 24 March 2014 to 27 April 2014, which was prior to her suspension and the audit. Her suspension was said to be under Part 2, section 15.1 of the NTC.

319. On the same day, 13 May 2015, Mrs Stockdale immediately sent Mr Carpenter an e mail stating:

"As per your actions today to suspend me from Sandsacre Post Office, I strongly reject any allegations against me and requested to be reinstated with immediate effect.

If this is not possible please can you send me the details of the appeal process which I must follow.

I would add that my solicitors on the Group Action, Freeths LLP, have today written to Bond Dickinson (POL's solicitors on the Group Action) to seek confirmation that the suspension will be revoked."

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320. She was not sent any details of the appeals process which she requested, or answers to further e mails from her chasing this on 6 June 2016 and 10 June 2016. The first one stated:

"Dear Andrew,

We are now into our 4th week of closure and as yet you have not contacted myself with any information regarding the investigation into my case.
I have customers coming into the shop constantly asking if we are going to reopen and when because they are finding it difficult to access other post offices as they are elderly.
Also, we have contacted the lottery to take it over but with no joy as they say it is still contracted to yourselves.
This is now having a fundamental effect on our remaining newsagent business as people cannot carry out all their business in one place as before.
I look forward to receiving your response."

And on 10 June 2016:

"Dear Andrew,

Today is four weeks since my suspension. I have tried to ring you and sent you previous e-mails, but you are not answering me, Why? The Post Office in my mind have treated me very badly and for what reason? Since I took over this Post Office in 2014 I have had nothing but trouble.

I have already paid you back every penny you say 'I owed' you even though you never gave me any proof that the monies were ever actually 'missing'.

You are now saying there are anomalies again which I didn't declare, I see your point but I was also told by the post office that while your paying back 'monies owed' you cannot settle another loss centrally, so what was I supposed to do??? It is all very well that you have to investigate what has gone on 'in branch', I understand that but why is it taking so long, and why are you refusing to talk to me or answer my e-mail's? Not only are you ruining my business that I had running along with the Post office but you are inconveniencing a whole lot of people who for one reason or other relied on this Post Office for their day to day lives or business.

I look forward to your response but taking into account the last months communications I'm not sure I will receive one?!

321. Indeed, she was not sent answers to any of this at all. She was, nearly a month after she had asked for details of the appeals process, sent a further letter on 10 June 2016 by Mr Carpenter. This said:

"Next Steps

<u>At present Post Office Limited's investigations are not yet concluded. I will be in contact with you in due course.</u>

In the meantime, if you have any information explaining when and how you believe the losses at your branch may have arisen, how they were treated in the Branch

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accounts, and whether (and if so when) you took any steps to raise with Post Office any issues with the Branch accounts, please feel free to provide this to me in writing."

(emphasis added)

322. The solicitors acting for Mrs Stockdale in this litigation were sent by the Post Office a large amount of documentation including "session data" for each month, which she had never seen before and which she says cannot be deciphered without assistance from the Post Office which was never given. She was sent a letter demanding payment within 21 days on 8 August 2016, and by then the overall shortfall was said to be £28,222.52. She attended a meeting on 19 August 2016 at the branch arranged by solicitors when she took Mr Carpenter through all her records. He did not really speak and allowed her and her husband (who together with her assistant accompanied her) to do most of the talking. He did not ask many questions.

323. On 16 September 2016 Mrs Stockdale's appointment as an SPM was immediately terminated on the grounds of falsification of accounts and failure to make good losses. Part of that letter, which was from Mr Carpenter, states:

"By falsifying the Branch accounts you have failed to maintain an accounting system in accordance with the Manual. In doing this since December 2015 we consider this to be a failure to act honestly in your operation of the Branch, which is a material breach of the Agreement which is not capable of remedy. In reaching this conclusion we have taken into account that you did not call the NBSC reporting the Losses and did not request assistance in respect of these Losses."

324. Another part states:

"As noted above, your failure to act honestly by falsifying the Branch accounts is a material breach of the Agreement that cannot be remedied and which gives Post Office Ltd the right to terminate immediately under clause 16.2.1."

(emphasis added)

325. Mrs Stockdale said that her confidence in the Horizon system was so low that she had never signed the statement which went with the Branch accounts saying they were accurate. This passage of her evidence was as follows:

"Q. So would it be right that when, during that period, you certified under the following words:
"I certify the content of this balancing and trading statement is an accurate reflection of the cash and stock at this branch."
That when you signed that in fact it was untrue?
A. I never signed it.
Q. Who did sign it?
A. No one."

No signed copy was produced or put to her, although she accepted that the Branch Trading Statement was "presented" to the Post Office who would treat it as though it were accurate.

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326. It is therefore the case that she was accused in the letter of 16 September 2016 of committing a criminal offence, which is punishable by imprisonment. She was already by that stage a claimant in High Court litigation, the extent of which was clearly set out in the first claim form, the schedule to which showed that she was a named claimant. The Claimants in the claim form, in the words then used (further isolated passages were added by amendment later in November 2017) expressly stated, that they

".....have been subjected to unlawful treatment by the Defendant causing them significant financial losses (including loss of their business and property), bankruptcy, prosecutions, serving community or custodial sentences, distress and related ill-health, stigma and/or reputational damage.

The [sub post master] contracts were replete with power and discretion in the hands of the Defendant. In all the circumstances, they included an implied term of trust and confidence and/or were relational contracts imposing obligations of good faith on the Defendant (including duties of fair dealing and transparency, trust and confidence and co-operation). There were also implied terms, including obligations on the Defendant: not to act in an arbitrary, irrational or capricious manner in decision-making affecting the Claimants; to provide adequate training and support to the Claimants (particularly if and when it imposed new working practices or systems or required the provision of new services); properly to execute all transactions which the Claimants effected; properly to account for, record and explain all transactions and any alleged shortfalls which were attributed to the Claimants; and properly and fairly to investigate any such alleged shortfalls.

....

From the introduction of Horizon and throughout, the Defendant failed to provide adequate training and support to the Claimants. When financial, accounting and other alleged errors or failures arose, including or resulting in alleged shortfalls in branch accounts, the Defendant in purported exercise of its contractual and/or prosecutorial powers: did not investigate the existence and/or causes of the alleged shortfalls fairly, properly or at all; required Claimants to make good the alleged shortfalls; encouraged Claimants to sign-off cash balances without being able to satisfy themselves that they were accurate and/or exercised undue or unreasonable pressure or influence on Claimants to do so; excluded Claimants from their own branches; suspended and/or terminated their appointments and/or engagements and/or imposed undue and/or unreasonable pressure or influence upon Claimants to resign or otherwise end their contract with the Defendant; unfairly investigated the Claimants (including by preventing or impeding any or any reasonable access by the Claimants to relevant data, information and documents and/or excluding from consideration the known risk, if not likelihood, of errors in or related to the Horizon system and/or related matters set out herein); mispresented to the Claimants the approach to and purpose of such investigations; prosecuted them for theft, false accounting and/or other criminal charges and took other measures against them including pursuing restraint orders against them (under 8.41 of the Proceeds of Crime Act 2002); unreasonably acted so as to prevent or inhibit Claimants from preserving, realising or recovering the value of their businesses including their capital investments and/or capital payment entitlements payable by the Defendant

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upon blanch closures; and/or otherwise acted wholly unreasonably, oppressively and/or arbitrarily and, in any event, in breach of the Defendant's duties.

Throughout, the Defendant concealed material facts from the Claimants and thereby misled them about: the reliability of Horizon and the errors in, and generated by, Horizon; the problems encountered by other Sub-Postmasters in using Horizon (Claimants being informed that they were the only one); the ability of the Defendant (or its IT provider, ICL and later Fujitsu, on its behalf) remotely to access and make changes to transactions, data and/or branch accounts, without the knowledge of the Claimants; the approach to investigations and audits following identification of alleged shortfalls and the purpose for which the Defendant carried out the same; the basis upon which the Defendant chose to prosecute or refer Claimants for prosecution and/or to take related steps above; and/or the extent to which the Defendant had discharged its duties set out above in the exercise of all its aforesaid powers and discretions. Further or alternatively, the Defendant deliberately committed breach(es) of duty in circumstances in which the same was unlikely to be discovered for some time by the Claimants and thereby deliberately concealed the facts involved in that breach of duty.

[the Defendant]

.....procured repayments and/or the settlement of claims by means of negligent misstatement and/or misrepresentation or deceit: unreasonably acted so as to prevent or inhibit Claimants from preserving, realising or recovering the value of their businesses including their capital investments and/or capital payment entitlements payable by the Defendant upon branch closures; and/or otherwise acted wholly unreasonably, oppressively and/or arbitrarily and, in any event, in breach of the Defendant's duties."

327. It can be seen that these are very wide ranging and extremely serious allegations against the Post Office, which include ones that the Post Office had treated them unlawfully, including prosecuting them, leading to bankruptcy and community and custodial sentences (which means imprisonment). Even if the precise terms of the first claim form were not known in early May 2016 (which depends upon when it was served), the Post Office would probably have learned of them at some point during the summer and before 16 September 2016. Yet during this period the Post Office was, acting as it did with Mrs Stockdale, shutting her branch and stating she was considered to have committed a criminal offence. It also expressly stated to her that it was taking into account that she had not contacted the NSBC or asked the Post Office for assistance. The documents available in this litigation show that this was simply not true, and she had expressly done both of these things. I will return to this subject when summarising the evidence of Mr Carpenter, who was the Post Office witness predominantly involved.

328. I found Mrs Stockdale to be a careful and accurate witness, and I consider she was telling me the truth. The single question that she declined to answer was that she had been misstating the accounts to hide discrepancies. Whether she was right to act as she did at the time regarding her accounts is a matter for another trial. As with the other Lead Claimants, I am making no findings in respect of breach, causation or loss.

Mrs Louise Dar

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329. Mrs Dar was the SPM of the Lenzie branch in Glasgow from 19 November 2014 to 27 March 2017. Her appointment was summarily terminated on that date. She had been employed by Hilton Hotels as an IT support helpdesk analyst between 2006 and 2011. This support was to members of staff of the Hilton Group, and she was also involved in providing staff training. She was made redundant in 2011 and set up a retail business in Lenzie, which was a local convenience store. It was a few doors away from what was the existing Post Office branch, which was run by Mr Toor. When the Post Office was going to change Mr Toor's contract – this was almost certainly the Network Transformation Programme, though he did not use these words – Mr Toor decided to resign. At about this time, a Post Office representative came to her shop and encouraged Mrs Dar to consider taking on the branch in place of Mr Toor. This idea had already occurred to Mrs Dar already.

330. Mrs Dar says that she contacted the Post Office three times in respect of her interest. Initially, she registered online. Each time, the Post Office appears to have lost records of her having done so. After the second occasion, she found that the Post Office was actually moving some distance away – in other words, a decision had been taken on the branch without considering her. On 17 April 2013 she sent the Post Office an e mail which stated:

"Dear Post Office Transformation Team

My name is Louise Dar, am the Partner/Owner of Day Today Express Lenzie. My Husband Rehman and I opened the shop on 1st August 2012. The shop is a newspaper shop/convenience store located at 118 Kirkintilloch Road, Lenzie, Glasgow. We are five doors from the Lenzie Post Office - which is currently going through consultation to move to the other end of Lenzie - nearer Kirkintilloch.

Liz Hammerton, one of your Reps visited our shop in August/Sept last year who advised of possible changes to the Post office branch as the current owners were looking to move on. We were given a Post office is changing leaflet and were advised to consider the facility to be based in our shop. I registered interest online to become involved in the selection process.

I was aware that the closing date was 18th September 2012 - so I called in the first week of November to see if there was any update as I hadn't heard anything. I was advised that there was no record of my interest and I gave all my details again. I was advised that no decisions could be made without us (my Husband and I, Day Today Express Lenzie) being included in the process, at least a visit from another person to do a survey etc.

I then heard in the last few months that the post office was moving to Scotmid on Gallowhill Road. I called yourselves back and was advised (again) that there was no record of my interest and would need proof of the registered interest. After a day or two I was told that nothing could be done as the post office had already been agreed/sold- which is not the case as its still during consultation.

I request, Day Today Express Lenzie, that we are included in the process to be considered to have the post office in our shop. The local community are currently having discussions in regards to their great concerns if the post office moves so far away (they see it as out of Lenzie). The proposed 'new location' is not easily accessed

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and is only just Lenzie- it physically sits on the border from Lenzie to KIrkintilloch. Lenzie postcode for Scotmid is G66 4QG and Kirkintilloch is G66 4TJ. If you check on mapquest they are the same location.

We have space at the back of the shop which can be altered to manage the post office facilities. The move causes great concern to the local business as if the post office moves a lot of the community will go elsewhere. I grew up in Lenzie my whole life and I'm very aware that Lenzie people like to stay in Lenzie and support local businesses. The proposed move does not support the community and its wishes. Lenzie Community council back the idea of the post office being in our shop, and the changes can be made with a short turnaround ensuring there's no time delay with the handover of the branch."

331. Mrs Dar was visited on 24 April 2013 by a Ms Hewitt and Ms Hailstones from the Post Office. Her claim to have previously registered interest was challenged, and she was told her premises were too small anyway. This is puzzling, given she was encouraged to apply in the first place by Ms Hammerton. On 22 July 2013 she was told, again, that there was no record of her registration of interest and the consultation period was extended so she could register this. Mrs Dar relies upon this to demonstrate there was a fault with the Post Office's computer systems, at least in this respect.

332. Eventually, she was successful. Prior to taking over the branch she had some limited discussions with Mr Toor, and she completed an online application form, although the Post Office has not disclosed that in these proceedings. She completed a business plan and although an e mail of 19 September 2013 states "I have also posted an information pack out to you which provides information on the fees that would be paid to you for post office transactions and also a general draft contract" she does not believe she received one.

333. By 24 October 2013 she had tried to submit her finalised application together with her completed business plan, which she had spent a great deal of time trying to get right. Yet again, there was an IT problem as shown by the following e mail she sent to the Post Office:

"Thanks Liz,

Just to let you know I have completed the business plan. I tried to call Audrey today as when trying to logon to submit the business plan the PO website says I'm not registered! I was advised Audrey was on the other line, and left message to call me back. Unfortunately received no call.

I'll try again tonight (to logon online and submit application) and if still no luck I'll try and call Audrey again in the morning to hopefully get assistance!"

334. She had an interview with Mr Trotter, and this was to take place on 6 December 2013. The e mail of invitation dated 18 November 2013 said that it attached a document to assist her with preparation of her presentation at the interview, but no such document was in fact attached. In fact it took place on 9 December 2013, and was recorded; the recording was available and had been transcribed. There were differences between the parties about what that interview did, or did not, amount to. For example, Mrs Dar

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considered she expressed reservations in the interview, and Mr Cavender challenged this for Post Office. Mrs Dar had originally stated in her claim that she had been told by Mr Trotter she did not need legal advice and this was again challenged. Paragraph 2 of the instructions that came with the pack stated:

"We strongly suggest you take independent legal advice before signing the relevant documents and returning them to us. We would also suggest that you keep a copy of the relevant documents that you have signed and dated."

335. Given Mr Trotter had been helpful to Mrs Dar over the application – he had effectively rejected her first one during her first interview, but in a constructive and helpful way – there are lots of possibilities for a misunderstanding between him and Mrs Dar about legal advice and the terms of the NTC. Whatever he said, the document itself contains a clear warning and I find that anything he may have said does not override or take priority over paragraph 2 of the instructions.

336. There is no reason why Mrs Dar would or should make up evidence about her numerous attempts to register and log her application – they may ultimately prove to be of no relevance to the issues in any of the trials through to the conclusion of her claim – but in any event she clearly recorded them at the time in e mails to the Post Office. They paint a picture of an organisation somewhat less than perfect in terms of how they dealt with registrations of interest such as this one.

337. I do not however accept that Mr Trotter told her in the first interview on 9 December 2013 that she did not need to get legal advice. This does not appear in the transcript of the interview – a very strong point in the Post Office's favour – but it would also conflict with the terms of the NTC itself. I accept that legal advice was referred to by Mr Trotter in a general way at the second meeting (whether it was a second "interview", or not) but do not consider that the way it was said, or its emphasis, meant that Mr Trotter told her she did not need to obtain any, or that he said anything on this subject that could or should be construed as Mrs Dar being able to rely upon it in contradiction to the terms of the NTC itself. As Mrs Dar herself accepted, this second meeting was relaxed and friendly, as well it might have been. Mr Trotter had expressed reservations about financial viability of her application in the first, more formal, interview, and by this second meeting on 4 June 2014 these had been resolved on a resubmitted application. eShe She received a letter of congratulation and details of training in a letter dated 4 June 2014. A department called Network Contracts ("NT Contracts") within the Post Office sent her an appointment pack that included the NTC, although internal e mails now available can be seen to be blaming her for the non-receipt of other documents sent earlier, such as:

"we issued a contract for Lenzie however the PNO has since moved house and failed to tell us, so we sent it to the wrong address. Are you please able to get a contract sent out to her new address?"

338. I accept Mrs Dar's address that she had notified the Post Office of her new address. The suggestion that she had not is, in my judgment, an excuse used by the person who sent the e mail above.

339. However, regardless of these byways about documentation and accuracy by the Post Office in communications both being acted upon by them at all (her numerous

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registrations of interest), sent out incorrectly (her draft contract initially) and seeking to excuse themselves (such as the address point) there is no doubt that Mrs Dar received the NTC eventually because she signed it and returned it, having discussed it with her father.

340. She said that Mrs Margaret Guthrie of the Post Office had told her the notice period was one year, but the NTC said at clause 16.1.1 the period would be six months. The combative way the Post Office approached this matter can best be reproduced from her cross-examination:

"Q: And then you can see on page E5/139/3, "Frequently Asked Questions". Cast your eye down there. Paragraph 3:
"*What are the notice periods for the new contracts?*
For main branches, either Post Office Limited or the operator would need to give at least 12 months' ...
For [Local] *branches ...*"
You knew you were a Local branch, didn't you?
A. Yes, there is also discussion on that. Yes, I was a Local, but whether we were -- we had some Local plus services and not others.
Q. So you are a Local branch:
"*... the notice period is at least six months. This can be given at any time after the contract begins."*
A. So at least six months. Not stated as six.
Q. At 6:
"What should I do if I'm not happy with the financial obligations attributed to me?
"If you're not happy to accept the financial obligations in the contract, you shouldn't sign it. Once you do sign the contract then you will be responsible for all the obligations so it is important2 you read it very carefully."
So I think you would agree with me the Post Office in various places in these documents, these instruction documents, made it clear to you (a) that these are important documents, yes?
A. Without -- I know they are important documents, yes.
Q. And secondly, you should therefore read and consider them carefully before signing and returning them?
A. I did read those. But I think also obviously the excitement, the adrenalin and the hope for the future takes over a lot of that as well. And you just think it's exciting and -- it is something you want to do to benefit the entire family.
Q. Is that really true, Mrs Dar?
A. Of course it is true.
Q. The excitement and the adrenalin? You were entering into a business relationship, yes? You were having advice from your husband and your father at least, who weren't probably, I suggest to you, as full of the excitement and adrenalin you refer to. They were giving you cool-headed advice, weren't they?
A. Cool-headed advice. That doesn't stop somebody being fired up and excited about a business. My dad has run, as I said, several graphic design businesses over the years. Obviously you have to have adrenalin to make you go forward to do something. If you didn't have that you wouldn't do anything in life.
Q. We can see you did sign the agreement and return it and that is at bundle {E5/148/6}. You signed it on 2 July 2014. Does that sound right?
A. Yes, that is my signature.

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Q. You would have signed that having taken any legal advice that you as a business decided to take. Is that also right?
A. I signed that as a new business owner, having got advice and, yes, I did sign that as I have explained.
Q. Because you suggest in your witness statement this is all very confusing and difficult. But I suggest to you it was actually very straightforward?
A. What part of the Post Office is very straightforward?
Q. The signing of this agreement and its structure?
A. The structure is not straightforward whatsoever. You get document after document after document referring to things you probably need to cross-reference. I just wouldn't think it is user friendly whatsoever."
(emphasis added)

341. This challenge to Mrs Dar by the Post Office was completely wide of the mark. The following points are notable. Given the presence of a signed set of terms none of these might matter contractually, but they give a good idea of the approach of the Post Office to the Lead Claimants generally:

1. Mrs Dar said that Mrs Guthrie of the Post Office had told her and her husband the notice period was 1 year, which is 12 months. Actually, the notice period is "at least 12 months" for Main branches. Mrs Guthrie could have been mistaken and told Mr and Mrs Dar the notice period for Main, rather than Local, branches. 1 year is not so far out of the realms of the period of notice, although obviously Mrs Dar was to have a Local, rather than Main, branch.

2. Mrs Dar knew the documents she had been sent were important, and had never pretended that they were not. She had been running her own business, and before that had been in a responsible position in IT at Hilton Hotels. She was not an idiot, or a primary school pupil. She was a reasonably successful small businesswoman whose second detailed application had been assessed as financially viable.

3. Taking on a new business commitment would be exciting for someone such as Mrs Dar; particularly if one expected it to improve the financial performance of an existing retail shop, (or was a change of career direction as with some of the other Lead Claimants). The Post Office in these proceedings were so desperate to maintain that these contracts were purely "business to business" that they wholly ignored, and disparaged, the human element involved in becoming a SPM.

4. There is no reason why Mrs Dar's husband and father should be more, or less, infused with excitement and adrenalin than she was, or "cool headed" if she was not. To suggest this, given the obvious gender difference, is simply patronising to Mrs Dar. It is also probably patronising to females in business generally. I would have thought the world has moved on from such stereotypes.

5. Finally, in my judgment Mrs Dar's evident astonishment at being told the Post Office was "actually very straightforward" is entirely well-founded. She had registered with the Post Office a number of expressions of interest in her branch. The Post Office had either lost at least three, or its online systems had failed to deal with them correctly. She had received e mails stating they had attachments when they did not, and the Post Office had told her they had sent important documents such as her draft contract which just did not arrive. When she chased up all of these instances, she

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was either disbelieved (with the online registration) or the faults were blamed on her (viz "we issued a contract for Lenzie however the PNO has since moved house and failed to tell us, so we sent it to the wrong address"). At every turn, at least so far as Mrs Dar were concerned, the Post Office had showed its level of administrative competence to be at the very bottom end of the scale. Yet she was told it was "actually very straightforward" and the court received submissions that "she tried to pretend the documents were confusing – when they were clearly not".

342. In my judgment, Mrs Dar was a remarkably persistent person. Had she not been, she would never have come close to contracting with the Post Office to be the SPM for the branch at Lenzie in the first place. She does however bitterly regret doing so.

343. Building works were done prior to the branch opening, and some of these were paid for and organised by Mrs Dar. She received communications about these works, one of which was a letter which appeared as follows:

"THIS LETTER IS DESIGNED TO BE COPIED AND PASTED INTO THE LATEST TEMPLATE
<COPY TO THE PROJECT SPONSOR>
Project for the Opening of Lenzie Post Office® branch
Here are the arrangements for the project at your Post Office which we discussed on 11/9/2014. This letter shows the action you will need to take to ensure the smooth running of this project…."

344. I am afraid that a communication such as this from the Post Office is another example of is inadequate documentation management and administration. The works being done included the installation of Horizon equipment. The works were completed on 12 November 2014. The Completion Certificate included what were listed as "snagging works" which included the configuration of Horizon to be done by Fujitsu, and the certificate also showed that Horizon installation and commissioning was not complete. Snagging is a term used in construction contracts to describe minor works that are outstanding but which are not such to prevent completion. Given Horizon is central to the operation of Post Office branches the fact it was not configured could not entirely correctly be described as "snagging", but that may not prove to be important. The statement signed on the certificate was:

"PRACTICAL COMPLETION (Electronic Signature):

We the undersigned agree that the contents of the Practical Completion document reflects the requirements of the project works."

345. Mrs Dar and a representative of the Post Office signed this. She and her husband were given some classroom training, but again, yet further inaccurate correspondence was sent by the Post Office. The e mail of 7 November 2014 to Mr Dar confirming his invitation stated:

"To assist with your preparations we have provided the following Training Workbooks (posted with a copy of this letter):
- Post Office Local Compliance Training workbook
- Dangerous Goods Training (Regulatory) workbook
- Dangerous Goods Training (Operational) workbook

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Please bring a copy of the Training Workbook answers with you to the Classroom Course."

346. No such workbooks were sent and Mr Dar had to chase for these, which he did. The training was 3 days long. Mrs Dar raised a specific query with the trainer about balancing and Horizon, and was told if there were problems or she was in doubt, she should call the Helpline. Mrs Dar considered the training inadequate. This was followed by branch set up and induction training at the branch. The Post Office auditor present for this was Mrs Margaret Guthrie. She did not give evidence before me. She was also responsible for induction training. She had problems with Horizon, logging on took some time and even before the branch opened Mrs Dar said there was a shortfall of £977, which she believes was due to mistakes by Mrs Guthrie in inputting the stock into Horizon. Mrs Guthrie spent some of her time trying to fix problems with Horizon rather than doing the induction training that Mrs Dar was expecting. She was also given a document called "Horizon Online Cash Declarations – Top Tips Guide". This stated:

"It is a contractual obligation that an accurate by denomination cash on hand declaration is completed daily for all stock units used. On average 1000 branches per day fail to make their daily cash on hand declarations.
The majority of failed declarations occur on a Saturday or Sunday.
Failure to make a correct declaration will result in inaccurate planned orders or planned returns.
Listed below are the 13 top guidelines to ensure that cash on hand declarations are made correctly.
Point 2 (although long) is the main reason for the high level of failed declarations being received."

347. This introduction is followed in that document by 13 points. Some of them are:

"1. Every Stock unit must make a cash declaration every day. All declarations must be made before 19:00 hrs & this includes Service Point on the Retail Till (Combi-counter): any declaration not made or made after this time will make the whole branches declarations invalid.
2. It is acceptable for branches to continue serving after they have made their daily final cash declaration as long as the stock unit concerned is going to be open the following day (the final daily cash declaration must be entered on Horizon Online before 19:00 (but as close to 19:00 daily, if they are open beyond 19:00).
If the stock unit is not going to be used the following day, the cash declaration must be the final transaction of the day in that stock unit.
This approach is crucial in community branches, which usually do not open every day, and it is critical for offices that are closed the following day, to declare their cash after the final transaction. This also applies to branches that operate individual stock units and have part time staff that will not be in the branch the next working day.
<u>There are many failures in the Network on Sundays, this is because branches declare on Saturday lunchtime but carry out at least one more transaction before closing. They are then closed on the Sunday but Flexible Planning is a seven-day programme and classes those branches as open because a transaction has been recorded since their last cash declaration.</u>
3. If the horizon system times out while you are completing a cash declaration. the individual logging back on will need to make a new cash declaration.

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….
7. On a balance day each stock should complete a daily and a weekly cash declaration. On any other day each stock should only complete a daily cash declaration. Completion of the weekly cash declaration on a non balance day will adversely affect the reporting. For example if you have a stock unit which is balancing on a Tuesday and will not be used again until Friday please make sure that the daily cash declaration is completed as well as the weekly declaration.
….
10. Inactive stock units that are opened to make price changes, upon completion, must have a daily cash declaration made. In addition, some software drops overnight e.g. tariff increases make inactive stock units active, so a new cash declaration is required.
…..
12. Cash in any type of Automatic Teller Machine (ATM) (OTHER THAN BANK OF IRELAND), which is filled with Post Office Ltd cash, e.g Hanco, Alliance and Leicester, TRM, is part of the branch cash on hand holdings and must be declared daily. The cash held in these type of ATMs must be recorded against the denomination line the notes represent.
For Bank of Ireland ATM only, all notes (whether in the machine or in the safe) need to be declared daily against the £10ATM note denomination line (currently just above unusable on the pick list)."

348. This sheet shows that the Post Office was aware of widespread failures in cash declarations – on average 1000 branches per week – and that "the majority of failed declarations occur on a Saturday or Sunday", that "failure to make a correct declaration will result in inaccurate planned orders or planned returns" and also that overnight software drops would make inactive stock units active. Such points may, or may not, prove to be notable in the ultimate resolution of these proceedings.

349. Mrs Dar had extensive IT experience from her previous employment with Hilton Hotels. She was particularly concerned when Mrs Guthrie told her she would have to make good shortfalls showing on Horizon and said she would be lucky if she was only £20 or £30 down when balancing. She asked what she should do if the system were not balancing and was told to phone the Helpline. Mrs Dar said she was not comfortable opening the branch without any troubleshooting training and could this be provided, but she was told she "would just have to get on with it and call the Helpline if" she had any problems.

350. Branch opening took place at 2.00pm on 19 November 2014. This was postponed from 1.00pm because not everything was ready by 1.00pm. Mrs Guthrie gave her the Acknowledgement of Appointment to sign in the following form:

"Subpostmaster's/Operators Contract
Acknowledgement of Appointment
MRS LOUISE DAR
I accept The Appointment as Subpostmaster/Operator at:
LENZIE
PO LOCAL AGREEMENT
and agree to be bound by the terms of my agreement,
and by the rules contained in the book of rules and
the instructions contained in those postal
instructions issued to me."

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351. The astute will note continuing reference to the non-existent book of rules. She was told she had to sign it in order to have the branch transferred to her so that it could be opened, and no part of this (or any of the other documents presented that day for signature) were explained to her. She was also given the Operations Manual and told to read it. Mrs Dar does not believe she was given this prior to branch opening day and I accept that evidence. Other documents were also presented for signature that day without explanation.

352. Mrs Guthrie stated on site after opening for 6 or 7 days. She was supposed to be providing further training during that period, at least this had been characterised in the previous communications to Mrs Dar. Mrs Dar described this as shadowing, interventionist and not helpful. Mrs Dar had taken on an experienced Post Office assistant, and had been encouraged to do this by the Post Office. Mrs Guthrie did not attend on Mrs Dar's first balance day, as she was supposed to. Mrs Guthrie also said that she would come back to give further training and support. In fact she did not, at least not until some months later on 15 July 2015 when she came back to carry out an audit.

353. Mrs Dar started with an immediate shortfall due to what had occurred when Mrs Guthrie was entering data on Horizon before the branch even opened. This was explained to the Post Office in an e mail from Mrs Dar in early 2015 in the following terms, which I will reproduce verbatim:

> "I spoke to Jamie in regards to an out of balance that occurred during the first week of business.
> Margaret Guthrie was training me on site when there was a power outage (26th Nov) Horizon was down for 10/15 mins. Margaret logged a call with Horizon support ref 16400215. She was advised to give the system 5 mins to come back up. Horizon seemed to be running fine after that.
> Once we reached the point of the first roll over to the next TP (27th Nov) there was a loss of the £937.71. Margaret checked and double checked with me the cash and coin to find a discrepancy and nothing was found. It got late in the night so we decided to go back early in the morning to try again. Yet again nothing was found. Margaret then remembered the outage and logged a call with the helpdesk (16400215) in case it caused a corruption in the system which could cause the OOB. Margaret was advised they would investigate and have an update after a few days. Margaret left site the next day.
> I called the helpdesk back the next Wednesday when l balanced my stamps, stock etc as the shortage was no longer showing in the suspense account. l asked if it was resolved and they said yes- as balances don't leave the suspense account on their own.
> I have all the documents and paperwork in the safe if required.
> I was then billed for this amount. Not sure what to do now!
> If you need any further information or have any questions, please let me know."

354. Given the issues in this case, it should be remembered that at this stage in the proceedings there is only Mrs Dar's account of this before me, and I have not heard from Mrs Guthrie (and indeed may never do so, depending upon whether she is called). The Post Office's position on Horizon and Mrs Dar, which is broadly the same as with all the other Lead Claimants, is that the Horizon system is robust and

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does not introduce errors, and that Mrs Dar's assistant had been falsifying figures. This assistant was actually sacked by Mrs Dar for gross misconduct, because when the shortfalls continued, and Mrs Dar knew it was not due to anything she Mrs Dar had done, she concluded (based on what the Post Office told her) that it could only be due to her assistant. It may prove notable that there was a power outage when Mrs Guthrie was entering data into Horizon, or may prove simply to be a coincidence.

355. On the day this occurred, Mrs Dar was at one point told by Mrs Guthrie that she, Mrs Dar, must have taken the money. Not only did this shock Mrs Dar, but Mrs Guthrie had been with her all day and said this suggestion was ridiculous. Ultimately, the Post Office corrected this in March 2015 by issuing volume TCs. She had apparent shortfalls other than this one on what she said was "a regular basis". One TC she was issued was for £2,660 in coins with which she did not agree, but she says she was told she had to accept it in order to roll into the next balance period. The internal e mail chain disclosed in this litigation shows the following exchanges within the Post Office:

On 4 June 2015 from Jamie Haugh to David Dixon:

"The above branch have been contacted telling them they never scanned £2660 of coin on 8/5/15. They can't understand this as they have been balancing OK. I'm not sure how this works.

Is there anything you can do to help understand what has happened?"

Reply on 5 June 2015 at 0856 from David Dixon

"I have looked at what the branch scanned in on the 8th and there was no coin, just notes…..The £2,660 has not been booked in, so I'm not sure how they managed to balance with the variance check they did. I have copied in Joan Gregg who works at the Bolton finance team. Joan might be able to shed some more light on this one."

Joan Gregg stated in reply on 5 June at 0915:

"You are right the office should have been balancing over since receiving the coin (if they did receive it).

I see that a transaction correction has now been issued and accepted at the office but this has possibly made them balance short. Sorry I can't explain what has gone wrong."

356. This was brought to Mr Trotter's attention by Mr Haugh in the following terms:

"Sorry to be a pain. I know how busy you are. Got a feeling the SPMR will be contacting you about this shortly. See email trail. Basically she can't find the Rem in slip so she is het for £2k of coin.
She is adamant that it is scanned in and has other receipts that prove this. Also she says the driver wouldn't leave without it being scanned and signed.
Not sure where she goes next. It seems the business are telling her she never scanned it in so you owe us the £2k.

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This is the same SPMR that we were asking for £9k for remming in wrongly. It was discovered that it was the trainer and all ended up ok. You can imagine what she thinks of PO.
Anyway, just a heads up!
Cheers"
(emphasis added)

357. Her experience with the Helpline was not a positive one. She contacted them 2 to 3 times per month, often in relation to apparent shortfalls or balancing. Most of the time she was told to recount and if there was still a shortfall she had to make this good (which means pay it herself). Once, she was told how to "get around" the problem by altering the stock figures to balance, which shocked her. She considered there was some kind of fault within the system.

358. She was audited on 15 July 2015 by Mrs Guthrie. Her branch was over £10,000 short. She was away at the time in Pakistan with her husband and her assistant had been managing the branch. After the audit of 15 July 2015, she was told there had been deliberate falsification and inflation of accounts and she should dismiss her assistant (who had worked for Mr Toor previously). This assistant had worked for the Post Office for 12 years. Mrs Dar dismissed her for gross misconduct, as she felt she had no choice. Mrs Dar was suspended. A large amount of the shortfall related to cheques which were said to be missing. These cheques later on turned up and were credited by the Post Office, reducing the shortfall. Mr Trotter in an e mail of 30 July 2015 stated to Mr Paul Kellett:

"Hi Paul

I was wondering if you could steer this query in the right direction please. The audit report below shows the branch had a large discrepancy in cheques, which looks like they may have been sent out of course or gone missing in the post. Therefore, could you please forward this email to the team that deal with queries of this nature, I would also be interested in finding out what endorsements are being put on the back of cheques accepted at the branch. This is an urgent request as the branch is closed at the moment at the Operator is suspended.

Many thanks"

359. The shortfall was adjusted by the amount of the cheques, which were in excess of £3,000. She was held liable for the balance and was allowed to reopen but only if she agreed to repay the amount of the balance, which she did, that being deducted in instalments by the Post Office. The Post Office had introduced in 2014 (this was confirmed by Post Office witnesses) something called the Suspended Termination procedure, where a suspended SPM was allowed to resume their appointment, as long as they repaid all the money and did not commit a material breach again.

360. She was audited again on 17 May 2016. This was by a different auditor, and although she was not suspended she was again required to repay the shortfall, this time of £2,252. This is because she could not explain the shortfall. A third audit occurred on 3 February 2017. This time she was suspended, and the shortfall was £6,800. She was again required to explain the reason for the shortfall and could not do so. Certain

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records she had were removed and these were not given back when she requested this. Her appointment was terminated on 27 March 2017. The letter stated:

"Dear Mrs Dar

Post Office® Lenzie branch at 188 Kirkintilloch Road, Lenzie, Glasgow, G66 4LQ

Notice of Termination of Off Site Post Office Ltd Local Agreement between Post Office Ltd and Mrs Louise Dar (the Operator) dated 17 June 2014 (Agreement)

As you are aware from my letter dated 3 February 2017, Mrs Louise Dar was suspended from operating the above Branch with effect from 3 February 2017. Post Office Limited has been investigating following the audit at Post Office® Lenzie branch that identified a total shortage of £6870.85. This comes after an audit in July 2015 that identified a £10,423.96 shortage and an audit in May 2016 that identified a shortage of £2,252.84.

Post Office Limited's investigations have now concluded.

I am writing to give you notice that Post Office Limited is terminating the Agreement with immediate effect from the date of this letter."

(emphasis in original)

The letter is lengthy and runs to 4 pages. The majority of it simply recites clause after clause of the contract terms. The entirety of the text relating to *any* investigation by the Post Office in respect of Mrs Dar's numerous issues and experiences (including with the Helpline, the way that she was told to report disputes) is the single sentence "Post Office Limited's investigations have now concluded". It is not said what those investigations consisted of; what issues were investigated; how they were investigated; over what period of time; how long that took; or any other basic information. The suggestion in the sentence is that there was some sort of investigation, but the accuracy of that statement may become clearer in later phases of these proceedings.

361. The Post Office in their Closing Submissions stated that Mrs Dar was "a less straightforward witness" and "tried to pretend that the documents were confusing – when they clearly were not". I reject those criticisms of her. I found her to be a reliable and entirely straightforward witness who was, so far as the evidence in this trial is concerned, telling me the truth. There are isolated instances where I have not accepted her evidence, such as whether Mr Trotter told her not to get legal advice on the terms of the NTC, but that difference probably comes down to a different understanding on her part regarding what Mr Trotter in fact said, rather than disbelieving that he actually said anything at all to her about such legalities.

362. There are also two points where not only her evidence, but her actual terminology, are entirely accurate and I fully accept them. The first is to describe the Post Office documentation in terms of her engagement as a SPM as confusing. It undoubtedly is. The second was her challenge to Mr Cavender's assertion on behalf of the Post Office

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that the signing of the agreement and the structure was "actually very straightforward". She said:

"The structure is not straightforward whatsoever. You get document after document after document referring to things you probably need to cross-reference."

363. She could have added "and some referring to documents that don't even exist, such as the book of rules". I have already made certain statements in respect to the 6 lever arch files of Operation Manuals, which I need not repeat.

364. All of the six Lead Claimants also gave evidence about their expectations of dealing with the Post Office, and the degree to which they were relying upon the Post Office in respect of becoming SPMs. I accept that evidence, although its specific relevance to the majority of the Common Issues is not central. It does arise, but only in terms of background consideration to the question of whether these are relational contracts.

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D. The Post Office Witnesses

365. The Post Office called a total of 14 different witnesses. The Post Office also provided a helpful Reading Note, which explained the structure of the statements and a suggested order in which they might first be read. It was explained that the statements dealt with three main areas. These were the structure of the business of the Post Office; the appointment of SPMs; and what was called "Claimant-specific evidence", which meant evidence specific to the Lead Claimants selected by both the parties. I will summarise their evidence in the order in which they were called, which is not the same as the sequence in the Reading Note. Even given there were 14 of them, the Post Office evidence was not the same in scope as that of the Lead Claimants, as so few of them could give any direct evidence of any of the six Lead Cases. It is for that reason that Part D of this judgment is somewhat shorter than Part C.

Mr Nicholas (Nick) Beal

366. Mr Beal worked for the Post Office from 1987 when he started as a counter clerk. He went into management in 1990 and has had various posts. He is now the Head of Agents' Development and Remuneration. In 2010 he became the Network Relationship Manager, and that is the date from which he acquired direct knowledge of Post Office policies, and he explained that evidence on this area prior to 2010 was made from his own experience but also "discussions with other long serving colleagues" and the documents. He has been involved in network policy from 2004. In 2011 he became the Head of Network Development. One of his three main areas of responsibility was developing and implementing the terms of SPMs' contracts. If so, he may well have been involved in implementing the basic but rather important improvements in contract formation for the NTC, compared to the way that the SPMC was dealt with, which I have referred to in some detail above.

367. He frankly stated in his evidence that for each model of operation of Post Office branches there is a standard contract, and if a SPM requested a change to these standard terms that would not be permitted. As he put it, such a request would not be acceptable to the Post Office. These are undoubtedly therefore standard terms which are not negotiated by the SPMs with the Post Office.

368. Nor are they negotiated, in my judgment, by the NFSP either, certainly not in the sense that the word "negotiation" is ordinarily understood. I provide an analysis of the relationship between the Post Office and the NFSP in Part F below. Mr Beal was centrally involved in the relationship between the NFSP and the Post Office. I summarise that relationship and what was disclosed in this litigation in Part E. It is obvious, in my judgment, that the NFSP is not remotely independent of the Post Office, nor does it appear to put its members' interests above its own separate commercial interests.

369. Mr Beal was completely unrealistic about this. Mr Green put the following point to him about the NFSP linking its own financial remuneration for a significant number of years going forwards with its role in agreeing the terms of the NTC.

> "Q. And that is not necessarily what you expect, is it, if you were a subpostmaster from an independent union?
> A. I am not a subpostmaster, so I don't have a view on that."

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370. I am not a subpostmaster either, but I doubt one needs to be, in order to have a view on what is a very obvious point. Such matters plainly should not be linked in the way that the NFSP and the Post Office linked them in this instance. I do not consider that the NFPS can in these circumstances properly be considered to be independent, and acting in the interests of SPMs, given the way it involved its own commercial interests as a condition in the way explained in Part F of this judgment.

371. Mr Beal gave evidence that is hard to reconcile with the actual documents themselves. He said that it was always the intention of the Post Office and the NFPS that the contents of the Grant Framework Agreement ("GFA") made with the NFPS would be made public. I reject that evidence, which is contrary to the detailed confidentiality provisions within the GFA itself. I provide more detail of this in Part F of this judgment, which provides further detail of the relationship between the Post Office and the NFPS.

372. He also stated that the change of the contract terms from those in the SPMC to those in the NTC did not change what he called "the core principles". This passage in his witness statement was put to him.

> Q. "Despite the changes, the core principles of the agent being responsible for running the branch, employing assistants and completing the accounts and liability for losses remained the same."
> So that was the intention, was it, in moving across to the NTC contracts?
> A. Of retaining those core principles?
> Q. Yes.
> A. The intention to retain those core principles?
> Q. Yes.
> A. Yes."

373. I reject that evidence too. As will be seen in Part H which deals with the contractual terms themselves, the clauses that deal with liability of a SPM for losses is entirely differently worded in the SPMC (which uses the word "fault") and the NTC (which does not have any such express reference). Mr Beal sought to give me the impression that the intention of the Post Office was to keep the liability for losses the same when the NTC was introduced. I doubt very much that was the case, and if it were, I do not see how the relevant clause of the NTC would be drafted as it is. Indeed, the Post Office's counsel accepted that the wording of the two clauses was rather different, as he would be expected to accept, given the obvious differences. Mr Beal is obviously a highly intelligent and successful member of the senior team at the Post Office, and must know this.

374. He also referred to what he called "the core principles". Mrs Van Den Bogerd, another highly intelligent and senior witness, said she was not aware of these. It is not possible to reconcile the evidence of Mr Beal and Mrs Van Den Bogerd on this point. If the Post Office does have such core principles written down somewhere, not all its senior personnel are aware of what they are, which is rather contrary to the concept of, and description as, "core principles".

375. Mr Beal's way of giving evidence was very much the house Post Office style, certainly for the more senior of its management personnel who gave evidence. This was to glide away from pertinent questions, or questions to which the witness realised

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a frank answer would not be helpful to the Post Office's cause. Giving evidence in court, and being cross-examined, is an unusual experience for most people, regardless of the amount and type of preparation that a person may have undertaken in advance. Mr Beal certainly knew his subject very well. He sought to give me evidence highly favourable to the Post Office, which I consider was slanted more towards public relations consumption rather than accuracy. It did not match the contents of the documents to which I have referred, namely the GFA, and the change in wording to terms dealing with liability for loss by a SPM under the NTC.

376. I find that on the wording of those documents themselves, it must have been the intention of at least the Post Office that the terms of the GFA itself were kept confidential, and that is why the terms of that document were drafted as they were. It must also have been the intention of the Post Office to widen the scope of liability of a SPM for loss under the NTC, hence the change in wording. Mr Beal's attempt to persuade me to the contrary on both points is regrettable; it is possible that he has persuaded himself.

Mr Paul Williams

377. Mr Williams is the Restrictions Adviser to the Post Office and his role is to ensure that the Post Office enforces the contractual restrictions upon the private business activities of SPMs which are carried out in the same premises as a Post Office branch. He started at the Post Office as a counter clerk in 1979 in Liverpool, and has therefore worked for the Post Office for a very long time. He moved into management in 1990 when he became a Customer Care Manager, and from 1993 until 1999 was an Agency Recruitment Manager for North Wales and the North West. He dealt with the appointment of SPMs, including advertising vacancies, arranging and following up interviews, arranging transfer dates and ensuring auditors/trainers were booked in for the transfer of branches. His evidence dealt mainly with this aspect. That region included the one where Mr Bates' branch was located. Mr Williams moved to become an HR Adviser in March 1999. In early 2000 all of the Agency Recruitment Teams were centralised into one team, whereas before that the country was divided into different regions.

378. Mr Williams gave particularly useful evidence concerning the expressions "Book of Rules" and "Postal Instructions" used in Mr Bates' Acknowledgement of Appointment. He agreed with Mr Green that the Book of Rules was "legacy wording"

"Q. There wasn't actually a book of rules with that title?
A. No. As we had been teased out of the Post Office Corporation into Royal Mail and Post Office Limited there were a huge set of rules which are called postal instructions, the subsets of which were placed, some would be in sorting offices for postal workers, some would be in motor vehicle centres, and some would be in Post Offices.
Q. What were they called later on? Different names?
A. The postal instructions to my recollection effectively became obsolete and were replaced by the counter operations manual.
Q. Because if we look -- we can see in a case of much later lead claimants. If you look for example at Mr Sabir at D1.3/4/1}, do you see that?
A. Yes.

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Q. What has happened is a font change or typographical change, "book of rules" is no longer in capitals and "postal instructions" is no longer in capitals. Originally postal instructions was an actual thing, wasn't it?
A. It was, yes.
Q. Can you remember roughly, when did that stop being a thing?
A. The postal instructions model to my recollection started to fade out after about 1992 -- it must have been about 1993, and we replaced them with the counter operations manual which were the set of instructions around performing transactions and carrying out accounting processes."

379. Therefore, the Book of Rules did not exist, and Postal Instructions used to exist, but were phased out "after about 1992" and were replaced with the counter operations manual which contained the set of instructions regarding carrying out of accounting processes.

380. Mrs Dar and Mrs Stockdale were therefore signing Acknowledgement of Appointments that included express reference to something that did not exist (the book of rules), and to "postal instructions" which had been replaced about 20 years or more earlier. This is very surprising.

381. That the official Post Office Induction booklet at the time, the following was stated:

"Contract
As a new subpostmaster, you have entered into a contract with POCL [Post Office Counters Ltd] which states what we as a business expect from you, but also what you can expect in return.
You will have received the full contract (on your day of appointment at the latest), which is a very 'live' working document for both you and Post Office Counters Ltd. You should read and understand it in its entirety."

382. Mr Williams accepted that it was unsatisfactory for an incoming SPM to obtain such a document on their actual day of appointment – which means the day the branch was transferred to them – and said his team were therefore one of the "early adopters" of an approach to send it in advance. He said he knew that not everyone did so across the regions, but the ladies who worked for him took pride in their job. He said he relied upon people not contacting him and saying "I thought you were sending me a contract and I haven't had it". Given the confusion in the wording to which I have already referred, it is not surprising that this did not happen, because in my judgment the documentation sent out to an incoming SPM did not clearly identify that the SPMC *should* have been in the envelope.

383. He also agreed that by branch transfer day incoming SPMs were contractually committed and essentially had to sign whatever documents the Post Office presented to them. He had also written the SERV 135 document in about 1993, which stated that the Post Office realised that some SPMs were "not conversant" with important terms of the SPMC, including liability for losses in Section 12 paragraph 12.

384. I found Mr Williams a clear and helpful witness, and his evidence was of great assistance. He had realised shortcomings in the Post Office processes for contracting with incoming SPMs, and (for example) had drafted the SERV 135 in 1993, and had adopted some regional and ad hoc (in the sense they were not nationally adopted at

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the time) practices to try and get around this. However, these were obviously not universally accepted by the time Mr Bates acquired his branch in May 1999, indeed some of the archaic references, in important documents such as the Acknowledgement of Appointment, persisted as has been seen for another 20 years or so. If anything, his evidence certainly does not contradict it. To be fair to Mr Williams, he frankly accepted his evidence was his recollection of the processes of over 20 years ago, and his team would do their best to help incoming SPMs if any of them said there was an error. But they were dependent upon that, I find.

385. He also explained that the Post Office considered that a copy of the SPMC was nearly always available for an incoming Subpostmaster from an existing branch. In reality, the Post Office had no idea at the time whether this was the case or not. I prefer the direct evidence of Mr Bates and find that the SPMC was not sent to Mr Bates as the Post Office claims.

Mrs Sarah Rimmer

386. Mrs Rimmer has worked for the Post Office since 1999. She started in the Assistant Vetting Team, within the Human Resources Services Centre. In this role she spent 5 years working at the advice centre, taking calls from SPMs and trying to assist them with their various queries such as entitlements to holiday pay and so on. She processed applications for the post of SPM between 2007 and 2017. She was also involved in the Post Office process of vetting assistants to be employed in branches.

387. Over time the application process has changed, and at some time before Mrs Rimmer's involvement in this (the change appears to have come in from about September 2006) the paper based application system for prospective SPMs became an online one, using a system called IRIS (short for Interactive Recruitment Information System). It was mandatory that interviews were recorded from 2008. She became the Manager for the Agent Application Processing Team in 2007 and was involved in this role until 2017.

388. She had no direct involvement with any of the Lead Claimants and her evidence was a general overview. She gave evidence about the procedure whereby incoming SPMs were given their contracts before being obliged to sign them– in other words, sufficiently in advance. She sensibly accepted receiving a document such as the SPMC on the day of branch transfer was "a bit late" as Mr Green put it, but regardless of that, in my judgment it was. Although it is helpful to have one's view confirmed by a Post Office witness, it is not essential, but it does confirm Mrs Rimmer's reasonable approach to the giving of her evidence.

389. There was Internal feedback within the Post Office from November 2011 that said that "Many of the new delegates who are SPM do not seem to have contact from HR and recruitment with regard to contracts, transfer dates change due to problems with outgoing, so maybe if both teams could contact the new SPM while they are on the [training] course it would avoid cancellation or changing transfer dates at the last minute." This had not reached Mrs Rimmer and so she was unaware of this. Being unaware of it, she had done nothing to remedy this and cannot be criticised for this. She also said the following, on the subject of an incoming SPM being expected to talk to the outgoing SPM about the terms of the SPMC:

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"A. There would be an opportunity to ask to see the contract if -- we never said it was a confidential document. If anybody ever asked where -- whether they would get to see the contract as part of the application process, we would always point them in the direction of the outgoing subpostmaster because he should have a copy.
Whenever I spoke to applicants, we obviously couldn't send it out prior, but there is nothing stopping the outgoing from showing you."

390. There are two important points to make on that evidence. Firstly, Mrs Rimmer believed she was not allowed to send out the SPMC to incoming SPMs prior to their taking over the branch. I accept that was the situation. I can think of no logical reason why the Post Office should have been so secretive to incoming SPMs about the document which the Post Office considered would contain their contract terms.

391. She also gave very useful summary evidence in paragraph 54 of her statement:

"Prior to [Network Transformation], successful Subpostmasters were required to sign the appointment paper and not the actual contract. Subpostmasters would be required to return the signed appointment paper (including the COA) to my team."

COA means Conditions of Appointment. It can be seen therefore that, prior to 2011, the Acknowledgement of Appointment had to be signed and returned, but this did not refer to the SPMC specifically. Indeed, nothing that an incoming SPM signed and returned to Mrs Rimmer's team specifically referred to the SPMC as a separate, stand alone document by its correct title, and only by that title, although parts of what she called the COA did quote from it. This is far from satisfactory, and I am surprised that this approach by the Post Office lasted for so many years.

392. Mrs Rimmer was a reasonable and straightforward witness. Where her evidence differed on specific issues of fact with any of the Lead Claimants, I prefer the evidence of the Lead Claimants, simply because her evidence was so general and went to processes and what were said to be systems of how the Post Office did things. I have explained my view of the Lead Claimants individually and their evidence went to what specifically *did* happen in each of their cases, rather than what the Post Office says ought to have happened, or should have happened.

393. Her written evidence did more than merely stray into areas of arguing the case. It embarked upon argument with gusto. One example will suffice:

"There is a strong and I would say completely reasonable expectation that applicants for the position of Subpostmaster will obtain a significant amount of information from the outgoing Subpostmaster. As I have explained, the outgoing Subpostmaster will have the responsibility for providing information and relevant particulars for the marketing of their branch, whether this is through the AB website (or previously the purple website) or through an estate agent. In addition, they would be the first point of contact for potential applicants prior to NT [Network Transformation]. Following implementation of NT, they would still have a reasonable level of contact with applicants. It would seem very strange for the incoming Subpostmaster not to take full advantage of the opportunity to obtain information about the branch and its operation from the current Subpostmaster and indeed they were encouraged to do so by my team during the application process as this was the best source of information about the branch and the conditions that they would be subject to".

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394. There is only one part of this lengthy paragraph that is actually evidence that should be given by a witness of fact, and that is part of the final sentence dealing with encouragement coming from Mrs Rimmer's team. The rest is pure argument. It may well not have been drafted by Mrs Rimmer at all, as some litigants' solicitors are often responsible for the content of witness statements. This was not pursued in cross-examination and so it is neither necessary nor desirable to make any finding about it. I certainly do not criticise Mrs Rimmer for it, although if it were not written by her, it should not have been in her statement.

Mr John Breeden

395. Mr Breeden started his employment with the Post Office in January 1997, when it was still caused Post Office Counters Ltd. This was as Head of Management Process, and he covered Scotland and Northern Ireland. He was not directly involved in the planning for the Horizon project, which was underway in this period, but he was involved in planning, process managing and supporting a Post Office programme called Customer First. This introduced the concept of total quality management and continuous improvement to all products and services. Om 2002 he became the Operations Manager in the National Multiples team. National Multiples are larger commercial businesses that manage Post Office branches across the country. At that time they included companies such as McColls (then called TM Retail), One Stop and the Co-operative Society. Another witness told me they now include WH Smiths. In 2005 he left this post and began managing a team of Contracts Advisers, which he still does. There were at that time three Area teams for the UK, namely North, South and Central. He became the Area Service Manager for the Central Area.

396. His witness statement covered two main areas. These were selection and appointment of SPMs (the beginning of their relationship with the Post Office); and suspension and termination (the end).

397. He accepted that compulsory recording of interviews with applicants commenced on 31 March 2008. He had misstated the date in his statement as 2006, but explained he had done this from memory without checking the documents. He also stated:

> "Both the Subpostmaster [ie the SPMC] and NT contracts contain important provisions governing how these contracts may be brought to an end. Prior to accepting his appointment, a subpostmaster has the opportunity to review his contract."

That very general statement is correct only so far as the NTC is concerned. On the evidence that I have accepted from the Lead Claimants, it is not even remotely accurate or correct for at least some who contracted on the SPMC, and those affected could be a large number. Mr Breeden is a senior person within the Post Office and must have known that this general statement was not wholly correct. This is an example, I consider, of PR-driven evidence.

398. There is an obvious business rationale to have suspension and termination provisions in a detailed contract between the Post Office and its SPMs, which I accept, and the terms themselves are considered in Parts O and P of this judgment. That rationale does not, nor could it, outweigh the legal principles both of contract formation and construction under the law. Obviously, the nature of the business of a Post Office

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branch is that cash and stock belonging to the Post Office is kept in the custody of a SPM, and some SPMs may be dishonest. Mr Breeden essentially explained why financial and personal probity is required from SPMs, and sketched out situations where the Post Office "may consider it appropriate to suspend a SPM" such as civil or criminal proceedings, misconduct, grounds to suspect dishonesty and insolvency. Prior to 2014 the decision to suspend a SPM, and thereafter to reinstate or terminate their appointment, rested with the Contracts Advisor allocated to the case. After that date, the decision had to be made either by Mr Breeden (as Team Leader of the Agents Contracts Deployment team for the relevant area) or his counterpart. This change was made because the right to appeal against an immediate termination, which was included in the SPMC, was removed in the NTC.

399. Mr Breeden sought to explain that the removal of the right of appeal was balanced by the introduction of a two-tier decision making process to terminate someone's engagement, with a recommendation first being made by the relevant Contracts Advisor. That seems a curious way to justify it, in my judgment, and I reject that this replicates what a right of appeal should be. The fact remains that under the NTC's terms the right to appeal which had been present in the SPMC was simply removed.

400. Initially he said that that there was no material difference in the SPMC and NTC terms, the latter was just more explicit. That is simply not correct. At one point in his evidence the following exchange took place.

"Q. Is it fair to say Post Office doesn't tend to focus on the precise words of a contract, you know what your interpretation is and that is what everyone is working to?
A. That is the way I would operate, yes."

401. This is obviously a very different approach to the interpretation and application of contract terms than is conventional under English law. The words of a contract are extremely important.

402. It is not clear to me under the regime for appealing termination without notice that did exist under the SPMC, what the test was to be applied upon such an appeal, or whether the Appeal Manager who heard the appeal was conducting a review, or a rehearing. Mr Breeden's evidence suggested to Mr Green at least (because he put the point to Mrs Ridge) that it was a rehearing. That evidence in his statement was:

"The Appeals Manager would have had no prior involvement in the case. He would undertake a full review of the case papers and <u>might</u> meet with the Subpostmaster. <u>The Appeals Manager would decide whether it was appropriate to terminate the Subpostmaster's Contact without notice based on his assessment of the risks to Post Office's assets and reputation and the materiality of the contract breaches.</u> His decision was final. The contractual appeal process was not replicated in the NT Contracts."

(my emphasis)

Mrs Ridge, who had decided to terminate Mr Abdulla's appointment, said to Mr Green when he asked her, that her understanding of an appeal was not a rehearing and that "I thought -- not a full hearing, but listening to the points that I have gone through

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and to see if I have done everything correctly." That suggests more of a review than a rehearing.

403. On either approach, I do not know why risks to the Post Office's reputation should be a relevant factor in such an appeal, or why a SPM's entitlement to be heard on appeal would differ from case to case. Also, the Post Office's reputation might be significantly affected if it were found to have suspended a SPM on grounds that were wholly unjustified. Unjustified suspension ought to be a factor in favour of an appeal succeeding, on any sensible view. The Appeal Managers are senior Post Office managers who are said to have had training to hear appeals. The reputation of the Post Office would best be served by appeals that were justified succeeding, and those that were not failing. It should not have formed any part of the criteria.

404. In the period April 2013 to June 2018 the number of SPMs who were suspended was 626. This equates to about 10 SPMs being suspended per month. 407 of those had their contracts terminated and as at the date of Mr Breeden's statement 150 had been reinstated, with 69 pending. The Post Office seeks to put a Temporary SPM in place during a suspension, to which the suspended SPM agrees. If they do not agree, the Post Office would be closed. If they do agree, usually most Temps insist (in Mr Breeden's experience) on receiving all the remuneration that would be paid by the Post Office. From the evidence in the Common Issues trial, the Temp appears usually to be an agency. There are obvious adverse consequences to a suspended SPM as the Post Office immediately suspends his or her remuneration. Nor are they in a strong bargaining position in terms of negotiating terms with the Temp.

405. So far a termination is concerned, one of the considerations taken into account to terminate a suspended SPM is whether they are able or willing to pay back to the Post Office a shortage or shortfall. This would therefore place a suspended SPM in something of a Catch-22 situation. Without being willing to accept they were liable for shortfalls and agree to repay that sum to the Post Office, they would be more likely to have their appointment terminated without notice.

406. Further consideration of the suspension and termination provisions are dealt with in Parts O and P of this judgment.

407. Mr Breeden also explained that the Support Services Resolution Team within the Post Office would be able to interrogate the accounts that came from any particular branch. He also said that his understanding was that this team could investigate shortfalls that a SPM maintained had been caused by software issues, such as defects or bugs, and this could be done by comparing data from the branch with data in what he called "secondary records" held by Fujitsu which would be between the Post Office and its clients.

408. As with the other more senior members of the Post Office group of witnesses, Mr Breeden is articulate, intelligent and also acutely aware of how much the reputation of the Post Office hinges on these proceedings. His evidence was presented in terms obviously designed to put the best possible gloss for the Post Office on matters, and some of his statements simply did not stand scrutiny. The one I have explained above, that SPMs had the chance to review their contracts before appointment, was expressly preceded by a statement that made clear he was referred both to the SPMC and the NTC. Such evidence is not helpful. When faced with the actual documents, he would

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agree Mr Green's points to the contrary, but one reason why the factual part of the Common Issues trial became so protracted is this approach by the Post Office generally. Agreement to even obvious points would be reached, eventually, but getting there took much longer, and a great deal more effort, than it ever ought to have done. His evidence was given through a PR-prism.

Mrs Van Den Bogerd

409. The most senior witness for the Post Office was Mrs Van Den Bogerd. She became the Business Improvement Director shortly before the trial. Her witness statement was the most substantial, and she was cross-examined over three days of the trial. She started with the Post Office in 1985, starting at the branch level as a counter assistant. She became a Branch Manager, Retail Network Manager, Head of Area for the rural agency in Wales between 2001 and 2005, General Manager for the Community Network, and as the National Network Development Manager designed developed and deployed the process which is called the Network Transformation Programme. This resulted in the closure of 2,500 branches. She was then Head of Network Services until 2012, and Head of Partnerships which included responsibility for the relationship with the NFSP. She was then Programme Director for the Branch Support Programme from 2013 to 2015, responsible for improving operations across the Post Office, including the handling of in-branch transactions. She was Director of Support Services (with responsibility for the Helpline) between April 2015 and December 2016. She was People and Change Director from January 2017 to January 2018, and she became People Services Director in January 2018, and was in that post when she signed her witness statement in August 2018. She is not only the most senior witness called, but she is obviously a very senior person within the Post Office organisation.

410. She has also been involved in the Post Office's position in relation to the litigation for some time too – she objected to the word "defending" the Post Office's position, but I do not understand this. Claims were being made by SPMs who became claimants, and these claims were resisted or not accepted by the Post Office, so defending seems to me to be an entirely apt choice of word. She had been appointed Programme Director of something called the "Branch Support Programme" at about the same time as Second Sight, an independent consultancy that was appointed by the Post Office to investigate the Horizon system, produced an interim report. This was as part of the Initial Complaint Review and Mediation Scheme which was instituted at the behest of a Parliamentary Select Committee following numerous complaints by SPMs to their constituency Members of Parliament. The Post Office did not proceed all the way through that process.

411. Mrs Van Den Bogerd at the end of her evidence described Second Sight as "independent investigators". The following description of the process appears in the Post Office's response to the Interim Report.

"1.1…..Second Sight is engaged as a firm of forensic accountants to provide a logical and fully evidenced opinion on the merits of each Applicant's case.

1.2 On 21 August 2014, Second Sight's Briefing Report – Part Two (the Report) was sent as a confidential document to a number of Applicants and their advisors, as well as to Post Office. <u>The purpose of the Report was to describe and expand on common issues identified by Second Sight as being raised by multiple Applicants (a thematic</u>

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issue). The aim being to provide general information that could then be applied in specific cases."

(emphasis added)

412. The Response by the Post Office stated that the Post Office rejected the concept of what were called "thematic issues" in a large number of sections of the Report. The Response also stated at paragraph 34:

"Second Sight identified a number of what it calls 'thematic issues' arising from its general assessment of the Applicants' complaints. Although a number of cases do have some features in common, Post Office's assessment is that each case is demonstrably different and influenced by its own particular facts."

(emphasis added)

413. Mrs Ven Den Bogerd has been closely involved in the Post Office response to the Second Sight Interim Report. I asked her if the sentence (which I have emphasised) reflected her view both at the time the Response was drafted, and also on the day she finished her evidence. She confirmed that it did, in both cases. This is not a surprise given she was involved in drafting the Response.

414. Indeed, some passages of the Response were, word for word, exactly the same as her witness statement. She did however attempt to distance herself from it where she could, by denying she was "the author" (it was never suggested she was) or that she had signed it (again, it was never suggested she had).

415. However, it is a surprise to me that she still held the view that each case was demonstrably different and influenced by its own particular facts. It is a view still held by the Post Office, and indeed in its Opening Submissions the Post Office invited me to order that findings would *not* affect the other claimants. A Group Litigation Order ("GLO") has been made by the court, despite opposition from the Post Office. Such orders are not made lightly, and have to be approved by the President of the Queen's Bench Division himself. Group Litigation has its own Practice Direction, and CPR Part 19.10 reads that a GLO "means an order under rule 19.11 to provide for the case management of the claims which give rise to common or related issues of fact or law."

416. Mrs Van Den Bogerd is entrenched in her refusal to accept this, and I simply cannot understand this. That is not to say that the issues will be resolved against the Post Office, as that will only eventually occur after future trials. However, having such a senior witness with such an entrenched view means that a degree of obstinacy affected the whole of her evidence. She seemed, to be entirely incapable of accepting any other view of the issues other than her own, which amounted to an obstinate refusal to accept that the cases of all the many hundreds of claimants were linked. She has been involved in the Post Office's handling of the complaints made about Horizon by many SPMs since 2010/2011. She remains heavily involved. She was involved in the Working Group with the title of an animal, the name of the particular animal being said to be privileged. Given she has, for so many years, been involved in defending the Post Office's position, she has become, in my judgment, extraordinarily partisan.

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417. There are two specific matters in which she did not give me frank evidence, and sought to obfuscate matters, and mislead me. The first relates to specific points of detail that were being put to her by Mr Green about Mr Abdullah's case. The records produced for the litigation (but which were not available at the time of Mr Abdullah's suspension) showed three separate TCs, each for £1,092. The short point is that these potentially showed that Mr Abdullah's branch had been incorrectly "billed" by Horizon for sums not properly due in relation to the Lottery. When Mrs Van Den Bogerd was asked about these points in detail, she said:

" ... I have just seen this cold, so I don't know what is behind it so I can't really comment further than that. I would need to understand what was actually dispatched"

418. Directions had been given for the trial of Horizon Issues, that trial commencing on 11 March 2018. As luck would have it, Mr Green was putting the detailed questions about Mr Abdullah's TCs from the Lottery on Tuesday 20 November 2018. Mrs Van Den Bogerd had signed a witness statement in the Horizon Issues trial just a few days earlier, on Friday 16 November 2018. She had dealt with these very TCs concerning Mr Abdullah in a number of detailed paragraphs in that other witness statement. When this was put to her (a little later, and after she had been given the opportunity of considering her Horizon Issues witness statement) she explained that her answer when she said she was coming to the matter cold was "a mistake". I reject that explanation. Her Horizon witness statement is very detailed, and was signed just a few days earlier. Mrs Van Den Bogerd is a very clever person, in my judgment, and she had detailed knowledge of the Lottery TCS/Mr Abdullah situation. She sought to give me the impression that she was being caught unprepared, and had only come to the matter cold when being asked questions in the witness box. This was wholly misleading.

419. The second matter concerned a very valid point that Mr Green put to Mrs Van Den Bogerd that she was very reluctant to give evidence that would be unhelpful to the Post Office's case.

420. There are many examples of this, but I shall use just one. There were numerous internal references, in documents obtained in the litigation, which Mrs Van Den Bogerd had herself authored (some with others) where she accepted problems and difficulties with Horizon that are contrary to the position adopted by the Post Office formally. In one, dated 24 October 2016 (a co-authored paper with one Marc Reardon) she and he had stated:

"Horizon Help (the in-branch operational support tool) has since its introduction over a decade ago fallen short of delivering the in-branch self-help functionality that was promised as part of Horizon roll-out and that postmasters and their assistants desperately need."

421. She accepted that entry as "an honest and candid internal recognition of the situation", which given she had co-authored it, was not surprising. The passage also seemed rather similar to the complaints made by Mrs Stockdale in her individual pleading, which said that she "had access to the Horizon system user guide and Horizon online help, both online, but these were difficult to use and often did not provide a resolution to the issue at hand."

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422. All Mrs Van Den Bogerd was prepared to accept about this complaint by Mrs Stockdale was that there was "some truth" in it, but it was "not entirely true" because the information was there, but sometimes took too long to find. This answer is inconsistent with the documents she had drafted internally. This reluctance might be explained by the Post Office's formal response to Mrs Stockdale's complaint, which was they were not sufficiently detailed, were irrelevant, inadmissible and were denied, to the extent they could be understood.

423. Mr Green put a general point to her about her approach.

"Q. Why don't you mention any of these difficulties in your witness statement? Why have we had to find all these documents and put them to you to correct the impression in your witness statement?

A. I don't ... I suppose the length of my witness statement, it is what information went in there."

424. Because that answer suggested that there was a concern or misunderstanding on Mrs Van Den Bogerd's part that her statement was restricted in length, at the end of her evidence I asked her if it was her understanding that there was a restriction on the length of her statement. She said:

"A. It was -- the witness statement is quite lengthy in itself anyway and I suppose it was just myself, just how much actually went into that statement in itself.

MR JUSTICE FRASER: So it was your judgment?

A. Yes, what information was relevant to go in there or not."

425. If that is correct, two conclusions follow. In a witness statement of 145 paragraphs, 44 of those are devoted to the Post Office as a business. None at all deal with the very great number of detailed points put to her by Mr Green, based on internal Post Office documents over the years, and this therefore must mean that Mrs Van Den Bogerd is an extremely poor judge of relevance. Her judgment also seems to have been uniquely exercised to paint the Post Office in the most favourable light possible, regardless of the facts.

426. In 2012 the Post Office adopted a software fix which was called "the ping fix". Mrs Van Den Bogerd explained this as follows:

"A. The ping fix was -- we were having a lot of transaction corrections from the lottery. So the process was that branch had to declare their figures into the Horizon system, so lottery is not connected to Horizon system and therefore they had to manually enter figures, and they were making quite a lot of mistakes doing that. So the ping was where we took the information from Camelot, because they would already have processed the information on the lottery machine, and sent the transaction acknowledgement to the branch to say: this is what your transaction sales should be, or your prizes, and therefore they just accepted that. So it was a semi-automatic way of getting the information into the Horizon system and that made a massive difference to the transaction corrections. And I believe it was 2012 although

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I am not 100 per cent certain of the date. But for 2015, I am sorry, I don't recall anything."

427. This answer was in the context of internal Post Office documents showing the overall value of TCs issued per year. In 2007 these were approximately (to 1 decimal point, which represents £100 thousand) £22.8 million; 2008 were £12.5 million; 2009 were £12.0 million; in 2010 £11.3 million; and in 2011 £4.5 million. In 2012, the year the witness thought the ping fix occurred, these fell below £1 million for that year.

428. I observed, making it clear that nothing should be read into the observation at all, the following. This was because by that stage of the trial, Camelot and the Lottery had been mentioned in evidence many times, and referred to in a great many different documents and TCs.

"This is just an observation. Camelot does seem to come up quite a lot in the different documents dealing with difficulties, doesn't it?

A. Yes, it does.

MR JUSTICE FRASER: Was that your experience before the ping fix, for example?

A. Yes, when I started looking through the branch support programme at the level of transaction corrections, Camelot was very high and there was an issue, and I looked at what we could do to try and reduce that and the ping was one of them but there were other things we were looking at as well. Partly it was because it is not part of Horizon system, it is an add-on. And whenever there is a manual input of information there is a risk that people forget to do it or they make an error."

429. To be fair to Mrs Van Den Bogerd, she had instituted various improvements in how Horizon worked when she became involved as part of her Branch Support Programme in 2013:

"A. There were a range of improvements. Really a couple of the improvements that came about from that work that we did was looking at the number of transaction corrections that were being processed, and looking at what the root cause of those corrections were and how we could look to mitigate that. So one of the improvements that mentioned as part of this hearing….. So at the end of the day, the branches basically summarise their cheques if accepted and rem them out, and part of the process on Horizon was that once you did that you had to go back into the system and then rem them out. So one of the improvements, this improvement that I introduced was where that became an automatic process rather than having to remember to go and rem out cheques. So that was one of the improvements that I introduced as part of that support programme."

430. She has also suggested other improvements that have not been adopted. For example, in Operations Board minutes from 17 October 2017 there is a statement "Ops simplification for the fix on Lottery is coming back at £0.2m and is unjustified. The solution is not to prioritise this on HNGT (next autumn) to redesign the product."

431. She gave some very useful evidence about "settling centrally" at a stage in the trial when the Post Office's position still seemed to be that the phrase was synonymous

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with an item being disputed and not being treated by the Post Office as due and owing to it. She was asked, at the very end of her evidence, about the choices available to a SPM when a TC was issued:

"…..please tell me, that if one settles something centrally the debt recovery process would then begin to be performed unless the issuing team suspended that process?

A. That is correct."

432. I consider this very important evidence. Since the trial ended, the parties have submitted their agreed Appendices 3 and 4, which have clarified this greatly. However, this evidence came in the third calendar week of the trial, and Mrs Van Den Bogerd was the first Post Office witness clearly to explain that even if a SPM "settled centrally" a disputed item, it was treated by the Post Office as a debt, which would be subject to the debt recovery process, unless that process was positively suspended.

433. Another area of her evidence which I considered to be important, and which is also relevant to the contents of Branch Trading Statement, is that relating to how SPMs were told to deal with discrepancies. The questioning was put by reference to a document which is entitled "Balance Procedure" with the footer "V5e – July 2006". This was in A4 size and was part of the training materials. However, I find that it was also available in branch (and laminated) and is the document to which Mr Abdullah referred when explaining the instructions for balancing. Whether all SPMs had it in branch or not does not matter because Mrs Van Den Bogerd accepted that it was how all SPMs were trained, and also that these "handouts" were often handed out to be taken away.

434. Firstly, the document states that "Outstanding Transaction Corrections must be resolved before the end of the Trading Period." That point is now agreed but the Post Office maintained it in issue for a significant part of the trial. Secondly, at item 5 it includes the following in relation to stock discrepancies.

"Amend Stock Discrepancies

To Reduce Stock Holdings

Transactions (F1) - Serve Customer (F1) – then sell the difference between your figures and the systems figures. (eg: The system thinks you have 225 1st class stamps, you actually have 221 1st class stamps You will then put in Quantity 4 and touch the F1 1st Class stamp icon. This will alter your system figure to 221)

To Increase Stock Holdings

Transactions (F1) – Reversals (F5) – New Reversal (F2) - then sell the difference between your figures and the system figures. (eg: The system thinks you have 400 2nd class stamps, you actually have 432 2nd class stamps. You will then put in Quantity 32 and touch the F2 2nd Class stamp icon. This will alter your system figure to 432) Then go back to the Riposte Screen."

435. Mrs Van Den Bogerd was asked about this.

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"Q. And it is standard training. What you do is you put in a fake transaction, without a customer actually buying stamps, to make your stock tally?

A. Yes."

436. This then led to a very lengthy and somewhat turgid extended debate about the different ways in which different scenarios might unfold. Examples using stamps were and are much loved in this case, although the issues are far more important than a few books of stamps. However, the principle can be illustrated by using stamps. The important points arising from this are as follows, in my judgment:

1. The steps a SPM was required to perform on Horizon "to reduce stock holdings" and "to increase stock holdings" in the event of a discrepancy were exactly the same as though a person (whom I shall refer to as Mr X) had appeared and bought 4 stamps (in the first example) or a sale of 32 stamps had been reversed (in the second example). This would reconcile the amount of stock in fact held at the branch, with the amount of stock Horizon recorded as being held there. This is common ground.

2. However, this introduces a "fake transaction" into the branch, a term accepted by Mrs Van Den Bogerd. There is no Mr X in the first example, and because he would not be purchasing those 4 stamps, the case with which such a purchase would be made (4 times the cost of a 1st class stamp, currently 67p, but much less in 2006) would not be handed over. The stock would therefore tally between physical stock and Horizon, but the cash would not.

3. This means that applying the training and following the instructions would of itself introduce a shortfall into the cash account at the branch in the total of the discrepancy, and under the terms of the SPMC or NTC, the SPM would be responsible for that personally.

4. Mrs Van Den Bogerd attempted to justify this by saying that in the worked example on the laminate, the SPM must have "forgotten to put it through".

"If you needed to reduce your stockholdings to align with what the system tells you to what you have got, then yes, it would ask you to sell it through the system because you have forgotten to put it through. That is what that is saying. And if you just amended your stock then you wouldn't get credit for selling the stamps"

5. However, this turned out to be based purely on her assumption of what in fact would be responsible for the shortfall in stock in the first place, which was fault by the SPM. When explored by Mr Green, it turned out to be the case that regardless of any fault on the part of the Post Office, everything lead to the branch, so whatever had occurred would, so far as the witness was concerned, be due to fault at the branch and so would be the SPM's responsibility. This would also apply (on her analysis) if the Post Office were at fault in sending a short delivery, which other witnesses said did happen sometimes.

437. Of course, this case concerns more than just a shortage of a few stamps. But the point is a useful one because nowhere in the training (or the interview, or anywhere else) is there any recognition of how to deal with a shortage, discrepancy or disputed TC of the order of magnitude of these six Lead Claimants, and if the steps instructed on

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these laminated instructions were followed, there would be shortages in the cash accounts of branches where these occurred.

438. The Post Office's approach can be very circular, and this was made increasingly clear by Mrs Van Den Bogerd's evidence. A Branch Trading Statement is treated by the Post Office as a settled and agreed account between it and an SPM, even though it may include items with which a SPM does not agree. This could only be fully understood when one finally came to grips with what the Post Office eventually accepted what it meant by "settle centrally". As stated in a document dated 14 November 2008 called "TC/Debt Recovery Review" the following is stated: "Settle Centrally" signifies acceptance of debt liability". The only difference between settle centrally and the other two options – making good for cash, or cheque – is time to pay. Disputes are dealt with entirely outwith the Horizon system, in so far as they are dealt with at all. This is because a positive step needs to be taken at the Post Office end even if an item or amount has been "settled centrally", to take the amount out of the debt recovery process. Even then, as Mrs Stubbs found, one part of the Post Office might say that the debt recovery process had been suspended, yet the sums still be pursued as though they were agreed to be due.

439. Another example of the circularity of reasoning generally adopted by the Post Office can be seen further in its Response to the Second Sight Report, in which Mrs Van Den Bogerd was involved. One passage deals with complaints by SPMs that their own records were removed by the Post Office and they were not allowed to have them. The Post Office's response was:

"Whilst Post Office are aware that some applicants have raised the issue that their own records were removed and not returned to them, there is no evidence produced or referenced by the report to support the position that data being withheld has prejudiced an applicant in any way."

440. I find that sort of logic more akin to that in a nonsense rhyme by Lewis Carroll, than a serious response to a number of similar (if not identical) complaints by many SPMs that the Post Office took their records. The Post Office accepted that it had removed documents – indeed, it attempted to take Mrs Stockdale's, but she would not provide them – but said that there was "no evidence" that the withholding of data had "prejudiced an applicant". Given the "prejudice" would be a SPM demonstrating that *with* the records they could provide an explanation for a shortfall, whereas *without* them they could not, such evidence of prejudice could only be provided by having the records that were being withheld. The Post Office's response to this can, in my judgment, be seen to be lacking in any common sense whatsoever.

441. Mrs Van Den Bogerd would, on some occasions, give clear and cogent evidence, and one important example is in respect of the way the Post Office treated sums that had been settled centrally. However, for the most part, she was extraordinarily conscious of the need to protect the Post Office's position in the case generally, which given her very close involvement in the Horizon problems with SPMs over the years, effectively meant protecting her own position too, which led to a disregard for factual accuracy. I find that it is necessary to scrutinise everything she said as a witness, both in her witness statement and in cross-examination, and treat it with the very greatest of caution.

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Mr Timothy Dance

442. Mr Dance is the Retail Transformation Integration Manager. This is a programme management office role, which involves the performance of programmes and ensuring project governance. Prior to that he was the Finance Performance Manager. He was at Royal Mail (which is a different entity to the Post Office, although obviously connected) between 2003 and 2012, and in November of that year became the Finance Performance Manager. This meant he was part of the Network Finance team. He reported to the Finance Director (Network and Sales) at the Post Office, Sharon Bull. His evidence predominantly dealt with business plans submitted by applicants and Post Office investment in certain branches. At one point he said "to myself as an accountant" and I therefore assume he was so qualified, although it is not mentioned in his witness statement. He was cross-examined by Ms Donnelly for the Lead Claimants.

443. He changed the pro forma business plans which were adopted under the Network Transformation programme, both to their content and how they were assessed by the Post Office. He was not involved at all with what an applicant would be sent in advance, or what terms they saw. He agreed that the declaration all applicants had to sign was included by the Post Office in order that the Post Office could rely on the contents of an applicant's business plan against the applicant, if necessary. The declaration stated:

"Declaration: I confirm that the information and documentation contained within this financial assessment is a true and accurate reflection of my personal/business financial position as at the date of my signature below. I also confirm that the business plan which is attached has been prepared with reasonable care and skill and that it is accurate to the best of my knowledge and belief."

444. This was contrasted, somewhat unfavourably, with the Post Office disclaimer on the pro forma business plan sent to Mrs Stockdale which stated, in the same terms but on a great number of pages, the following:

"Post Office Limited hereby excludes its liability for any act or omission, negligent or otherwise, and for any negligent mis-statement on the part of itself, its employees or agents in connection with this financial model. It should not be assumed or implied that the financial model has been prepared, checked, approved or endorsed either as a whole or as to any particular part by Post Office Limited. Figures included in this financial model are estimates in all cases and no warranty or guarantee as to their accuracy is given by Post Office Limited."

445. A very similar disclaimer was sent to Mrs Dar, but with wording that was even more comprehensive. New wording disclaimed liability even for the accuracy of formulae in the spreadsheets provided, as well as for the accuracy of the Post Office's own estimates for fees in the first year based on historic trading under the previous SPM. These two pro formae were sent out within 7 weeks of one another; Mr Dance could not tell which was the later one, and neither had a version number.

446. His witness statement contained statements about matters of which he had no knowledge whatsoever. e He gFor example, he had said:

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The "Post Office would discuss with the National Federation of Subpostmasters (NFSP) the questions asked in business plans. The NFSP, therefore, was aware of what information applicants had to provide in their business plans."

447. He knew nothing about such discussions at all. He had not had any such discussions himself and assumed that this had been done by Sharon Bull at a steering committee. When a series of rather confusing answers were forthcoming, what it boiled down to was that the NFSP could, may or might know about the contents of such plans if applicants showed them any particular pro forma. The

448. Mr Dance said that his evidence was not restricted to business plans for applicants under the Network Transformation Programme, but it turned out that he had only looked at those of Mrs Stockdale and Mrs Dar (both of whom were NTC applicants) and not those of Mr Bates or the other Lead Claimants who were under the SPMC.

449. I accept what Mr Dance said regarding the purpose of applicants' business plans, namely to enable the Post Office to make a risk assessment of the suitability of a particular applicant to be a successful SPM. It would be in nobody's interests – neither the applicant's, nor the Post Office's – for an unrealistic or unfeasible application to succeed. Mr Dance made it clear that the Post Office "also reviews how the business plan covers Post Office and retail income and costs to evaluate the net profit and cash flow of the business." This therefore means that the way in which an applicant has understood, and made provision for, losses due to shortfalls not only is reviewed by the Post Office but forms part of the Post Office's evaluation of that application.

450. What the legal effect of that consideration is, if any, will be dealt with in Part J below.

451. Overall I found Mr Dance's approach to giving his evidence unhelpful. His written evidence glossed over important points as I have explained above, and orally Ms Donnelly would often have to pursue a particular point in order to obtain a straight answer. I consider his evidence suffered from an overarching reluctance to provide evidence that may assist the claimants.

Mrs Helen Dickinson

452. Mrs Dickinson is a Security Team Leader at the Post Office. She started in Royal Mail in 1992 with a delivery job and in the afternoon worked for Royal Mail Revenue Protection. Her interest in this increased, and her role evolved into a full time one in that field. Revenue Protection means the department within the organisation responsible for preventing loss of cash, stock and assets by error, theft or fraud. She worked in management in Revenue Protection for 5 years, until becoming Area Manager. She moved into the Security and Investigation Service team within Royal Mail in 2000, which dealt with fraud by those not employed in the business, namely third parties, called external fraud. She joined the Post Office investigation team in a similar role in 2003, describing this as "moving across" because the Post Office and Royal Mail are separate. She was promoted to Security Team Leader in 2013.

453. She and her team deal with security-related queries, internal frauds, audit shortages if dishonesty is suspected, and robberies and burglaries. They also deal with other more obvious and physical issues such as attacks on ATM machines (such as ram raids or

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gas attacks) and robberies conducted on the fleet of delivery vehicles carrying cash and valuables, or "CViT" as this is called.

454. Mrs Dickinson did not say this in her statement, but by definition given the Post Office's case in these proceedings, unexplained shortfalls which the claimants allege were caused by Horizon would fall in her sphere of influence as the Post Office suspects dishonesty (or carelessness).

455. She explained that "a large majority" of SPMs were honest and that those who committed "acts of dishonesty are not necessarily 'bad' and often don't have histories of dishonesty. Frauds will often begin where an individual is under financial pressure, then they will rationalise their actions and the problems will simply increase. She gave examples of how this might happen, with a shortfall being dealt with initially by an intention to make good for cash, but that step may not actually be taken and the shortfall in the branch's account will simply increase. She also gave examples of how false accounts might be submitted and the reasons for this. She was also experienced in using the Proceeds of Crime Acts legislation to recover shortfalls from SPMs, and in order to do this the Post Office required those SPMs to be convicted. Such legislation cannot be used against a person unless that person has been convicted.

456. The escalation of fraudulent behaviour is described in the fraud prevention field as "the fraud triangle". When she was being cross-examined about this, Mr Green referred to the Enron corporate fraud to suggest that both companies and individuals can engage in conduct that increasingly escalates in this way within the fraud triangle, and that phrase is also used to refer to companies as well as individuals. Mrs Dickinson claimed not to know about the Enron case.

457. Enron was an energy company based in Houston, Texas. In 2001, it filed for Chapter 11 (an American phrase meaning bankruptcy), which turned out to have been caused by perhaps the largest corporate fraud in history. What was thought to be a blue-chip company with revenues of US$100 billion turned out to have engaged over many years in fraudulent accounting practices on a massive scale. One of the five major accountancy firms in the world, Arthur Andersen, Enron's auditors and management consultants, was convicted in the US of obstructing justice by shredding huge quantities of documents. Arthur Andersen collapsed, Enron went bankrupt, different individuals went to jail and the Arthur Andersen chief executive coined the phrase "we've all been Enroned". These are matters of public knowledge.

458. Mrs Dickinson is a fraud specialist and it is simply inconceivable that she was not familiar with the Enron case, at least in outline terms. I reject her evidence that she did not know about Enron, which I find incapable of belief. The only reason to claim ignorance as she did was simply to be unhelpful.

459. With respect to Mrs Dickinson, and in any event, in my judgment her evidence wholly misses the central point that is at issue in this litigation. I entirely accept that the Post Office requires its SPMs to be honest, and I do not believe that point to be in issue. The central point in this litigation is that the claimants' case is that due to the Horizon system, shortfalls and discrepancies appeared in their accounts through no fault on their part. They however maintain they were treated in a great number of cases as though they were dishonest, with all that entails, even though they were not. Explaining the importance of fraud detection and prevention measures is not relevant

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to whether these SPMs were or were not engaged in fraudulent accounting, or in resolving the very large number of legal and factual disputes between the parties.

460. Mrs Dickinson did not know that there was no "dispute" button on the Horizon system and that even disputed items by the SPMs had to be "accepted", so far as the Horizon system is concerned. She had only limited knowledge of the Horizon system, although she had been given some initial training (on a course with SPMs) and had picked things up since. She said that the number of days' training was:

"A. Three. And then basically you pick things up as you go along. But ultimately I wouldn't work on the Horizon system because then that could cause a conflict with me investigating a matter."

461. It is not clear why having more detailed knowledge of Horizon, or even having worked on Horizon, would cause her a conflict in the way she explained. Logic would suggest that an investigator might be assisted by having more detailed knowledge of how Horizon worked. In my judgment, an investigator such as Mrs Dickinson ought to have a detailed knowledge of how Horizon works, certainly in terms of the options available to a SPM at the end of a trading period, as otherwise she would not know if a SPM she was investigating was telling her the truth or not.

462. In any event, her evidence does demonstrate the Post Office's default position regarding their SPMs. This is that shortfalls and discrepancies are not caused by the Horizon system, therefore those that do occur can only be the responsibility of SPMs. This conclusion means that the Post Office fraud prevention and debt recovery procedures will be used against SPMs in this position, unless an SPM can show that the shortfall or discrepancy was not their fault. Whether this is justified will only be resolved after further trials, and this judgment does not contain findings on breach, loss or causation. Evidence saying in general terms how fraud occurs and that the perpetrators are not necessarily "bad" people does not advance matters a great deal.

Mr Michael Shields

463. Mr Shields is now a New Contracts Advisor, but until 2018 was a Temporary Subpostmaster Advisor. He started at Royal Mail in 1989 as a postman, and by 2005 had moved to the Human Resources Service Centre. He actually took redundancy in 2011, but rejoined in April 2013 on a fixed term contract during the Network Transformation programme. This was for 2 years, and when this term ended in May 2015 he became a Temporary Subpostmaster Advisor. He was cross-examined by Mr Warwick, again with a high degree of skill, for the Lead Claimants.

464. His evidence dealt predominantly with how the Post Office would place a Temporary Subpostmaster in a branch where the incumbent SPM was suspended. He would not be involved in the decision to suspend. The Post Office does not control the premises and so needs the suspended SPM to agree to a Temp, although the actual choice for a SPM who has just learned they are to be suspended is either to agree to the use of a Temp or have their branch closed by the Post Office. Not only would closure in this way affect whatever other retail business the SPM is operating at the branch, but there is the potential for detrimental public perception if the branch is simply closed. The incoming Temp receives whatever remuneration is due from the Post Office, which stops paying the SPM. For a period of time either Mr Shields or his team produced the

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contractual documentation in respect of the Post Office and the Temp, although the terms upon which the Temp would occupy and use the branch premises were agreed separately between the Temp and the suspended SPM.

465. His involvement began in May 2015 and he said had no involvement with any of the Lead Claimants. They all pre-dated his time. In fact, it was put to him that he had been copied in on e mails in relation both to Mrs Stockdale and Mrs Dar but he could not remember this. In any case, neither of these had a Temp put into their branch.

466. His knowledge of the relevant terms of the different contracts under which SPMs were engaged, and hence which did or did not deal with a power to appoint a Temp at all, was non-existent. The SPMC is completely silent on the point; he did not know this. The Modified SPMC included an additional provision that stated:

"In such cases the retail network manager may require the subpostmaster to make his premises available at a mutually agreed rate of payment for the continued provision of Post Office services."

Mr Shields was unaware of this too. He was aware of the Local NTC contract, however, and was more familiar with it than either of the SPMCs, although he would not look at it during his role to read or check the wording. He was not familiar with the term used in the NTC for a Temp, namely “temporary substitute”.

467. Clause 15.3 of the NTC reads "Following the operator's suspension, whether under clause 15.1 or otherwise, the operator shall at its own cost and expense promptly take all reasonable steps to enable Post Office Limited to maintain access for customers during the period of suspension to products and services."

468. This was read to the witness and he was then asked:

“Q: Have you seen that provision before?
A. I'm not familiar with that provision, no.
Q. It is sort of an access requirement, isn't it? But it's an odd one because it is one that requires the operator to allow Post Office to maintain customer access to products. Do you agree with that?
A. I agree with that, but a suspended postmaster has to allow access to the premises and use of the premises for us to -- for me or anybody involved in the temporary appointment process to appoint a temporary subpostmaster.
Q. Could you tell his Lordship what the source of your knowledge for that answer you have just given me is? Where do you get that from? Where do you get that understanding from?
A: That is the way it was passed over to me.”

469. It is therefore clear that Mr Shields did not know of the differences between the SPMC, the Modified SPMC and the NTC in terms of the different contractual obligations upon suspended SPMs, and that even under the NTC the SPM had to allow the Post Office access to the premises and use of the premises, whereas the clause 15.3 required the SPM to take reasonable steps. This understanding on his part was something he had been told, and given the lack of differentiation by him between SPMC and NTC SPMs, the logical consequence is that the Post Office acted this way in respect of all SPMs regardless of their different contract terms. This is consistent

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with the point accepted by Mr Breeden, namely that the Post Office doesn't tend to focus on the precise words of a contract, it knows what its interpretation is and that is what everyone works to.

470. In other words, regardless of the terms of any particular SPMs appointment, Mr Shield's cross-examination made clear that he would proceed on the basis that the suspended SPM had to allow the Post Office access and use of their premises. It also made clear that the Post Office was prepared to pay the Temp more than was paid to the incumbent SPM if the Post Office wanted the branch to stay open; and sometimes a suspended SPM might want a Temp to be appointed, but this would not happen and the branch would remain shut. 30% of all Temps were provided from three agencies, and Mr Shields and his team would have to appoint Temps to between 15 and 20 branches per month.

471. In the February 2015 version of the Post Office policy document "Appointment of Temporary Postmasters" in which Mr Breeden and Mr Shields' predecessor Mr David Sears were what was called "Key Stakeholders", it was stated:

"If the Temporary Postmaster is operating a Local Post Office, they must have exclusive use of the premises, unless the format allows for the security of all cash, stock, mail and other security items e.g. fortress format in high risk sites."

472. Mr Shields said this policy was under review currently, he was very familiar with the document and had provided input into the review, but the policy document was not accurate because in a Local Post Office the Temp would not have exclusive use. This means either Mr Shields was not being straight with me, or the Post Office does not follow its own policy. I consider he was giving me accurate evidence, which means that this policy set out in the 2015 document must be being routinely ignored by the Post Office.

473. One final point of note in respect of the Lead Claimants is as follows. Mr Shields accepted that he might line up a Temp prior to an audit taking place, in other words prior to the SPM knowing or realising that they were about to be suspended. This had appeared to happen in Mrs Stubbs' case because a document dated June 2010 referred to the Temp agency Newrose being "on standby" ready for when she was suspended.

474. I found Mr Shields broadly reliable as a witness. He did, from time to time, stray from the question in order to put the Post Office point of view, but these instances were isolated and generally he was doing his best, I find, to explain matters to me. His lack of knowledge of the terms of the SPMC and the Modified SPMC was surprising, in objective terms, but did match the Post Office's approach to contract wording generally. They believe they know what a SPM's obligations are and they do not need to trouble with the wording of the NTC or the SPMC, or the differences between them.

Mrs Elaine Ridge

475. Mrs Ridge started her career with the Post Office in 1980 at a Crown Office branch in London. She subsequently became an Assistant Branch Manager and then in the1990s

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a Branch Manager. She became a Contracts Advisor, as she put it, "in the late 1990s/early noughties" and left the Post Office in 2015. She gave direct evidence in respect of Mr Abdulla, whom she had interviewed together with Christine Adams. It was she who confirmed Christine Adams and Christine Stevens are not the same person.

476. She would perform 5 to 6 interviews a week on average, and often several a day. She could not therefore remember specific details of Mr Abdulla's interview and cannot be criticised for this. Although she stated what areas would be covered by reference to two Post Office documents, these were from Mr Trotter's interview conducted with Mrs Dar in 2013. There is nothing to suggest that this was in the use at the time she interviewed Mr Abdulla 7 years earlier, and this part of her written evidence sought to give the impression, through careful wording of her witness statement, that she covered the same ground in the interview as contained in the later checklists. Her evidence orally was very clear and she made it perfectly clear that she could not remember the interview at all and based her recollection entirely on documents. She immediately accepted paragraph 12 of her witness statement, dealing with everything she "would have" gone through with Mr Abdulla, was based solely on the 2013 document and she could not otherwise remember. Her reliance on documents not then in use cannot have been something that Mrs Ridge herself initiated for the purposes of her statement. I reject the suggestion that all of the different items in the 2013 document were gone through in the interview with Mr Abdulla in 2006. This passage of her evidence appeared to have been written for her, but again, the point was not put so I make no findings about it. She did however give evidence of her usual practice from memory:

"A. The number? You would always start off with that it is a contract for services, not a contract of employment, you were not an employee. It would cover -- I can't remember all of them now because it has been a long time.

Q. That was a big one, that first one?

A. That is the main one, yes, that would be definitely ... Staff are your employees. You would cover losses that you are responsible -- or discrepancies, it wouldn't be losses, discrepancies. So it would be that you are responsible for any discrepancy. If it is short you would have to make it good, if you are over you would take it out. Standards in the branch. Training of the staff.

Q. You didn't discuss any particular sums of the discrepancies with Mr Abdulla, did you?

A. On the whole normally I would have said it could be £1 or it could be £1,000. It didn't make any difference, it would have to be made good.

Q. Mr Abdulla is pretty sure you didn't say that. So is it possible -- you say "normally", and "normally" means not always.

A. I think it is possible that I did say it.

Q. You are saying it is possible you did, possible you didn't, is that fair?

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A. Yes. But I can't remember, so ..."

477. I found Mrs Ridge's oral evidence on this point was generally persuasive and she came across to me as entirely honest and straightforward. I find that she did refer to liabilities for losses with Mr Abdulla in the way she explained. Her oral evidence also was that she had her own crib sheet, but no copy of that is available. Liability for losses is an important point and Mrs Ridge seemed to me to be a careful person. Also, given how many interviews she must have conducted, her practice must have become fairly ingrained. She explained that, at that time, interviews would not be recorded if there were two interviewers, but she thought recording may have started prior to 2008 when it became mandatory. There was no detailed discussion of contract terms at interviews at that time, as no applicant would have had the SPMC in advance – she confirmed the practice was as has been described, that it be kept in the branch. The main focus in the interview was the business plan, which the applicants were told to bring with them. The outline summary document was not expected to be discussed and they were not told to bring that with them, by contrast.

478. I do not accept that she told him to take either legal or professional advice, as her written evidence suggests in paragraph 18 of her statement. That passage of her written statement is, I am afraid, just wishful thinking on her part, and on the part of the Post Office. I do not accept she told him that he was obliged to provide personal service. I find as a fact that he was not told to take legal or professional advice.

479. Mrs Ridge also dealt with the suspension of Mr Abdulla. She was cross-examined about this. He was invited to a meeting as has been seen, and Mrs Ridge had some documents that showed, in particular, Lottery TCs. The documents she had in the interview were lacking in much (or any) detail about what different items were, or to what they related. Some were simply numbers listed. She accepted that the much greater detail on another document, which she did not have at the time (an Excel spreadsheet) would have been helpful, and would have helped her more fully to investigate, and she also accepted that given what she had in the interview, she "could not investigate in any depth". Given the odd combination of various items all for £1092 – which she accepted "was a bit odd", this information would evidently have been very useful. She also accepted that this would be "pretty important" anyway, and would have helped her decide whether to believe Mr Abdulla at the time. I find that he was giving her an account concerning £1092 which she would have been more willing to consider was truthful had she had the Excel spreadsheet at the interview.

480. The hearing process in respect of Mr Abdulla's suspension (and eventual termination) therefore proceeded with incomplete information being provided to the person tasked with conducting the hearing and making this important decision, and still less information being given to him by the Post Office. More and better information was available, and I have already expressed my view on it dealing with Mr Abdulla's evidence above. She said requesting further information from Fujitsu – something called an ARQ - is not something that she would have done, which I took to mean in any case, not simply Mr Abdulla's alone. She also said that the Post Office rule that a SPM could not be accompanied by a legal adviser was something that the Post Office lawyers had told them, and that was the origin of the rule. I make no findings on any matters connected with breach, causation or loss. Mrs Ridge seemed to me to have a greater awareness of the need to be fully accurate and helpful to the court than some of the other Post Office witnesses.

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Mr David Longbottom

481. Mr Longbottom is a Training and Audit Advisor for the Post Office. He started with the Post Office 33 years ago, originally as a counter clerk in a Crown Office branch in Yorkshire. He has been doing training and support for at least the last 20 years. He has also been carrying out audits since 2008. He did the branch transfer audit for Mrs Stockdale in Bridlington. The branch was transferred but then immediately closed for refurbishment. Mr Longbottom had to do both the branch transfer on 30 April 2014, then again the set up and opening on 8 May 2014. He could not remember it in great detail.

482. His evidence concerned the process of transfer audits generally, and in terms of his specific evidence, what he could remember, having been shown or read some documents. Mrs Stockdale was not there on 30 April as she was having her classroom training elsewhere, and her husband attended as her representative. He was the lead auditor and the Post Office cannot locate signed copies of all the documents in the Transfer Pack. He stated, that notwithstanding this lack of documents, "all the relevant documents from the Transfer Pack would have been correctly completed, signed and returned. If documents …. are missing, I think they have been mislaid after I (or one of my colleagues) returned them to Post Office". In human terms, it is understandable that Mr Longbottom is reluctant to admit of the possibility that he did not arrange for all the necessary documents to be signed. One of the main functions of the auditors on transfer day is to obtain signatures on multiple documents, Given Mrs Stockdale signed the NTC itself this may not much matter in any event, but I accept Mr Longbottom's evidence that he would have obtained the necessary signatures and sent the documents off to the relevant departments in the Post Office, where they have been lost. However, it was also clear from his evidence and that of other witnesses – both from the Post Office, and the Lead Claimants – that Branch Transfer Day was a day of frenetic activity generally, and documents were presented to incoming SPMs for signature as a formality. He said there would be about 12 or 13 signatures required, but some documents would be duplicates, and he thought about 7 or 8 different documents were involved. Even so, I was left with a clear impression not only that there would not be time for an incoming SPM to read them all, or any of them, and the Post Office knew this, but that the Post Office did not even expect them to read in any event.

483. He had performed a visit to one of the other claimants – not a Lead Claimant – and in February 2017 he had requested transaction logs from the Financial Services Centre to assist in dealing with an investigation that SPM was trying to perform in terms of an unexplained shortfall. He had internally requested these going back only to November 2016, and the Post Office department in question had refused to give them to him. This left him angry and frustrated, although he tried to play this down by saying the visit wasn't an audit and he was doing it for the SPM "as a favour". He was undoubtedly there in his official capacity as an auditor, and he was undoubtedly asking for these records in that capacity too. I do not accept that he was performing such a task informally or as "a favour". I do not know why such records should not be made available to a Post Office auditor by others in the Post Office, particularly when that auditor specifically requested them in order to get to the bottom of what a SPM maintained was an unexplained shortfall. Given by early 2017 this litigation was well

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underway it may be an example of internal suppression of material, but I make no specific findings on that. I can think of no rational explanation for this, however.

484. One point which I found of great interest is that Mr Longbottom, who has done many transfer audits over many years, confirmed that an outgoing SPM is not permitted to leave with any documentation whatsoever when they hand over their branch. The only document they take is a copy of an Official Secrets Act statement, that includes the following words:

"I hereby declare that I have surrendered any equipment and any document including any electronic document and back-up disc made or acquired by me owing to my official position, save such as I have Post Office Ltd's written authority to retain."

485. This therefore means that no records or documents are available to them once they leave. A Final Trading Statement is also produced in relation to the outgoing SPM that stated on the front in block capitals:

"TO BE AFFIXED TO THE FRONT OF THE CASH ACCOUNT PRODUCED ON DAY OF TRANSFER /CLOSURE"

486. Mr Longbottom explained that there was no longer anything produced called a "cash account" and had not been since 2010 or so when Horizon Online was introduced. This is yet another example of documents produced and used by the Post Office being incorrect and consisting of reference to archaic items which no longer existed. Another example was an e mail sent to Mrs Stockdale from the Post Office saying it would provide a one day induction session for her and her staff on 7 May, even though the branch was not going to be ready to open until 8 May. This latter one in isolation is not a large point, but is symptomatic of the lack of accuracy generally in communications from the Post Office.

487. He said that the first paragraph on the SERV 135 form, which stated "Recent findings by the audit teams have raised doubts in my mind as to how conversant subpostmasters are with certain very important Post Office regulations," was not something that had ever been mentioned to him personally.

488. Mr Longbottom was too ready to argue the case for the Post Office; for example the previous paragraph refers to an answer from him that was only eventually reached after some difficulty. The usefulness of his evidence is limited to the points I have identified in this section. That is not to say he was always positively unhelpful, simply that he was somewhat wedded to the overall Post Office cause in the litigation. An example of this is when he was being asked about the wording on the SERV 135 form. He said in relation to the issue of whether incoming SPMs were, generally or somewhat, unaware of important contractual terms (which was said in the SERV 135 itself to have come from audit teams) "I don't think a postmaster has ever said to me that they didn't know that the funds were not for their private use." This wasn't remotely an answer to the question, and is exactly the sort of argumentative and combative answer that is wholly unhelpful. He must know that of the significant number of issues in this litigation, both contractual and otherwise, there is no question of the claimants advancing any case that the funds held in a Post Office branch are for their private use.

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Mr Michael Webb

489. Mr Webb performed the transfer audit for Mr Sabir. His evidence was in a very narrow compass and he was cross-examined by Ms Donnelly. He started working for the Post Office as a counter clerk in Lancaster Head Post Office in 1978, and over time he has had different roles within the Post Office. He became an auditor in 1998, and has been continuously in the Audit Team since 2002. That merged with the Training Team in 2008. He is currently a Training and Audit Advisor.

490. He did both transfer audits and investigation audits, but more of the latter than the former. The main focus of both was the physical counting of stock and cash in the branch. He has done hundreds of transfer audits, and in 2006 the records show that he did the one at Cottingley as the Lead Auditor, assisted by a colleague.

491. Ms Donnelly put to him a Post Office internal feedback document in 2011 that stated the following:

> "General
>
> Completing the transfer and then expecting the branch to open in the afternoon is a very optimistic expectation. In all but a handful of cases the money transfer for the business does not take place until at least 2pm on the day of the transfer and it is quite often later than that. Once the money has transferred the incoming is then pulled in all directions, trying to learn from the outgoing what all the keys open and close, learning the locking up process, how the tills work, dealing with stock takes, removal men, agreeing meter readings, putting beds together so the children have somewhere to sleep that night, numerous phone calls from the bakery/ milk/ newspaper supplier wanting to set up accounts etc etc. The last thing they want to do serve in the PO. So you either get the staff running the branch, which is OK as you can get them coached in minimum sales standards (if required) but this could obviously be completed later in the week. However as the on site FSA you want the new Subpostmaster and it is very hard to see him/her.
>
> If a single person branch you get a very harassed person who wants/needs to be elsewhere and he/she takes nothing in. No matter how much you stress on the pre-transfer telephone call what the expectation is in my experience it does not happen successfully very often. I feel we should go back to lunchtime transfers and leave the PO closed pm. As branches are generally busier mornings that afternoons anyway less customers would inconvenienced. Branches were there are staff or the Sub wants to could still open after the transfer once the money has gone through and it would make better use of FSA time as we would not need to attend until lunchtime in all but the busiest branches where it may be beneficial to go a bit earlier.
>
> We would not to sit around for at least half a day and sometimes considerably more awaiting the transfer of funds. I am of course aware that there would be an additional cost of one day on-site training if it was decided to stick to the same delivery package as at present. but this would in my opinion be justified as the value of day one on site in terms of training is generally worthless."

492. Mr Webb made it clear that he did not agree with everything stated in the document, but he did agree that transfer day was a very stressful day. Although waiting for

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"money to arrive" is a reference to incoming SPMs who may be buying or leasing the premises, and whose transactions were dependent upon receipt of funds by the selling SPM, it is clear that there was a recognition by at least some within the Post Office that "day one training on site" was worthless. There was also a recognition that on transfer day incoming SPMs had a huge amount to do, and were pulled in many different directions. It was also clear that the cost of training incoming SPMs was thought to be lower if that could be combined with a transfer audit, as the same person would perform both the training and the transfer audit. Mr Webb also made it clear that he thought a transfer audit was less stressful than an investigation audit, although relative lower stress is not of great relevance.

493. Mr Webb could remember being at Cottingley, but he could not remember Mr Sabir and he could not recall any details of the event. He said this meant nothing unremarkable had happened. Mr Sabir had a transfer audit on a Friday afternoon with the branch opening the next morning.

494. Mr Webb explained that the practice at the time was for the documentation that was to be signed by the incoming SPM – the transfer pack - would be sent to the outgoing SPM (in Mr Sabir's case Mr Rooney) by post but addressed to the auditors. The auditors would not take these with them to the branch, they would expect the outgoing SPM to have these documents ready there waiting for them. Curiously, although sent out in advance, they were not sent to the incoming SPM (so that he or she could read them) but would be provided to them for the first time on transfer day.

495. "Q. Do you know if there is any reason why all the documents that Mr Sabir was going to be required to sign on transfer day were sent to Mr Rooney in advance rather than to him?

A. That is standard practice. In those days it was sent in an envelope that was addressed to the auditors so Mr Rooney wouldn't have been expected to open them and go through them. When we rang up beforehand we would always say "Have you received the transfer pack?" and tell them "You don't need to fill those out, we will do that when we come". Nowadays we actually print them off and take them with us, they are not sent out anymore, but it is not up to either the incoming or the outgoing postmaster to fill them in beforehand."

496. These questions were then followed with these:

"Q. So Mr Sabir couldn't have had a look at them in advance of the day, could he?

A. He could if he unsealed the envelope I suppose but --

Q. If he had gone to Mr Rooney and asked him to unseal the envelope he didn't know --

A. No, I wouldn't have thought he would do that. Sorry, could you just rephrase that?

Q. Mr Sabir obviously couldn't have seen the documents sent to Mr Rooney --

A. No, we wouldn't usually --

Q. -- in advance of transfer day?

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A. No, I wouldn't say so."

497. The reference to "ringing up beforehand" is to a call from the auditors to the outgoing SPM. "Nowadays", of course, the appointments are on the form of the NTC, and this is clearly sent out in advance, and must be signed and returned. However, in Mr Sabir's time the SPMC form was being used, and these were not so signed and returned in advance. This "standard practice" of sending the transfer pack to the outgoing, and not the incoming, SPM is somewhat unusual and although it is obviously the way the Post Office conducted things, it does seem to me to be difficult to understand why it should be done this way. It means that the SPMC form could (as is obvious) be sent out in advance – the Post Office system however was such that it was not sent to the other contracting party, the incoming SPMC.

498. Mr Webb would helpfully agree with sensible points that were put to him by Ms Donnelly. He did say that he thought he would be able to answer most questions from incoming SPMs, but frankly admitted he was not often asked any on transfer day. Given the pressure on their time on such a day, I am not surprised that incoming SPMs rarely asked him any questions; they seem to have had quite a lot to deal with in any event. Mr Webb seemed to have a fairly open mind about the way he gave evidence, without worrying in advance which direction the answers might take him, and I found him reliable.

Mr Michael Howarth

499. Mr Howarth is a Network Engagement Manager for the Post Office. He started as a counter clerk in Blackburn in 1978. He progressed within the Post Office to become a training instructor in the mid-1990s, and moved into the Retail Network side of the business in 2000. In 2003/2004 he moved into the Contracts Manager role, and moved to his current post in 2010. Whilst he was a Contracts Adviser he interviewed many hundreds of applicants, and the documents show he was the person who interviewed Mr Sabir. He cannot remember doing so. He accepted that he had structured the whole of his witness statement from documents.

500. Mr Howarth signed his witness statement that stated that he had interviewed Mr Sabir by using, or by reference to, a checklist which he produced as a document, which was the same one as referred to by Mrs Ridge and Mr Trotter. He also gave evidence of what, effectively, was his standard practice by reference to this checklist, which also included (as he put it) running through parts of the SPMC.

501. However, in his evidence in chief, he stated that he had used his own personal checklist, and not the same one as Mrs Ridge (who had used her own version, the contents of which he was unaware) or Mr Trotter. There was something of an air of unreality about his evidence when cross examined about this:

"Q So have you ever seen Mrs Ridge's personal checklist that she used?

A. I haven't seen her personal checklist, no.

Q. So you are not able to say that you were using the same checklist as Mrs Ridge, are you?

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A. I can't say definitely I was using the same list but I would imagine it would contain the same key points.

Q. So it is based on what you imagine?

A. That is -- because I have never seen Elaine's Ridge's checklist, no."

502. This sort of evidence is, purely and simply, an attempt to put matters as favourably for the Post Office regardless of the accuracy of the evidence. Mr Howarth had initially in his written evidence said he had used the same checklist as Mrs Ridge and Mr Trotter. This was not the case, as he accepted when making the important correction in chief that he did. These were different checklists in use at this time, and he had not in any event seen Mrs Ridge's, and was simply making an assumption which in my judgment turned out to be incorrect. It is a puzzle how someone can expressly say their checklist was the same as that of Mrs Ridge, if they have never seen Mrs Ridge's checklist.

503. He did not in any event have any independent recollection at all, and the document which he had used to reconstruct what he said he would have covered in any interview was based on a document that either he no longer had (his own individual checklist) or one he had never seen, but imagined what was in it (Mrs Ridge's personal checklist). I did not find his evidence either helpful or particularly accurate in terms of what happened at Mr Sabir's interview. Neither did he know how Horizon worked, or that a SPM would be forced to accept in their accounts figures with which they disagreed. Nor do I accept that Mr Howarth would have explained at the interviews for SPMs that the Post Office could terminate the appointment of a SPM on 3 months' notice. I accept that he would have gone through responsibility for losses, and used an example as he explained. I accept he did use his own personal checklist, but as he did not put this in the file at the time, and there is no longer a copy of it available, that is a point that does not go very far.

504. I accept that he would routinely in interviews generally give an example about responsibility for losses, and will quote his exact answer to me. This must have been an example he had given many times and he readily explained it:

"A. What I would have said was that if you were dealing at the counter with a customer who was depositing £90 into the bank account, when you input it into Horizon you input it as £900 and gave the customer a receipt for £900, you are only physically putting £90 in the drawer, so when you come to balance you would be £810 short. So that is an error made in branch and you would be responsible for making that good."

505. I reject Mr Howarth's evidence that he would always explain to an applicant at interview that they should obtain legal advice, or that he did so with Mr Sabir. There is no doubt that the awareness on the part of the Post Office of the importance of recommending an incoming SPM take independent legal advice eventually dawned upon the Post Office at or about the time of the introduction of the NTC. That document contains wording to that effect. Indeed, it is a notable difference in the Post Office's approach from the time when the SPMC was used, as was the (perhaps obvious) step that the document should be provided in advance to an incoming SPM, giving them the opportunity to read it, and then be signed and returned. However,

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there is no reliable evidence to suggest that this was done in the days prior to the use of the NTC. Mr Howarth may have persuaded himself that he did – and I am not finding that he consciously sought to mislead me – but there is no corroboration of this, he had no independent recollection of Mr Sabir's interview, and he accepted it did not appear on his personal checklist. It would also have been very odd had he done so, because at that point the interviewee would not even have been provided with a copy of the SPMC. Mr Howarth's evidence that he did tell an interviewee to seek legal advice is, in my judgment, simply wishful thinking on both his, and the Post Office's part, and I find that this did not occur.

Mr Andrew Carpenter

506. Mr Carpenter started with the Post Office in 1993 as a Retail Network Manager. He had different posts over the years and by 2005 he was a Contract and Service Manager. He became a Contracts Adviser in the National Contracts Team in 2006 and became a Business Development Manager in 2007. He then became an Agents Contract Adviser in 2009 which is the post he still holds. He had interviewed many applicants and his involvement in this case was as the person who had interviewed Mrs Stockdale.

507. He could not remember doing so. The interview took place in 2014 in Leeds, even though his witness statement said it was in the branch. 2014 is not so long ago, although Mr Carpenter had interviewed many different applicants over the years. Some limited documentation was available. Mr Carpenter said he had noticed his witness statement was wrong so far as the location was concerned, but he had not asked to correct it. This was not a promising start to a witness giving accurate evidence. However, on the basis that he could not remember the interview at all, it may not much matter.

508. He kept his own personal interview checklist at the time (the checklist used by the Post Office now is an online one) but no copy of that was available. The business plan discussion would take up the bulk of the time in the interview. His narrative of the summary of this was in the disclosed documents and showed Mrs Stockdale's application was assessed as high risk, but this was because there were not 3 years of accounts available (because the outgoing SPM would not provide these).

509. Mrs Stockdale was a potential appointee under the NTC. So far as losses were concerned, Mr Carpenter told me that he would explain that a SPM would be responsible for losses caused by them or their staff; he would not have addressed losses caused by the Post Office, or losses not caused by the SPM or their staff, but to be fair to Mr Carpenter the Post Office generally does not accept that such things exist. It would be hard to explain to an incoming SPM their responsibility for something that the Post Office does not accept exists; this whole litigation concerns, at its heart, whether that position by the Post Office is justified or accurate.

510. He did not know how Horizon operated in any detail, did not know there was a button at F2 to "accept now", and said:

"A. No, I am aware when a transaction correction comes, my Lord, that they have an option where they can actually settle it or settle it centrally."

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511. He did know that (to quote an internal Post Office document) "Branch trading forces the acceptance of the TC on the Horizon system to enable the kit to rollover" but that point would not be dealt with an interview. He was clear that the operation of the Horizon system or the detailed way it would be operated was not part of the Post Office interview.

512. He did give very interesting evidence about the role of the Helpline, in respect of items that were disputed by a SPM, where an example was used of a notional item of £5,000.

"Q. And she [ie the SPM] can dispute it, I understand what you are saying, via you?

A. Yes.

Q. What I am asking as well is the role of the Helpline within that scenario.

MR JUSTICE FRASER: And can you, just to make life easier, just explain to me your understanding of the role of the Helpline in that scenario.

A. The role of the Helpline would be to direct the query to whichever department, whether it be to myself or whether it's the agency accounting team, who they would see as the person that was best suited to pass the challenge on to."

513. That evidence, together with that of Mrs Ven Den Bogerd, is most illuminating. I deal with them together in "Summary of the Helpline operation" below.

514. Mr Carpenter was also responsible for the decision to suspend Mrs Stockdale. Because this happened after the litigation had commenced, I was most interested in the exact sequence. Therefore in questions from me at the end of his evidence I wanted to ensure that I had a complete understanding of the sequence in respect of this.

"MR JUSTICE FRASER: Just focusing on the Mrs Stockdale suspension decision, just so I have the sequence right. I think you say you requested the audit.

A. Yes.

Q. You were looking at the whole figure [ie the shortfall in her accounts]

A. Yes.

Q. By "whole figure", do you mean including the amount that she was repaying over a period of time?

A. Yes, I was aware of the outstanding debt, my Lord, and of course the £18,000 that she had settled.

Q. What was your understanding of her choices in terms of settling sums centrally during that period when she was repaying the amount?

A. My understanding is there was never a block on her settling centrally a shortage. The options are both the same.

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Q. Sorry, when you say "the options", which options?

A. Making good to cash or cheque or settling centrally.

Q. You say they are both the same. Both the same in terms of what? Because as I understand it, if you make good to cash you put the cash in.

A. Sorry, I didn't explain myself clearly. She would have had the options she would always have had in that she could settle cash, settle cheque or settle centrally. What I understand was the situation, she wouldn't have then been able to request a repayment plan because she was already on a repayment plan to pay back previous losses.

Q. So what was your understanding of -- let's just take an example figure. If she settled £5,000 centrally --

A. Yes.

Q. -- she can't request a repayment plan, is that right?

A. (Witness nods)

A. The process would be she would settle it centrally. She would then have been invoiced for that amount.

Q. For the £5,000?

A. Yes. At which stage she would have had the opportunity to say "I can't make it good, I have a problem", and we could have then investigated further as to what was happening at the branch.

Q. Were you individually responsible for the decision taken to suspend her in May 2016?

A. At that stage I would have put a recommendation forward to make the suspension.

Q. To whom would that recommendation go?

A. To my line manager, Mr Breeden.

A. When you made that recommendation did you know she was a claimant in the litigation?

A. I don't believe I did. I knew very quickly because of the email I received the same day. I don't believe I was aware at the time but I'm not 100 per cent certain on that, my Lord."

515. The following pertinent points arise from this evidence, which I found of considerable interest. I do not consider the re-examination (which was both lengthy and leading) changes its substance in any appreciable respect.

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(1) Sums that were disputed by SPMs were treated by the Post Office, and those responsible within the Post Office for decisions to suspend SPMs, as though they were "outstanding debts".

(2) There was in effect no difference, so far as the Post Office was concerned, in terms of amounts "made good to cash" or "settled centrally". The latter were treated as debts owed to the Post Office, and were invoiced to the SPM on that basis.

(3) Having been on one repayment plan (which in reality simply means the Post Office had given an SPM time to pay, rather than having to pay the full amount immediately) an SPM such as Mrs Stockdale would not be granted another plan at the same time. Other documents show this period lasted for 12 months after the repayment plan had ended.

(4) An investigation would only be started – even on Mr Carpenter's evidence – if *after* an invoice had been sent (which did not refer to contractual obligations for losses, and asserted sums due to the Post Office in somewhat blunt terms) an SPM did not pay it and said "I can't make it good, I have a problem". I have seen no correspondence to any SPM that explains this, and this ability does not seem to have been notified to any SPM. It is also directly contrary to the correspondence sent to the SPM telling them to pay the sum due.

(5) Mr Carpenter was not 100% sure that he did not know Mrs Stockdale was a claimant when he recommended her suspension. Even though – on his evidence - he found out on the day, that does not seem to have had any effect on his recommendation to suspend at all.

516. I have already identified, when considering Mrs Stockdale's evidence, that these proceedings contain very wide ranging and extremely serious allegations against the Post Office. They include allegations of unlawful treatment, including that the Post Office has prosecuting claimants, leading to bankruptcy and community and custodial sentences (which means imprisonment). Shortly after proceedings were issued, the Post Office acted as it did with Mrs Stockdale, shutting her branch and stating she was considered to have committed a criminal offence. It also expressly stated to her factually untrue statements, namely that she had not contacted the NSBC or asked the Post Office for assistance.

517. It must be understood with crystal clarity that I am not making findings on these substantive and serious issues in this judgment. Whether the Post Office was guilty of acting in the ways complained of by the Claimants can only be resolved later in these proceedings after other trials. However, even putting it at its best for the Post Office, such conduct towards Mrs Stockdale during this early stage of the litigation could potentially be construed as threatening, oppressive, and potentially discouraging to other potential claimants to become involved in the litigation, whether by accident or design. I can think of no reason why such an approach was taken unilaterally by the Post Office in such a way, without the Post Office's solicitors giving advance notice to her solicitors, so that a less confrontational and aggressive path was adopted, given her role as a claimant in the litigation. However, even once it was done and she was suspended, the Post Office continued to act in a highly regrettable fashion.

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518. Further, the discourtesy in the Post Office simply ignoring so many communications from the SPM herself to them is extremely puzzling. The Post Office wrote to her directly (rather than to the claimants' solicitors on her behalf) when it suited them; her requests back in response were not even given a bare acknowledgement, or a request that she communicate to the Post Office's solicitors. Even her most basic and immediate request to be provided with details of the appeal process was simply ignored. Even Mr Carpenter accepted that, if he had not known she was a claimant (which he was not sure about) he had found out extremely quickly. Yet here the Post Office was, simply ignoring and "stonewalling" the desperate attempts to communicate back to them from Mrs Stockdale.

519. I am troubled by the way that the Post Office has acted in relation to Mrs Stockdale since April 2016. It must be remembered that, at the very beginning of these proceedings, there were not so many claimants as there are now. Now, there are nearly 600. She appeared as one of the first claimants in the first Schedule of Claimants, Claimant No.77. At the earliest stage, it was not Group Litigation at all. The Post Office put itself in the position of giving at least the appearance that this behaviour towards her was directly influenced by her having issued proceedings. Why the audit was performed at the time that it was, and whether the litigation was, or was not, any factor at all in that decision, is something that cannot be fully addressed at this stage of the proceeding or in this judgment, and I do not make any findings in that respect.

520. That concern is amplified by the approach of the Post Office to specific disclosure requests made by the Claimants' solicitors in this litigation in the period following the audit. On 26 May 2016 Freeths asked for disclosure of different categories of documents relating to Mrs Stockdale. These were precisely drafted categories, and included (for example) Helpline printouts, audit reports, and internal Post Office correspondence including that relating to the basis for, and making of, the decision to audit her branch and suspend her. The answer to that from the Post Office's solicitors Womble Bond Dickinson was in a letter dated 2 June 2016 and said "in circumstances where you have not set out any basis on which you believe that our client's actions have been unlawful or otherwise affect Mrs Stockdale's ability to participate in the Bates High Court litigation, we are not currently minded to engage in ad hoc piecemeal disclosure connected to a live investigation." All that the Post Office was prepared to do was preserve the documentation, which it should be noted, it would be required to do as a bare minimum to comply with a litigant's obligations generally. I am surprised that it even occurred to the Post Office otherwise that it might *not* preserve such documents.

521. On 13 June 2016 Freeths tried again, and again sought disclosure concerning Mrs Stockdale. That included a signed letter from Mrs Stockdale expressly asking for the same information. The response from Womble Bond Dickinson on 22 June 2016 was "….we find it difficult to see how provision of certain of the information you have sought will progress matters (in the absence of any input from your client as to the cause of the losses, it looks like a fishing expedition)". Yet again, the central thrust of the Post Office was that there was an initial requirement upon a SPM to demonstrate cause of the losses, in order for the Post Office to engage. This was wholly illogical. The subject matter of the litigation, which by then was well underway, included complaint that SPMs specifically could not themselves identify cause. The claim form

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itself stated that Horizon "severely limited their ability to access, identify, obtain and reconcile transaction records and themselves investigate any alleged shortfalls."

522. Some documents were provided by the Post Office on an encrypted CD-ROM, but not all, and on 29 July 2016 Freeths wrote again, seeking in particular, internal correspondence dealing with the decision to audit and suspend her; correspondence and notes relating to visits to the branch and contact with her; and documents identifying the root cause of previous shortfalls in 2015. Again, this was refused. The letter of refusal of 5 August 2016 from Womble Bond Dickinson stated that "we have given you all requested information that could reasonably be said to assist your client in identifying the cause of the shortfall" and "the relevance of these further documents is not understood in relation to the current issues". The current issues must, on any sensible construction of that phrase, at that time have included those on the claim form. In August 2016 no orders had been made by me about future conduct of the litigation. Indeed, the GLO itself was not made until 21 March 2017, and my Directions Order No.1 was not made until 26 April 2017. This statement by the Post Office's solicitors in August 2016 that the relevance of the documents "is not understood" is simply unsupportable. It is also the case that all litigants have continuing disclosure obligations. Once Mrs Stockdale was chosen as a Lead Claimant for the Common Issues trial, and at the very latest when the Post Office decided (as at some point it must have done, given the way she was cross-examined as to her credit) to accuse her formally of false accounting, the documents underlying the audit (the result of which formed the basis of the accusations) became highly relevant and clearly disclosable.

523. For the reasons I have expressed above, I have considerable misgivings about the Post Office's motivation for the treatment of Mrs Stockdale during this litigation, and for the treatment itself in terms of refusal to provide obviously relevant documents. The evidence by Mr Carpenter, far from satisfying these concerns, actually increases them. The Post Office appears, at least at times, to conduct itself as though it is answerable only to itself. The statement that it is prepared to preserve documents – as though that were a concession – and the obdurate refusal to deny the relevance of plainly important documents, and to refuse to produce them, is extremely worrying. This would be a worrying position were it to be adopted by any litigant; the Post Office is an organisation responsible for providing a public service, which in my judgment makes it even worse.

524. If there were any hint or risk of appearing to have targeted a SPM because they were a litigant, I would have thought the Post Office would have been most anxious to have done everything possible to demonstrate that were not, in fact, the case. However, on the contrary here, the Post Office has done the opposite, and has refused to disclose documentation that would resolve this point in its favour.

525. The evidence of Mr Carpenter also clearly reinforced the central flaw running through the Post Office's case, which directly impacts upon Common Issue 13. I will return to that flaw when considering that issue, but it is to treat a Branch Trading Statement as though it were an agreed and settled account between agent and principal.

526. Furthermore, his evidence wholly ignored the existence of the instruction Mrs Stockdale was given from the Post Office, recorded in a document that is still

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available, that stated in express terms that she was not permitted to settle any further sums centrally.

Mr Brian Trotter

527. Mr Trotter has been a Contracts Advisor since 2006 and conducted the interview of Mrs Dar in 2013. The business plan had been assessed by the Post Office finance team prior to the interview. The interview was recorded and the transcription was available. Mrs Dar had two interviews and Mr Trotter did both. Mr Trotter in 2013 told Mrs Dar that he started off "at the counter 33 years ago" so he has obviously worked for the Post Office for a very long period of time.

528. Mr Trotter's written evidence concentrated on the first interview. He said that "the business plan was not approved by the Post Office finance team and that was a key part of the interview". Actually, it had been approved by the Post Office finance team for the purpose of the interview, but Mr Trotter took the view that he would not approve it at the interview, and the business plan was the main focus of the interview.

529. Mr Trotter's written evidence expressly stated that he "always followed a structured format for interviews. I ran through an Interview Checklist." He also said that "after refreshing my memory from disclosed documents, I can recall parts of the interview with Ms Dar." However, he had not considered the recording or the transcript when preparing his witness statement, and when the transcript was considered (essentially in cross examination) his statement turned out not to be accurate. He had *not* gone through all the items on the checklist with Mrs Dar at the first interview. I do not accept that he went through it at her second interview either.

530. Mr Trotter had not approved Mrs Dar's business plan, and therefore she did not pass the first interview. He gave some constructive and useful guidance to her, and she actually went away, reconsidered some elements of her proposed business, came back with a different business plan and this was approved. I do not criticise Mr Trotter for that. There is not much point in making applicants submit business plans if they are all to be approved without demur. However, what I do criticise him for is that his written evidence in chief was not only so general, but so inaccurate.

531. Mrs Dar had said in her Individual Particulars of Claim that she had expressed concerns about taking over responsibility of the branch. Mr Trotter in his witness statement said:

> "Ms Dar alleges that she expressed concerns about taking over responsibility of the branch and that I provided her with assurances as to the training and support that would be provided by Post Office. I do not recall this part of the interview and do not believe that Ms Dar expressed the concerns alleged. I would have explained, as I did in all interviews with new applicants applying for Post Office branches, that Post Office offers training and support to Subpostmasters. However, if Ms Dar had expressed concerns about being responsible for the branch, I would have brought the interview to an end as she would not have been suitable for the position of Subpostmaster."

532. I wholly reject this evidence by Mr Trotter. The transcript shows that she did express concerns. She expressly stated her concerns about data protection, what she termed

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"legislative and contractual requirements", the Financial Services Authority, wanting "more assurance", and saying "I don't want too much of a risk". This specific point was not put to him, but it appeared as though his witness statement had been written by someone else, and not by Mr Trotter.

533. I have already stated above, when reviewing Mrs Dar's evidence, that I do not accept that Mr Trotter specifically told her she did not need to obtain legal advice. Mr Trotter was helpful to Mrs Dar in her re-application process, and whether that amounted to "encouragement" or not (the term she used) does not much matter. Mr Trotter thought that word was "a bit strong", but he was acting wholly sensibly and constructively and providing assistance.

534. Mr Trotter was accused of being evasive in some of his answers. I do not accept that he was being evasive, but he certainly seemed nervous about giving evidence that he thought might be unhelpful to the Post Office.

535. Before I provide my conclusion overall on the Post Office's factual evidence, there are two points that must be made. Firstly, the majority of these 14 witnesses did not have direct evidence to provide in relation to the six Lead Claimants. This is either because they were not involved, or they could not remember, or they were giving evidence about the type or system of behaviour at the Post Office, for example that a copy of the SPMC *should have* been put in an envelope to an incoming SPM. When a particular claimant states that they never received the SPMC, and all that the Post Office can do is to produce a witness who basically says "well, it should have been in the envelope" and that claimant is accepted by the court as being reliable and broadly accurate, it does not require the application of advanced theoretical physics to conclude that the SPMC was probably not sent to that claimant. In any event, such a claimant is in a good position to give evidence on a specific point such as this, compared to more general evidence from someone in the office at the Post Office who cannot remember, and just gives evidence about very general practice.

536. Being interviewed for the post of SPM, and having a branch transferred to you in order to become the SPM, is likely to be a singular event which would stick in an SPM's mind, even if that had occurred some years ago as with Mr Bates. By contrast, the person doing the interviewing, or the audit on branch transfer day, is likely to be doing those same activities again and again. Such a person might not necessarily have any recollection at all of those events with a particular SPM, unless something particular had occurred which might stick in their mind.

537. Memory is in any case somewhat subjective. In ***Blue v Ashley*** [2017] EWHC 1920 (Comm) Leggatt J (as he then was) said the following about this subject:

"IV. Evidence based on memory

65. It is rare in modern commercial litigation to encounter a claim, particularly a claim for millions of pounds, based on an agreement which is not only said to have been made purely by word of mouth but of which there is no contemporaneous documentary record of any kind. In the twenty-first century the prevalence of emails, text messages and other forms of electronic communication is such that most agreements or discussions which are of legal significance, even if not embodied in writing, leave some form of electronic footprint. In the present case, however, such a

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footprint is entirely absent. The only sources of evidence of what was said in the conversation on which Mr Blue's claim is based are the recollections reported by the people who were present in the Horse & Groom on 24 January 2013 and any inferences that can be drawn from what Mr Blue and Mr Ashley later said and did. The evidential difficulty is compounded by the fact that most of the later conversations relied on by Mr Blue were also not recorded or referred to in any contemporaneous document.

66. I have no reason to think that (with the possible exception of Mr Leach when he retreated from what he had said to Mr Blue's solicitors) any of the witnesses were doing anything other than stating their honest belief based on their recollection of what was said in relevant conversations. But evidence based on recollection of what was said in undocumented conversations which occurred several years ago is problematic. In *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm), at paras 16-20, I made some observations about the unreliability of human memory which I take the liberty of repeating in view of their particular relevance in this case:

> "16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> 17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
>
> 18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a

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> person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.
>
> 19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.
>
> 20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."

67. In the light of these considerations, I expressed the opinion in the *Gestmin* case (at para 22) that the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.

68. A long list of cases was cited by counsel for Mr Blue showing that my observations in the *Gestmin* case about the unreliability of memory evidence have commended themselves to a number of other judges. In some of these cases they were also supported by the evidence of psychologists or psychiatrists who were expert witnesses: see e.g. *AB v Catholic Child Welfare Society* [2016] EWHC 3334 (QB), paras 23-24, and related cases. My observations have also been specifically endorsed by two academic psychologists in a published paper: see Howe and Knott, "*The fallibility of memory in judicial processes: Lessons from the past and their modern*

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consequences" (2015) Memory, 23, 633 at 651-3. In the introduction to that paper the authors also summarised succinctly the scientific reasons why memory does not provide a veridical representation of events as experienced. They explained:

> "… what gets *encoded* into memory is determined by what a person attends to, what they already have stored in memory, their expectations, needs and emotional state. This information is subsequently integrated (*consolidated*) with other information that has already been stored in a person's long-term, autobiographical memory. What gets *retrieved* later from that memory is determined by that same multitude of factors that contributed to encoding as well as what drives the recollection of the event. Specifically, what gets retold about an experience depends on whom one is talking to and what the purpose is of remembering that particular event (e.g., telling a friend, relaying an experience to a therapist, telling the police about an event). Moreover, what gets remembered is reconstructed from the remnants of what was originally stored; that is, what we remember is constructed from whatever remains in memory following any forgetting or interference from new experiences that may have occurred across the interval between storing and retrieving a particular experience. Because the contents of our memories for experiences involve the active manipulation (during encoding), integration with pre-existing information (during consolidation), and reconstruction (during retrieval) of that information, memory is, by definition, fallible at best and unreliable at worst."

69. In addition to the points that I noted in the *Gestmin* case, two other findings of psychological research seem to me of assistance in the present case. First, numerous experiments have shown that, when new information is encoded which is related to the self, subsequent memory for that information is improved compared with the encoding of other information. Second, there is a powerful tendency for people to remember past events concerning themselves in a self-enhancing light.

The footnote to this last sentence in the judgment stated "For example, when US college students were asked to remember their high school grades and their memories were checked against records of their actual results, they were highly accurate for A grades (89% correct) but extremely inaccurate for D grades (29% correct). See Daniel Schacter, "*How the Mind Forgets and Remembers: The Seven Sins of Memory*" (2001) pp150-1."

538. Although that case concerned a disputed alleged oral contract formed in a public house, and this has different subject matter, those statements about memory are notable. Judges will rarely, if ever, take directly challenged evidence of fact at immediate face value, regardless of the subject matter of a particular case. The process of weighing up and considering different factual evidence involves considering, on any particular point, all the evidence in each direction including the contents of any documents. In ***Blue v Ashley,*** the central issues were what was said at a meeting the Horse & Groom on 24 January 2013 and the only sources were the recollections of those people who were present. In other cases, there may be documentary references not only to what was said or happened, but to other

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documents and e mails, as well as the contents of actual documents themselves, such as (in these proceedings) the SPMC and the NTC, together with covering letters and so on. The confusing and contradictory nature of the documents produced by the Post Office to SPMs, and the difference in terminology when referring to a particular document, together with the same terminology to refer to different documents, does not assist the Post Office in its factual case against the different Lead Claimants in this trial. Any recipient of a particular document needs to know that it is supposed to be included in an envelope, in order sensibly to have any chance of pointing out that it is not (if it has been missed). Further, if an incoming SPM is expected to familiarise themselves with the terms of a document held by the outgoing SPM, basic common sense requires that the incoming SPM is actually told this important information.

539. It is for this reason that the Post Office has had to resort to an inferential case on contract formation for those SPMs who are Lead Claimants who did not sign that standard term document. The approach of the Post Office can be summarised as follows: the outgoing SPM would have had his or her contract available; you would, should and probably did ask to see it; if you had, it would (or might) have been shown to you; therefore you had knowledge of the terms, and contracted with the Post Office on that basis. The weaknesses in such an approach are obvious, and numerous. When the formal document of Appointment, presented for signature on the day of transfer, does not even specifically refer to the SPMC and uses the ambiguous phrase "terms of my agreement" then the difficulties for the Post Office become even more pronounced, in my judgment.

540. I consider that it is likely that the Post Office itself must have realised internally that the processes for contract formation using the SPMC were inadequate, and that is why the procedure under the NTC became more conventional, with both parties having to sign it, and it being provided to an incoming SPM in advance. The Acknowledgement of Appointment still referred to documents that did not exist, and was not entirely clear, but it was at least an improvement.

541. Secondly, a number of contemporaneous documents internal to the Post Office show that there was, at least to some degree, an awareness of Horizon problems within the Post Office itself over a number of years. A number of these documents were put to the different Post Office witnesses. Some of them state the following (in chronological order). These documents were referred to in the transcript of proceedings, but not all of the documents were put. I did however tell counsel for both parties that I would read all of the documents in preparation this judgment and neither party objected to my doing that.

542. Some extracts from these are as follows:

1. On 1 November 2000 in internal e mails from Frank Manning to Sue Locke, at 14:39: "*We talked about this case when I was in St. Albans last month & it is still on-going. I visited there today & was too scared to accept a cup of tea in case the Horizon system crashed cos the electricity supply is still a live (excuse the pun) issue. The balances are a mess (in pre Horizon times - the Postmistress virtually achieved a clean balance every week) & I've got the RNM going in there next Wednesday to see what actually happens on the ground but I worry that something like 25 re-boots in one day is having an effect overall. Need your best offices to get this case to a proper*

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solution - she keeps getting promises of attention - but nothing is actually being done now to clear up the problem. ***It is Horizon related*** *- the problems have only arisen since install & the postmistress is now barking & rightly so in my view. Help please.*"

(the bold emphasis **"It is Horizon related"** is present in the original, the underlining has been added in this judgment)

2. Sue Locke sent an answer back to Frank Manning on 2 November 2000 at 09:24 which was copied to Sanjay Patel. This asked "Frank - As discussed when you visited, can you confirm that the office have had an independent electrician visit it and that the problems are due to the electrics input by Horizon?"

The answer to this was very clear from Mr Manning, in an e mail of 12:58 on the same day, again copied to Sanjay Patel.

"Answer is YES to both points."

(again, the use of block capitals was present in the original)

3. In the next email in this sequence, from Sue Locke to Kevin Cox, on 2 November 2000 at 14:05 she said: "*Frank came to see me about this office and we discussed it with Sanjay and said that she* [ie Mrs Stubbs] *needed to prove that it was Horizon that was causing all these power failures in the office (I think Remedy records this). Can you tell us please how we can now get this resolved as it appears now it is a direct consequence of the installation and not anything that has happened in steady state.*"

(emphasis added by me)

4. On 8 February 2007, in an e mail in relation to recovery of a disputed amount, Jacqueline Whitham stated:

"I in the debt recovery section of P & BA and so could only report to you TCs that have already been issued. However part of my duty includes the deduction from remuneration process and so I do have a little knowledge of the office. I can confirm that a TC relating to Lottery has been issued and settled centrally for a credit of £22,778.40. Unfortunately, this credit was eaten into by a Lottery debit TC for £34,028.00."

5. On 14 November 2008 in a document called a "TC/Debt Recovery Review" the following was noted about SPMs generally:

"Key Feedback Issues
NFSP.
They are forced to accept debts they do not agree with at Branch Trading.
7 days is a reasonable period of time to investigate a transaction correction before being forced to accept. Evidence provided is not meaningful in some cases e.g. Lottery Transaction Correction instructions are not clear."
Network
.... Processes are not understood.
Communications to branches and network needs to be improved. What does settle centrally mean?

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Costs of non-conformance – can this be passed on?

Legal
"Settle Centrally" signifies acceptance of debt liability.
Forcing TC acceptance on the same day as receipt through branch trading requirements would probably be regarded as unreasonable by a court of law and cause a related claim to fail.
NBSC.
The vast majority of calls to NBSC are either appropriate generic queries around processing TCs or complaining about being able to contact the Lottery team. There is nothing on the Knowledgebase to deal with a branch who needs more time to assess a TC.
1) Reinforcement of existing processes
> Defined product ID on TCs….
> Define Settle Centrally…

4) Rejected Proposals
Dispute button on transaction corrections – TCs are issued with evidence. The use of a dispute button simply provides a delaying mechanism and requires P&BA to resupply the evidence.

5) Further Investigation
Maintained error analysis – are any branches repeatedly getting amounts written off. Link to worst branch analysis.
Can we consolidate and issue – debits and credits? Do we keep it a secret?"

(emphasis added)

6. On 10 February 2010 in a Post Office policy document entitled "Review of the Creation and Management of Transaction Corrections in POLFS to correct accounting errors in Horizon":

"2.2.6 High Value Transaction Correction Authorisation Signature Requirement

As part of the Transaction Correction creation process a high value authorisation series of signatures has been introduced. This is a form that goes with the evidence and is signed by the level of manager dictated by the value. Between £10k and £29.99K the team leaders' signature, £30K to £49.99K Senior managers signature and over £5OK requires the head of P&BA to sign. These forms are then filed with the paperwork. The reason for creating this extra check step was two fold; firstly to prevent large credit Transaction Corrections being issued, then a long period for the debit to be issued, which then might get disputed and blocked. The second reason being to ensure that branches are not hit by a large value Transaction Correction which is subsequently found to not be proper to that branch."

"*Camelot uses a process of rolling up or amalgamating all errors incurred by a branch over a period and issues one transaction correction to the branch. They send a spreadsheet with details of the errors to the branches to help them reconcile with their paperwork. This is not a popular method and there is a feeling that branches find it difficult to understand that evidence.*

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The reason for using this method is because there are too many errors to handle on an individual basis without doubling the resource requirement or getting into a backlog situation."

"*Fujitsu send a file containing all the Transaction Corrections sent to Horizon, the data shows all the information the branch received, this includes the text. Analysis of the Fujitsu file found c2000 Transaction Correction were found to have no contact number within the text out of 40K issued between August and October 09 which is circa 5%. In some cases this is because the branches are instructed to address any disputes in writing.*

During the analysis of the long text of the Transaction Corrections there were many other issues which made the task very difficult. E.g. the text l field was very inconsistent in teams approach, some use a reference number some use the name of the product."

(emphasis added)

7. On 26 May 2010 in an internal e mail about Mrs Stubbs from Rajinder Gihir to Nigel Allen:

"*However when I put the audit figures in the Horizon it would not match the figures on my audit spreadsheet. I tried that for two hours without any success, so finally accepted the Horizon figures which came to overall shortage of the office £3218.36 a difference of £374.48 from my above figure. (2843.88). Pam was quite happy to accept the new figure maintaining that when she puts her figures for everyday work they also do not match with the Horizon*."

8. On 28 July 2010 in an email from N Allen to POL duty manger, M Dinsdale and J Owen dated 28/07/2010 re what are called ARQ Requests, which is something raised with Fujitsu but which SPMs could not action, they had to be raised by the Post Office:

"Nigel. No probs with requesting data from Fujitsu but it will take around three weeks. Has Jason agreed to take this case on, because we don't hand over Horizon logs to an spmr. It needs an expert to understand what it says and usually this requires one of the investigators"

I will give Jason a call in the morning then I will raise an ARQ from Fujitsu. Is this for our benefit, as there is a cost attached to ARQ requests, we do get a supply free of charge as part of the contract but we usually don't enough, therefore we usually charge the defence lawyers."

(emphasis added)

The reference to "defence lawyers" could mean either those instructed to defend civil claims for outstanding amounts, or lawyers acting for those SPMs who were being or had been prosecuted by the Post Office.

9. On 7 September 2012 in a Post Office Branch Audit Trend Analysis YTD Q1 2012/2013:

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"*A couple of existing agents have claimed that their discrepancies are as a result of the Horizon system. Action taken – the process we follow to investigate claims from agents that the Horizon system is generating discrepancies has been reviewed.*

The refreshed process is detailed at appendix 2."

This document is at {G/7/6} of the electronic trial bundle, and is Appendix 3 to this judgment. It is a complex flowchart, but whatever is done, eventually the central question is reached "Can agent provide specific day and timeframe for alleged fault?" If the answer to this is No, then the SPM will be told that the Post Office response is to "Advise unable to progress further until can do so".

10. On 17 October 2012, at a meeting which 4 Fujitsu personnel attended as well as numerous Post Office personnel, entitled "Receipts-Payments Mismatch issue notes":

"What is the issue?
Discrepancies showing at the Horizon counter disappear when the branch follows certain process steps, but will still show within the back end branch account. This is currently impacting circa 40 Branches since migration onto Horizon Online, with an overall cash value of circa £20k loss. This issue will only occur if a branch cancels the completion of the trading period, but within the same session continued to roll into a new balance period.
At this time we have not communicated with branches affected and we do not believe they are exploiting this bug intentionally. The problem occurs as part of the process when moving discrepancies on the Horizon System into Local Suspense.
Note the Branch will not get a prompt from the system to say there is Receipts and Payment mismatch, therefore the branch will believe they have balanced correctly.
Impact
• The branch has appeared to have balanced, whereas in fact they could have a loss or a gain.
• Our accounting systems will be out of sync with what is recorded at the branch
• If widely known could cause a loss of confidence in the Horizon System by branches
• Potential impact upon ongoing legal cases where branches are disputing the integrity of Horizon Data
• It could provide branches ammunition to blame Horizon for future discrepancies.
The Receipts and Payment mismatch will result in an error code being generated which will allow Fujitsu to isolate branches affected this by this problem, although this is not seen by the branches. We have asked Fujitsu why it has taken so long to react to and escalate an issue which began in May. They will provide feedback in due course.
Fujitsu are writing a code fix which stop the discrepancy disappearing from Horizon in the future. They are aiming to deliver this into test week commencing 4th October. With live proving at the model office week commencing 11th October. With full roll out to the network completed by the 21st of October. We have explored moving this forward and this is the earliest it can be released into live.
The code fix will on stop the issue occurring in the future, but it will not fix any current mismatch at branch.
Proposal for affected Branches
There are three potential solutions to apply to the impacted branches, the groups recommendation is that solution two should be progressed.

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SOLUTION ONE - Alter the Horizon Branch figure at the counter to show the discrepancy. Fujitsu would have to manually write an entry value to the local branch account.
IMPACT - When the branch comes to complete next Trading Period they would have a discrepancy, which they would have to bring to account.
RISK- This has significant data integrity concerns and could lead to questions of "tampering" with the branch system and could generate questions around how the discrepancy was caused. This solution could have moral implications of Post Office' changing branch data without informing the branch.

SOLUTION TWO - P&BA will journal values from the discrepancy account into the Customer Account and recover/refund via normal processes. This will need to be supported by an approved POL communication. Unlike the branch "POLSAP" remains in balance albeit with an account (discrepancies) that should be cleared.
IMPACT - Post Office will be required to explain the reason for a debt recovery/ refund even though there is no discrepancy at the branch.
RISK - Could potentially highlight to branches that Horizon can lose data.

SOLUTION THREE - It is decided not to correct the data in the branches (ie Post Office would prefer to write off the "lost"
IMPACT - Post office must absorb circa £20K loss
RISK - Huge moral implications to the integrity of the business, as there are agents that were potentially due a cash gain on their system"

(emphasis in bold present in original; emphasis by underlining added)

11. On 14 May 2013 in a document entitled "Local Suspense Problem":
"*The purpose of this note is to provide a management level summary of the "Local Suspense" problem that was identified earlier this year and was seen to impact 14 of the current Horizon Branches. This issue occurred on Horizon Online and due to the different architecture of the old Horizon system, such an issue could not have occurred on the old Horizon system.*
...This problem was not reported to Fujitsu in 2011/12 and only affected a small number of branches and only for a single Trading Period. However, it was reported to Post Office Ltd who could see the impact of the problem in their back end system and wrote off the loss for the branch but did not ask Fujitsu to investigate further."
"*At the same trading period 2012/13 the problem reoccurred and this time one of the affected branches reported the problem to Fujitsu on 25th February 2013 (Peak 223870) resulting in a detailed analysis of this issue and finding the orphaned BTS records. The root cause was determined by 28th February 2013 and a preliminary report was sent to Post Office Ltd. A further update was sent on 14th March 2013 with a full analysis of the issue and all affected branches.*"
(emphasis added)

12. On 26 June 2013 in an internal document "Benefits of extending the life of business transaction data":
"***Business benefits***
The business, in particular the Security and P&BA departments suffer from the inability to interrogate its data due to the short periods of retention. If we were to

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keep data for longer and for that data to be interrogatable the following areas should benefit:
POCA Claims and Disputes
Banking
Other product Claims and Disputes
Flag cases
Fraud and Conformance investigations
Proactive fraud identification (obviates the complexity costs of the Detica project which if goes ahead will need to take inputs from multiple sources instead of just one single database)
Security investigations
Criminal investigations
SPMR Contract advisors – re non-conformance suspension hearings"
Financial benefits
Paying Detica for proactive fraud project probably way too much due to complexity of taking from multiple sources ARQ (Audit retrieval process) costs at least £384k recurring annually. This is subsumed without breakdown in the Fujitsu Security Management costs. 720 requests @ £450 unit cost"

13. On 24 October 2016 in what is called in the trial bundle Index "Business Case Paper", but the actual title on the document is "Network Development Enhanced User Help & Support":
"1. Horizon Help (the in-branch operational support tool) has since its introduction over a decade ago fallen short of delivering the in-branch self-help functionality that was promised as part of Horizon roll-out and that postmasters and their assistants desperately need. This has resulted in a sub-optimum level of service to customers when branches are unclear on a product detail and need to seek help from the Branch Helpline (NBSC). NBSC currently handles 30,000 calls per month and costs c£1.5m pa."

The proposal in the document, which was to provide "Enhanced user help and support" on Horizon was described as a *"Key change"*. It involved *"an intuitive search engine that enables the in-branch user to quickly get to the information they need, therefore building the trust of branches in the content and encouraging self-service*." Under consideration of the question *"what would the impact be of delaying or rejecting the decision to progress"* (which was obviously going to incur a cost) the following was stated*:*
"Delay or rejection would result in:
a. Continued acceptance of a poor Horizon user experience and consequently an equally poor customer experience."

14. Finally, on 17 October 2017 in the Operations Board the following is stated. "Client" is another name for a company with whom the Post Office does business, such as Camelot for the National Lottery:
"Camelot:
Data integrity from client has led to a hold on TC issued in P6. The increase in P6 following clearing back logs which is expected to take until P7 to clear.
Ops simplification for the fix on Lottery is coming back at £0.2m and is unjustified. The solution is not to prioritise this on HNGT (next autumn) to redesign the product."
(emphasis added)

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543. These internal Post Office entries make it clear that, notwithstanding the tenor of the Post Office evidence before me, behind the scenes there were at least a number of people within the Post Office who realised that there were difficulties with the Horizon system. Whether the internally expressed reservations then, or the different position expressed now by the Post Office, is the correct one is something that will only be resolved after the Horizon Issues trial.

544. I have no reason to think that any of the Post Office witnesses were doing anything other than stating their genuine belief as at 2018 (when the trial occurred) based on their recollection, with two exceptions. The first is some of Mr Beal's more extreme claims that the drafting of the NTC was designed to replicate a SPM's responsibility for losses under the SPMC, and that it was also intended by the Post Office that the contract with the NFSP would be made public. Neither of those claims bear analysis when compared with the detailed drafting of each of those documents, both of which had been carefully drafted no doubt with the assistance of sophisticated legal advisers. The second is Mrs Van den Bogerd. She tried to give me the impression that the detailed cross examination about Mr Abdulla was something she could not really deal with because she had no detailed knowledge in the witness box. This was simply not correct; she had signed a very detailed witness statement just a few days before for the Horizon Issues trial which dealt with the matters being put to her about Mr Abdulla in considerable detail. I find that she was simply trying to mislead me. She also explained a wholesale absence in her witness statement of highly relevant matters as being due to a restriction on length of that document, or if not a restriction, a desire to keep her witness statement short. That answer was simply disingenuous. This is a very significant and high profile dispute for the Post Office. There was no such restriction on length, and I do not believe that, of all the witnesses, she felt there was any need to keep her statement short. The non-inclusion of that evidence within her statement is explained, in my judgment, by the Post Office's approach to the litigation. The Post Office appears determined to fight every single possible issue, and make resolution of this intractable dispute as difficult and expensive as it can. Mrs Van den Bogerd did not deal in her witness statement, which was her evidence in chief, therefore supposed to be the whole story, because those matters which Mr Green was putting to her in some detail were highly unfavourable to the Post Office's case. She was simply not prepared to volunteer such matters in a witness statement.

545. The problem with the Post Office witnesses generally is they have become so entrenched over the years, that they appear absolutely convinced that there is simply nothing wrong with the Horizon system at all, and the explanation for all of the many problems experienced by the different claimants is either the dishonesty or wholesale incompetence of the SPMs. This entrenchment is particularly telling in the Post Office witnesses who occupy the more senior posts. When even a Post Office auditor, Mr Longbottom, attempts to go beneath this veneer, to investigate an unexplained shortfall, and finds that he is not provided with the documents he considers necessary, very considerable doubts arise about the Post Office's overall control of information.

546. Mrs Van den Bogerd is a particularly stark example of how a witness had to force their evidence of fact to fit with a pre-ordained thesis. She remains, apparently genuinely, of the view that all of the different claims by the 589 claimants have no common issues or themes between them, and every single case is simply factually

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different with no connection between them. This is despite the approval of a Group Litigation Order by the President of the Queen's Bench Division.

547. They appear to maintain this view, notwithstanding the weight of material put to them. Whether that view is in law and fact justified can only finally be resolved after subsequent trials. But they remain steadfastly committed, in their collective psyche, to the Post Office party view, despite such steps having been taken as amendments to the Camelot software using the Ping fix, and the contents of some of their own internal documents that suggest to the contrary. They give me the impression that they simply cannot allow themselves to consider the possibility that the Post Office is wrong, as the consequences of doing so are too significant to contemplate.

548. Unless I state to the contrary, I would only accept the evidence of Mrs Van den Bogerd and Mr Beal in controversial areas of fact in issue in this trial if this is clearly and uncontrovertibly corroborated by contemporaneous documents.

Summary of the Helpline Operation

549. The evidence is clear that when a SPM became aware of discrepancies or shortfalls which they could not explain or understand and/or did not want to accept, or when they received Transaction Corrections with which they did not agree, they were supposed to call the Helpline.

550. Calling the Helpline was presented by the Post Office in the evidence for this trial as being the way that a dispute was registered by a SPM at, before, or no later than the end of a branch trading period, and in order to generate a Branch Trading Statement. The Branch Trading Statement is treated by the Post Office as having the status of an agreed and settled account between agent and principal. The status of a Branch Trading Statement is entwined with the meaning of the phrase "settle centrally".

551. In the Post Office document dated 14 November 2008 "TC/Debt Recovery Review" to which I have already referred to above [438] above, the following two highly notable statements are included. The first is that, as clearly identified in that document, the Post Office recognised as long as ten years ago that SPMs "are forced to accept debts they do not agree with at Branch Trading". The phrase "at Branch Trading" means at the end of the branch trading period. The second is, in relation to the question "what does settle centrally mean?" the answer is clearly given as follows:

' "Settle Centrally" signifies acceptance of debt liability'.

552. The reason that I find those two statements so notable, is, firstly, that they are entirely in accord with the evidence given before me in this trial by both the Lead Claimants and the Post Office witnesses. They are however both directly contrary to the case being run by the Post Office in this trial. In the early phase of the Common Issues trial at least, it was expressly submitted by the Post Office – and also put to some of the Lead Claimants – that a SPM did *not* have to accept debts with which they did not agree at the end of a branch trading period. That proposition is plainly incorrect in fact. It is recognised as being incorrect in fact on the terms of the Post Office's own internal documents. I find as a fact that SPMs were forced "to accept debts" with which they did not agree at the end of a branch trading period, in other words within the Branch Trading Statement for that period.

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553. The second reason that I find those statements so notable is that the Post Office spent an enormous amount of time in the trial before me attempting both to persuade witnesses, and indeed persuade me in submissions, that if a SPM decided to "settle centrally" then that meant the item was put in dispute. In other words, that the phrase "settle centrally" did *not* signify acceptance of debt liability. This proposition is also plainly incorrect in fact. Even Mrs Van den Bogerd accepted that if an item were "settled centrally" it was treated by the Post Office as a debt owed to the Post Office by the SPM. It would be subject to debt recovery procedures, and if a SPM ignored the letters of demand and did not pay, then the best that the SPM could expect would be a repayment plan. That, of course, would still lead to the SPM paying the sum in question, simply over a longer period.

554. There is no doubt that some sums that the Post Office considered were outstanding debts were written off and not pursued; Mr Bates' early experience of the sum of £1041 which he refused to accept or pay was written off. However, those isolated examples (and they are isolated) do not have any effect upon the status of a Branch Trading Statement, or the meaning in context of "settle centrally".

555. It is therefore the case that the only route for any SPM to challenge specific items with which they did not agree (such as TCs) or discrepancies or shortfalls in the figures generated by Horizon was the Helpline.

556. However, the Helpline does not seem to have operated in that way, and on the evidence before me for the issues in this trial, the matters in dispute reported to the Helpline were not treated differently even when they were reported. The Lead Claimants' evidence made it clear that just getting through to the Helpline was an achievement in itself, and when this was finally accomplished, the experience would be variable at best, and does not seem to have come close to resolving any of the disputes. Some operators would assist with getting Horizon to permit rollover into the next trading period by suggesting "work arounds". These "work arounds" did not resolve disputed items. No particular investigation appears, in the case of any of the six Lead Claimants, to have been initiated by reporting a dispute to the Helpline. An item "settled centrally" would be subject to debt recovery processes by the Post Office regardless of what the particular Lead Claimant did regarding the Helpline.

557. Mrs Stockdale assumed the debt recovery letter she received meant an investigation had been done and resolved against her. That assumption was not correct. Mrs Stubbs has been pressing for many years to find out the outcome of whatever "investigation" was in fact performed in her case. In both cases, the Helpline had been notified by each of these Lead Claimants. In neither case could the Post Office produce and put to the claimant, or show the court, the end product of any such investigation.

558. It is therefore the case that, on the evidence before me, the Helpline did not operate for the Lead Claimants in the manner that the Post Office contended for. What was presented to the court by the Post Office in respect of disputes notified to the Helpline show that, for the most part, initially the SPM was told they would have to pay the shortfall. Even when persistent, all that would happen is the sum would be "settled centrally" and after a period of a few weeks the SPM would be chased for the Post Office for that sum as though it were a debt. Detailed findings of fact as to this must however wait for a later trial.

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The Post Office approach to documents

559. There is no doubt that the Post Office is acutely aware of the potentially damaging repercussions in terms of its reputation, if this litigation succeeds. That is entirely understandable. I have dealt with the cautions urged upon me at [35], and in my judgment on the pre-trial strike out application also identified that the Post Office's own evidence for that hearing explained that it wished to avoid adverse publicity.

560. What is less understandable is the way that this approach seems to have affected the Post Office's approach to documents. The following examples can be given:

1. Even the identity of both the sender and recipients of internal e mails about the termination of Mr Bates' appointment have been redacted from disclosed correspondence, as I have explained at [120] above. The contents of the e mails are themselves heavily redacted, and the court will not go behind such an assertion of privilege. However, given that part of the e mails are not privileged, and have not been redacted, I cannot see any sensible basis for the redaction of the identity of the sender and recipients.

2. I have accepted Mrs Stubbs' evidence concerning the instruction given to the Temporary SPM, after she was suspended, that all documents relating to her appointment in the branch should be destroyed. This is dealt with at [166] above.

3. I have also dealt at [483] above with the Post Office refusal to give one of its own auditors, Mr Longbottom, the documents that he requested internally, which he must have considered he needed, when attempting to get to the bottom of unexplained shortfalls at another branch.

561. These are examples, in my judgment, of a culture of excessive secrecy at the Post Office about the whole subject matter of this litigation. They are directly contrary to how the Post Office should be conducting itself. I do not consider that they can be a sensible or rational explanation for any of them.

The "debt trap"

562. Finally by way of summary of the evidence, the Post Office would, when faced with a persistent SPM, discuss and offer what the Post Office witnesses referred to as "mitigation". Mitigation is a word that means moderation or reduction in effect, as well as other similar words. If a party mitigates the loss it has suffered, this means steps are taken that reduce the effect of that loss. In the sense the term was being used by the Post Office's witnesses, it meant that the financial impact of the shortfall, discrepancy or unexplained loss would be "mitigated", by the SPM being given time to pay. Payment in instalments, usually 12 months, was offered, instead of the payment being demanded instantly.

563. This approach had two very fundamental problems. Firstly, it confused primary liability (whether the SPM was liable for the disputed sums at all) with mitigation of the effect upon the SPM of owing the Post Office those sums. Mitigation only has any relevance if primary liability is first established. That step was ignored completely by the Post Office. Secondly, because that first step was ignored, there was no separate resolution to the dispute; a blanket assumption was made that the sums were indeed

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owed by the SPM. Thirdly, if there were subsequent disputed sums, these were dealt with the same way, namely the same assumption was made again. In fact, the SPM's position was even worse for subsequent shortfalls, as they would already have been given time to pay for amounts for which the Post Office considered they were also liable.

564. These problems led to what Mr Green described as a "debt trap". The sequence would go as follows. The Horizon system would show that there was a discrepancy at the branch, which so far as the SPM was concerned would have arisen through unexplained shortfalls and discrepancies. These were challenged through the Helpline. That SPM disputed that the sums were due. Because of the way that the Post Office approached such disputed items, these were treated as due and owing by the SPM to the Post Office in any event, in other words as non-disputed debts. The most that a SPM could expect from the Post Office was time to pay off the amount, over 12 months, deducted from their future remuneration. The only alternative the SPM would have would be giving notice themselves, which would bring to an end their appointment as a SPM, and they would in any event (so far as the Post Office was concerned) still owe the disputed sum. Accordingly, the SPM would accept the offer of time to pay – it was their only real alternative. This scenario is amply demonstrated by the position in which Mrs Stockdale found herself. She was told matters were being investigated, but then sums said to be due were demanded from her in any event. The most she could obtain was time to pay.

565. Their position would then, in financial terms, simply become increasingly worse for any subsequent unexplained discrepancies and shortfalls. The amount owed would simply increase in size. This downward spiral would continue until, at some point, the amount would be too large for the Post Office to deal with in instalments; or the Post Office would perform another audit; or the Post Office's patience would come to an end. Suspension would then follow. Throughout the entire sequence the Post Office would treat the sums as undisputed debts.

566. The whole of this litigation is aimed at resolving the disputes involved between the different SPMs and the Post Office. However, it remains the case that there was no separate mechanism established at any stage to resolve the disputed shortfalls and discrepancies. As the flow chart at Appendix 5 demonstrates, unless the SPM can identify with precision the day and time of the fault he or she alleges, the Post Office will not assist. This is clear from the entry "Can agent provide specific day and timeframe for alleged fault?", where if the answer is "No" the following entry states "Advise unable to progress further until can do so." This is a 2012/2013 document, but I find as a fact that it correctly identifies the Post Office's approach to this issue raised by SPMs from the introduction of Horizon onwards.

567. Given the amount of information available to a SPM on Horizon, it is difficult to see how an SPM in this position could ever satisfy the Post Office by providing exact details of the fault, or product, that had led to the unexplained shortfall or discrepancy. In any event, by confusing mitigation with primary liability, the Post Office's approach meant that the most favourable outcome any SPM could hope to achieve for disputed shortfalls and discrepancies was time to pay the disputed sums. The only exceptions to this were when, occasionally, items were "written off" with no explanation which is what happened to Mr Bates, or when a SPM simply refused to pay, which is what occurred with Mrs Stubbs. However, even Mrs Stubbs paid the

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sums she disputed in 2000, before her awareness of the situation was as developed as it became, and when the sums claimed by the Post Office were far more modest.

E. The Factual Matrix

568. The reason that so much of this judgment has been concerned with the facts is two fold. Firstly, a great many material facts were simply not agreed by the parties. The only way forward therefore was to decide the contested issues of fact. Secondly, there are six different Lead Claimants, each with their own different factual situations concerning contract formation. It was also the case that the way in which the Branch Trading Statement came to be produced, and what options a SPM had at the end of a branch trading period, was in issue, at least until after the end of the trial when Appendix 3 was produced. Even then, given the potential public importance of the issues to other cases, I have considered it beneficial to identify in detail what a Branch Trading Statement is or was, and how it would come to be generated by a SPM who wished to dispute the accounting information from Horizon in respect of his or her branch. In any event it was necessary to do so, given the subject matter of Common Issues 12 and 13.

569. I find the following as facts, retaining the numbering from Categories 2 and 3 of the Revised Factual Matrix. Category 1 (which was numbered 1 to 22) included agreed facts and therefore it is not necessary to make findings in respect of those. It should also be remembered that Horizon did not exist until 2000. Although when I come to consider Contractual Formation in Part G for Mr Bates and Mrs Stubbs, the question of the SPMC governing their contract with the Post Office is in issue, the questions of construction of the terms SPMC arises anyway. The Post Office did not identify in its Opening or Closing Submissions any variation to the SPMC as at the date of the introduction of Horizon. The Post Office maintained that the underlying manuals were changed, and also maintained that these had contractual effect. However, neither party contended that those manuals changes the terms within the SPMC which require construing as part of the Common Issues trial.

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23, 24 and 62. The Post Office decided which products and services must be available in a branch, and over time the number and complexity of these increased.
25. The question of the "high degree of power, discretion and control" and "significant imbalance of power between the contracting parties" is considered under Common Issues 1, 5 and 7.
26. The claimants did make long term and expensive commitments in respect of their relationship with the Post Office. The Post Office denied this was true. This denial is an example of the attritional approach of the Post Office to this litigation. This is, in my judgment, obviously true; claimants who purchased property (freehold or leasehold) and who, literally, lived "above the shop" because they lived at the premises, obviously made an expensive commitment. Even those who did not obtain residential accommodation as part of their acquisition of any branch made long term and expensive commitments. Sensibly, this point should not have been in issue and could readily have been agreed.
27. It is a factual matter in each case, under the SPMC, whether the Post Office provided a particular claimant with a copy of the full terms of the relevant written contract at or before the date of their appointment. Whether they were provided with it after the date of contracting is not relevant. I have made specific findings for the four Lead Claimants whom this affects.
28. The Post Office drew specific attention, so far as the SPMC is concerned, to certain terms in the letter sent to appointees which extracted some isolated terms. No such specific attention was drawn to onerous or unusual terms in the NTC, although that document was required to be signed. The effect of that signature is considered in Part O.
29. The operation of the contractual relationship between individual SPMs and the Post Office Defendant required a high degree of communication, co-operation and predictable performance, based on mutual trust and confidence.
30. The Post Office provided the system by which transactions effected or initiated by Claimants were ultimately executed and by which a record of such transactions and their financial incidents was kept.
31. When there were discrepancies between trial balances generated by Horizon and the physical cash and stock in hand which appeared to show less cash or stock in hand than shown on Horizon ("an apparent shortfall" or an "alleged shortfall"), the Post Office did require Claimants to make good the amount at the time of balancing, unless '*other arrangements are agreed'*. The only "other arrangements" of which evidence was given in this trial is a SPM was given time to pay, or in isolated cases (such as Mr Bates) amounts were written off.
32. Claimants seeking to dispute apparent shortfalls, or shortfalls, discrepancies or TCs with which they did not agree, did not have an option within Horizon to do so, and were required to contact the Helpline to seek assistance. Given the reliance placed by the Post Office on the Branch Trading Statement, this is plainly of the utmost relevance.
33. Claimants who contacted the Helpline were in any event required to settle any disputed amounts centrally. This meant that the disputed amounts were treated by the Post Office as debts to be recovered.
34. Claimants were themselves unable to carry out effective investigations into disputed amounts because of the limitations on their inability to obtain the necessary information from Horizon.
35. The process for disputing discrepancies or apparent or alleged shortfalls is agreed by the parties in Appendices 3 and 4 to the judgment as being by phoning the

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Helpline. However, even amounts that were disputed in this way were treated by the Post Office as debts owed by the SPM.
36. A branch cannot enter (or "roll over" into) a new trading period without the Subpostmaster declaring to Post Office the completion of the Branch Trading Statement. That would include disputed amounts.
37. The Post Office operated the Helpline which it provided and recommended to Claimants as a primary source of advice and assistance in relation to Horizon, transactions, errors and issues relating to their trading statements and accounts.
38. The Post Office required Claimants to comply with contractual obligations in relation to the keeping and production of branch accounts.
39. The Defendant had the power to seek recovery from Claimants for losses relating to branch accounts.
40. The Defendant in fact sought recovery from the Claimants for apparent shortfalls. I would also add that on the evidence the Post Office did this regardless of whether disputes had been reported to the Helpline or not. This was accepted by all the Post Office witnesses, and occurred whether the SPM in question was appointed under the SPMC or the NTC, even though the terms of those contracts were different. It was also done regardless of any analysis of any causative fault on the part of SPMs. It was also done when the SPM in question had been told that no action would be taken in respect of a disputed shortfall.
41. It is a matter for the Horizon Issues trial whether it would be right to infer or presume that a shortfall and loss was caused instead by a bug or error in Horizon.
42. The Post Office required Claimants to accept changes to records of branch transactions, (“Transaction Corrections” or “TCs” issued by the Post Office), unless the Claimant was effectively able to prove that the Transaction Correction was not correct.
43. The Post Office did sometimes issue Transaction Corrections after the end of the branch trading period in which the transaction had taken place. There was only limited evidence before me about whether this was also done after the 42/60 day period during which Claimants could generate (limited) reports using Horizon. However, for some of the examples used in evidence, this time limit was not observed by the Post Office.
44. The Post Office required Claimants to *‘balance and complete a Branch Trading Statement’* at the end of each branch trading period, initially on a weekly basis, but this changed subsequently to a 4 or 5 weekly cycle.
45. Completion of branch trading statements required balancing of physical cash and stock in hand with a trial balance produced by Horizon; and also SPMs were required to check and confirm that the cash and stock shown in the accounts matched the cash and stock held in the branch in order for the branch to enter a new trading period and to continue trading the following day.
46. The Post Office effected, recorded and managed the reconciliation of transactions effected by the Claimants.
47. Whether it was the Post Office who possessed and/or controlled the underlying transaction data in relation to such transactions, or whether it was the Post Office’s clients (such as Camelot) is an issue which cannot be resolved in this trial. It was certainly not the Claimants. This is relevant to Common Issue 13.
48. The Claimants were ultimately reliant on those transactions being executed, reconciled and recorded by the Post Office.

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49. Horizon comprised computer system hardware and software, communications equipment in branch, and central data centres where records of transactions made in branch were processed, recorded and retained.
50. The introduction of Horizon limited the Claimants' ability to access, identify, obtain and reconcile transaction records.
51. The introduction of Horizon limited the Claimants' ability to investigate apparent shortfalls, particularly as to the underlying cause thereof. Both this, and 50 immediately preceding it, are obvious on the evidence, and could readily have been agreed. It cannot sensibly be argued to the contrary, in my judgment.
52. Horizon operated such that transactions entered by Claimants or their staff or assistants onto terminals in branches were transmitted to the Defendant's central data centre where they were processed, recorded, reconciled and retained. Sometimes, such transactions may be performed by a Post Office auditor or trainer. Occasions when this might happen were during on-site training, when an auditor might be assisting/training/observing a newly appointed SPM, and also on other occasions when an auditor might be present in the branch.
53. This did not form part of the evidence before me in this trial.
54 to 57. I cannot make detailed findings about Fujitsu's role on the basis of the evidence before me. However, it is clear that Fujitsu were able to obtain greater information about a particular branch's transactions than either the Post Office or the SPM. How this was done, and whether it included providing a data transfer service between the central data centres and clients of the Post Office, must await the Horizon Issues trial (if relevant).
58. The evidence is that Fujitsu would raise a cost to the Post Office with respect to data sought from it, once an initial number of enquiries had been made of it. No findings can be made at this stage as to whether this affected the behaviour of the Post Office (or disincentivised the Post Office) from making such enquiries or investigating apparent shortfalls properly, or from seeking to obtain underlying data. That must wait for future trials.
59. I find that in some instances, there was discussion internally at the Post Office about the altering of branch transaction data directly, and also of the Post Office and/or Fujitsu carrying out changes to Horizon and/or transaction data which could affect branch accounts. Mrs Van den Bogerd accepted this could be done. Further detailed findings on this will be dealt with in a later trial.
60. There is no evidence available to demonstrate that *any* SPM has, to date, ever been able to establish to the Post Office's satisfaction that an alleged shortfall was the result of a Horizon bug or error. There is however evidence that the Post Office has, on occasion, "written off" sums which it had initially claimed were due to it. This happened in Mr Bates' case. However, there is no explanation available for why that was done.
61. The Post Office has on occasion detected that Horizon generated errors caused the appearance of shortfalls and errors which the Claimants themselves had not been able to identify as the cause of those apparent shortfalls. Whether the individual Claimants had been forced to make these good from their own funds, or when recovery was sought from them had refused to pay, must depend on the resolution of individual cases in later trials.
63. The Defendant requires some minimum products and services to be offered by its branches, but does not require all Post Office branches to offer all products and services it offers save that changes may be agreed with SPMs regarding opening hours and/or the products to be offered at individual branches.

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64. Subpostmasters contract with the Defendant on a commercial basis and SPMs are neither employees nor consumers. The SPMs conducting their business in expectation of profiting from the business relationship both in respect of Post Office remuneration and in respect of the footfall and revenue for any retail business operated from the same premises. However, the correct characterisation of the relationship is considered in Common Issue 1.
65. Subpostmasters are under no obligation to contract with the Defendant on the terms that it offers or at all. However, if a person wishes to become a SPM, they can only contract on the terms offered by the Post Office, whatever they may be in the standard form contract offered. The Post Office will not entertain negotiation of, or amendment to, the terms offered by the Post Office.
66. The Post Office typically interviews applicants before appointing them. Generally, during the interview, the matters considered include the following: (i) the viability of the applicant's business plans; (ii) how the applicant intends to operate the branch and promote the sale of Post Office products and services; (iii) the applicant's staffing plans, including the extent to which the applicant SPM will rely on the services of a branch manager and/or assistants; and (iv) the applicant's ability to be a responsible person. However, the “operation of a branch” is dependent upon the operation of Horizon, and this is dependent upon the training provided. This is not something that can be addressed at the interview. Mrs Stubbs was not interviewed, due to the particular circumstances of her appointment.
67. Prior to contracting with the Post Office, Subpostmasters are generally made aware that they are responsible for the stock, cash and other property that they hold on its behalf; and that there are circumstances in which they will be held liable to the Defendant for shortfalls occurring at their branches. However, they are not made aware that they are to be held strictly liable for losses at their branch no matter how they are caused, other than for those contracting on the NTC, by reason of the terms of that contract. They are not made aware that the accounting procedures used do not provide an opportunity for them to dispute shortfalls, discrepancies or TCs with which they do not agree, prior to rolling over to the next branch trading period. They are not made aware that the Branch Trading Statement will include disputed matters. They are not made aware that the Post Office will consider them liable for sums which Horizon may show are due, which they dispute, or for transaction corrections with which they disagree.
68. The Post Office’s practice for the NTC is to supply Subpostmasters with a copy of the full terms of that contract which must be signed by the time of their appointment. The same practice was not adopted for the SPMC, and the practice for the NTC is a marked improvement on the procedure adopted for the SPMC. The documents sent with the NTC also recommends that the applicant obtain legal advice. This was not done for the SPMC.
69. It would not be impracticable for all of the parties’ rights and obligations to be set out in a single contractual document. However, there are aspects of the relationship between the Post Office and its SPMs that cannot be set out fully in documentary form and this is considered further in Common Issue 1. It is to be expected that the Post Office would rely upon manuals and other documents containing instructions, but these would go to procedure of operating the branch and not substantive matters governing the scope of the legal relationship between the Post Office and the SPM.
70. On the evidence of the six Lead Claimants, even when further training was specifically requested it was not provided, and in some cases the SPM was told there was no entitlement to it, even though it was specifically requested.

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71. Subpostmasters, as agents of the Post Office, do the following things on its behalf: (i) enter into transactions with the Post Office's customers; (ii) effect and/or process transactions with its clients, such as Royal Mail (for postal services), various UK government departments (for services such as benefit payments and passports) and various financial institutions (for banking services and insurance products); (iii) make and receive payments and incur liabilities; (iv) operate equipment belonging to the Post Office (or its clients) ranging from IT equipment (e.g. a lottery terminal used to sell Camelot lottery products) to basic equipment such as safes in which cash is stored; (v) hold and deal with stock (including cheques, vouchers and other items) belonging to the Post Office or its clients; and (vi) hold and deal with cash belonging to the Post Office.
72. Some Subpostmasters and assistants may act dishonestly in the conduct of their branches, including in defrauding the Post Office.
73. Unless the use of an assistant is notified to the Post Office, it would typically be unaware of the assistant's involvement in the operation of the branch.
74. Subpostmasters, but not the Post Office, are in a better position to detect incompetence and/or dishonesty on the part of assistants, depending upon the extent of the dishonesty. However, so far as further training is concerned, the ability or position of a SPM to detect the need for further training on the part of an assistant is itself dependent upon the level and quality of training that SPM has themselves received. Although the following is a point of law, it is convenient here to note that in any event, the NTC does not impose liability upon a SPM for criminal acts by a third party.
75. The Post Office does not rely on the accurate and regular reporting by Subpostmasters of accounts, transactions and the cash and stock held at a branch. The evidence makes clear that the Branch Trading Statement is not an accurate report if and in so far as disputes have been reported to the Helpline. It is only when those disputed items are taken into account, properly investigated, and resolved that those results, together with the Branch Trading Statement, would constitute an accurate picture of the cash and stock held at the branch. This is because the Branch Trading Statement includes disputed items.
76 and 77. Subpostmasters and/or their assistants do have "first-hand knowledge of the transactions taking place in their branches" in terms of knowledge that a physical transaction has taken place. The Post Office is unable to monitor at first hand the custody and use of its property (principally, cash and stock) in branches. However, the Post Office has greater knowledge of the record of transactions undertaken in branches on its behalf, in relation to which it is liable to its clients, as these are performed using the Horizon system and the Post Office has a greater access to the information contained in that system than the SPMs. Further findings on this must await the Horizon Issues trial.
78. The truth (as to the cause of shortfalls arising in a branch) does not lie peculiarly within the knowledge of Subpostmasters as the persons with responsibility for branch operations and the conduct of transactions in branches. Where there is a dispute, "the truth" and whether such a shortfall "arises in a branch" can only be determined after a proper investigation. Further findings must await the Horizon Issues trial.
79. Whether losses in branches arise in the ordinary course of things without fault or error on the part of Subpostmasters or their assistants can only be determined after the Horizon Issues trial. This is dependent upon the answers to the Horizon Issues, as the Horizon system is used by SPMs in "the ordinary course of things".

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80. The final "fact" that the Post Office seeks in Category 3 is "If SPMs submit false accounts to the Post Office, that can lead to concealing losses from it, sometimes for many months or even years". There is no doubt that the submission of false accounts is a serious matter, and the Theft Act 1968 specifically identifies false accounting as a separate criminal offence. However, this final entry in the Factual Matrix by the Post Office, the relevance of which to the Common Issues is disputed, is so general that it serves no purpose. I therefore propose to deal with this point as follows. False accounting is a criminal offence, and although concealment of losses is not an element of that offence, in many instances concealment will be involved. Concealment of losses by someone committing fraud might be discovered after many months, and on occasion even years, dependent upon the individual circumstances of a particular fraud or frauds.

570. Turning to relevance, the Post Office directly challenges the relevance of the facts I have found at 32 to 36 above, to *any* of the Common Issues. Given the wording of Common Issue 12 and 13, I reject that attack on relevance concerning the way in which the Branch Trading Statement was produced. In fact, I would go further, and state that I find it incomprehensible how any sensible consideration could be given to Common Issues 12 and 13 without understanding how Branch Trading Statements were produced, together with the options available to a SPM.

571. So far as the factual matrix for construing any particular term in the SPMC or NTC is concerned, the following approach must be adopted.
1. Words must be construed in the light of the factual matrix at the time the contract was entered into.
2. The SPMC was used between the years 1994 and 2011. It became what the parties call the Modified SPMC in 2006. In 2011, the NTC was used.
3. Horizon was not introduced until 2000. Therefore, nothing that concerns Horizon can form part of the factual matrix for any SPMs appointed prior to 2000.
4. However, for terms in the SPMC, the same terms applied over many years without amendment. Conceptually, the exercise of construction of the terms of the SPMC, so far as Mr Sabir's appointment in 2006 is concerned, is entirely separate to the same exercise at the time another SPM was appointed in (say) 1998. The factual matrix would be different in 2006, with Horizon being used, to what it was in 1998, when it was not.
5. However, I find that it is highly unlikely that the same words in the same clauses should be construed differently for the appointment of a SPM appointed in 2006, than for the appointment of a SPM appointed in 1998.
6. Exactly the same reasoning applies to the appointment of a SPM under the NTC.

572. In fact, the Post Office made no formal variation to the terms of the SPMC when the Horizon system was introduced in 2000. Further, none of the parties contend for a different construction of the same words in the same contract but for different Lead Claimants, depending upon when they were appointed. I consider this means that the same exercise of construction should be undertaken for those SPMs appointed under the SPMC, whenever they were appointed, on the one hand; and also for those appointed under the NTC, whenever they were appointed, on the other.

573. Having found the facts, and made my approach to the factual matrix clear, I will now consider the Common Issues themselves separately and the legal principles that apply.

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Some of the Common Issues are self-contained such as Common Issues 22 and 23. Others are more wide-ranging.

F. The Post Office's relationship with the National Federation of Subpostmasters ("NFSP")

574. This subject is relevant for the following reasons:

1. The Post Office relied, in numerous places both in its evidence and in its submissions, upon the fact that the NFSP does not support the litigation. As an example, in its written Opening it submitted "it should be noted that the National Federation of Subpostmasters ("NFSP"), which is the organisation which represents SPMs and their interests nationwide, does not support this action and does not endorse the factual premises of the Claims."

2. The Post Office's case is that there is what it called an "interpretative spectrum" of contracts, ranging from sophisticated contracts which have been carefully negotiated and/or professionally drafted at one end, to more informal contracts at the other. The Post Office submits that the SPMC and the NTC are at the "more sophisticated" end of that spectrum. So far as negotiation of the terms is concerned, the Post Office relies upon the fact that the negotiation of the terms of the NTC was done between the Post Office and the NFPS, as though they were parties in a commercial bargaining position at arm's length from one another.

575. Public support for a cause, or lack of NFSP support for the claimants, does not cut much ice in court. It plays no part whatsoever in the outcome. I have already referred to public and press interest in this litigation, for the reasons explained, and that plays no part either. I am entirely disinterested in whether the NFSP does, or does not, support the proceedings. However, for the two reasons identified (and because some of the Post Office witnesses, for example Mr Beal, dealt with the NFPS' involvement and it was relied upon by the Post Office), it was of sufficient relevance to permit Mr Green some limited cross-examination on this subject. It should also be noted that Mrs Van Den Bogerd also gave evidence that the NFPS has publicly supported the Post Office's view that Horizon is robust. The Post Office therefore rely upon this support by the NFPS to support its stance in this litigation.

576. In about 2013 the Post Office commenced discussions with the NFSP in terms of its Network Transformation Programme which had started in pilot form in 2011. It wished to have the support of the NFSP to the revision of some of the terms, and in an e mail dated 2 August 2013 Mr George Thomson, the General Secretary of the NFSP, set out what he called the framework for a potential agreement. Part of this e mail – the Post Office being referred to as POL - stated the following:

"POL and NFSP to sign a 15 year contract for the NFSP to represent all post office operators. This will include:
Financial agreement
£500k payment 2013-14
£1.25m payment 2014-15
£1.25m payment 2015-16
£2.5m payment 2017 onwards to 2028

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This process allows for the drop off of our present membership fee, and facilitates the change from check off towards POL charging a fee from all agents which is passed directly to the NFSP.
Memorandum of Understanding to be worked on with rights and responsibilities on both sides.
If necessary, NFSP will drop Union badge to sign contract.
Please note - a signed agreement with the blood of both myself and Paula is necessary on the future of the NFSP before any agreement is granted on either NT and other points."

(emphasis added)

577. "Paula" is Paula Vennells, the Chief Executive of the Post Office. The sums represent amounts to be paid to the NFSP from the Post Office. The total amount identified in that e mail represents £30.5 million. Mr Beal explained that the compensation provision for SPMs under the 2011 NTP was based upon 18 months' remuneration, and the e mail in question above was in respect of (inter alia) an *increase* of that to 26 months. He also accepted that the matters were linked in the negotiations between the Post Office and the NFSP. Rather curiously therefore, the e mail above demonstrates that the NFSP was only prepared to agree what amounted to an increase in its members' potential compensation, if its own future was assured by the payment of substantial sums to it. I find that this shows that the NFSP put its own members' interests well below its own, and I also find that the NFSP is not fully independent.

578. Eventually, agreement was reached between the Post Office and the NFPS and on 21 July 2015 the Post Office entered into a Grant Framework Agreement ("GFA") with the NFPS. Mr Beal explained that the intention of the parties (that is the Post Office, and the NFPS) was always that the contents of this agreement be made public. I find that evidence difficult to accept, and I reject it. This is because within the detailed GFA the following provisions appear:

"23. CONFIDENTIALITY
23.1 Subject to POL's rights set out in clauses 23.3 and 24 (Freedom of Information), neither party shall make public statements about this Agreement and/or the relationship established by this Agreement without the prior written agreement of the other party.
23.2 Subject to POL's rights set out in clauses 23.3 and 24 (Freedom of Information), the parties shall keep confidential the contents of this Agreement. The parties shall also keep confidential all Confidential Information obtained in the course of this Agreement and shall not disclose such information to any person (except where necessary for the purposes of this Agreement to its own Personnel), but this clause 23.2 shall not extend to information which:
23.2.1 was rightfully in the possession of the relevant party before the Commencement Date and in respect of which that party is not subject to any other obligation of confidentiality to the other party;
23.2.2 is already public knowledge or becomes so at a future date (otherwise than as a result of a breach of this clause 23.2); or
23.2.3 is required to be disclosed by law or any governmental or regulatory body."

(emphasis added)

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"17.6 Event of Termination

…

17.6.2 the NFSP commits a material breach of any of its obligations under clause 23 (Confidentiality)".

579. The GFA was negotiated by lawyers, at least on the Post Office's side. The name of the Post Office's solicitors, Bond Dickinson LLP, appears on the front page. That is the same firm as represents it in these proceedings, although the name has changed since then due to a merger. It is stretching credulity to ask the court to believe that such a detailed confidentiality provision, with a breach of it by the NFSP being defined as an event of termination, would be drafted by a sophisticated legal team and included within the terms of the GFA if the intention was always that the whole GFA would be made public.

580. This scepticism is reinforced by the history of a Freedom of Information Request that was first made under the Freedom of Information Act 2000 on 12 May 2016 by one Mr Mark Baker, who asked for a copy of the GFA. The Post Office stated that an exemption applied under the Act, namely s.43(2) "commercial interests", declined to provide the GFA and sought more time to consider the request. The Post Office said a reply would be provided by 8 July 2016. This was challenged by Mr Baker, who sought an internal review, alternatively production of a copy of the GFA.

581. The Post Office, through Martin Humphreys of the Information Rights Team, on 20 June 2016 stated to Mr Baker the following:

"Post Office have not yet made a decision in respect of the information you are seeking and are currently considering the public interest as it applies to the commercial interests exemption.

Therefore we will write to you once a decision has been reached whether to the release the information."

582. This was almost one year after the GFA, with the confidentiality provisions to which I have referred, was signed. Throughout this entire period, Mr Beal, who accepted he would have been involved but said he could not remember, would have me accept his evidence that the Post Office and the NFSP had always intended would be published.

583. The reply of 20 June 2016 from the Post Office did not satisfy the redoubtable Mr Baker. On the same day, 20 June 2016 he sent back to the Post Office the following:

"You have completely ignored the points I raised in my e-mail to you dated 11th June 2016. I challenged your position on relying on Sec 43 (2) of the Freedom of Information Act and you have failed to refute this challenge. You cannot have any commercial reasons to withhold this information and you are wrong to use this section as an excuse to delay supplying the information I have asked for. This is a sum of money paid as a Grant issued by a Public Authority and as such the terms of the grant should be available to the public.
Sec 43 (2) relates to commercial contracts between two parties are you saying that this is in fact a contract to provide services and not a grant?

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You leave me no choice but to take this matter up directly with the Information Commissioner as you are not complying with the terms or the spirit of the Freedom of Information Act."

584. On 11 July 2016, the Post Office shifted its ground with Mr Baker and sent a letter stating the following:

"I can confirm that Post Office does hold the information you have requested, however, under Section 22 of the FOIA concerning information intended for future publication, we are not required to provide information in response to a request if that information is intended for publication at a future date."

585. On 30 August 2016 Mr Baker was provided with the outcome of an internal review performed by the Post Office, that having been requested by him (and being something to which he was entitled under the Freedom of Information legislation). This communication was signed by Kerry Moodie, the Information Rights Manager. In this letter, the Post Office asserted that it had always intended to publish the GFA.

586. It stated:

"On reviewing the handling of your request and our responses we accept that we should have made it clear in our initial response that at the time of your request there was already an intention to publish the Grant Agreement and that Section 22 applied."

It also stated that:

"The intention of the parties to publish the Grant Agreement is reflected in the Memorandum of Understanding ("MOU") from 2013 which preceded the Grant Agreement. This has been published on the NFSP website and can be found via the following link: http://www.nfsp.org.uk/write/MediaUploads/PO MOU.pdf. The statement that the Grant Agreement would be published is at point 10.
Post Office and the NFSP are still in a transitional period, during which time we are setting up new processes and systems that support the Grant Agreement. The parties are working closely together to ensure that there are appropriate communications to postmasters about these new processes and systems in a timely, logical and planned manner. Publishing the Grant Agreement now would disrupt this communication strategy, leading to confusion and unnecessary queries which will be disruptive to the completion of the final transitional work and which will be avoided by delaying the publication of the Grant Agreement until after this work has been completed. It is anticipated that this work will be completed by 31 December 2016 at the latest, by which time it is intended that the Grant Agreement will be published. We therefore consider it is reasonable to withhold the Grant Agreement until this time.

Public Interest Test
In applying Section 22 to your request we are also required to consider the public interest in maintaining the Section 22 exemption or disclosing the information requested.
This involves weighing the balance of public interest in maintaining the exemption or releasing the information. Post Office understands that there is public interest in promoting the transparency and understanding of matters which are of interest to the public. However it is reasonable in the circumstances that the information should be

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withheld from disclosure until publication."

587. The letter then again referred to, and relied upon, the Memorandum of Understanding ("MOU") which dated from 2013:

"The key terms of the Grant Agreement are already in the public domain through the published MOU which we consider does go some way to meeting the public interest in understanding the arrangements. We also consider that disclosure of the Grant Agreement now would be disruptive to the final transitional activities we are putting in place with the NFSP and could cause an unnecessary disruption and distraction from completing these activities as soon as possible.

Post Office considers that, with regard to the information that has been withheld from disclosure, the public interest is best served by maintaining the exemption respect of the information requested. However we will write to let you know once the document is available."

588. I have studied in some detail both the MOU and the Grant Agreement. I do not see how it can sensibly be said that the "key terms" of the Grant Agreement were in the MOU, or were already in the public domain when this letter was written. I also consider that this letter was carefully drafted, to give the impression that the MOU had always been on the NFPS website. I asked Mr Beal, who was the person within the Post Office who dealt with the NFPS, when the MOU was published on the website. He could not remember. Mr Cavender for the Post Office told me, upon instruction, that it was in 2015 but the only document demonstrating this was an e mail asserting this, but that was dated 19 November 2018.

589. I gave the Post Office multiple opportunities to produce a document from 2015 demonstrating this, and they either could not or would not do so. Also, the NFPS' own website was amended during the trial. At some point between this matter being raised in cross-examination with Mr Beal, and the question of documents evidencing dates being re-visited at the end of the evidence, someone at the NFPS had specifically altered the NFPS website. I deal with this at [594] below. What they did not know, when whoever it was did this, was that counsel for the Lead Claimants had printed the NFPS website page as at the beginning of the trial. It was therefore clear that the change had been made, and also clear that it was done during the trial. I was given no evidence by anyone from the Post Office about why this was done, and done in terms that suited the Post Office's case on this point. I find this behaviour highly suspicious. It also undermines, yet further, the claim by the Post Office that the NFPS is independent.

590. The GFA was provided on 20 December 2016. Its terms, in addition to the ones about confidentiality above, included the following provisions:

"5. GENERAL CONDITIONS OF THE GRANT
….5.7 The NFSP shall (and shall use best endeavours to ensure that all Personnel of the NFSP shall):
5.7.1 not act dishonestly or negligently at any time and/or not act directly or indirectly to the detriment of any Annual Plan and/or any Approved Project; and
5.7.2 not take any action or engage in any commercial activities which brings, or is likely to bring, POL's name or reputation into disrepute."

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“17. WITHHOLDING, SUSPENDING AND REPAYMENT OF GRANT
17.1 POL's intention is that the Grant will be paid to the NFSP in full. However, without prejudice to POL's other rights and remedies, POL may at its discretion withhold or suspend payment of the Annual Grant Payment and/or an Individual Grant and/or require repayment of all or part of the Annual Grant Payment and/or an Individual Grant if there is an Event of Clawback.

17.2 Event of Clawback.
"Event of Clawback" means any of the following events or circumstances:
17.2.1 the NFSP commits a breach of any of its obligations under clause 5 (General Conditions of the Grant) and/or clause 12 (General Provisions in respect of Grant Monies);
17.2.2 the NFSP commits a material breach of any of its obligations under clause 6.2 or 6.3 (Annual Grant Funding);
17.2.3 the NFSP uses any Individual Grant for purposes other than those for which they have been awarded;
17.2.4 the delivery of an Approved Project does not start within twenty (20) Business Days following the relevant Award Date and the NFSP has failed to provide POL with a reasonable explanation for the delay;
17.2.5 the NFSP provides POL with any materially misleading or inaccurate information;
17.2.6 the NFSP is otherwise in breach of its obligations under this Agreement; or
17.2.7 the NFSP induces Post Office Operators to breach the provisions of their contract with POL.”

“32. ENTIRE AGREEMENT
This Agreement constitutes the entire agreement between the parties with respect to its subject matter. No representations or agreements, oral or otherwise, between the parties not included within this Agreement shall be of any force or effect.”

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591. Mr Beal accepted that supporting the litigation could affect the reputation of the Post Office. It is therefore the case that were the NFSP to decide to support the litigation, which undoubtedly risks damaging the Post Office's reputation if the Claimants were to win, the NFSP would not only put itself in breach of the terms of the GFA but face having grants "clawed back", that is repaid by the NFPS to the Post Office.

592. There is nothing in the MOU about clawback of funds, and there is nothing about the NFPS agreeing that it will not take any action bring "which brings, or is likely to bring, POL's name or reputation into disrepute", (which is the language of the GFA). Perhaps unsurprisingly, given that both the Post Office and the NFPS represents the latter as an independent body purporting to represent the interests of its members, there is absolutely nothing that comes close to the contents of the e mail of 2 August 2013 from Mr Thompson that the NFPS demanded an agreement between the Post Office on the future of the NFPS before it would agree to anything concerning Network Transformation "and other points", which included (on Mr Beal's evidence) a sizeable increase in compensation for SPMs.

593. There is a further footnote about this subject and the MOU. In the electronic trial bundle there had been included a print-off of the NFSP website which had a page entitled "About Us" and which was dated 12 October 2018. It also stated on the same page "October 2018 Edition". The last passage on the page stated:

"No-one can represent subpostmasters more effectively, and our vision is to continue to fulfil that role, growing our influence for the benefit of our members."

594. As of 26 November 2018, the last day of evidence, the same document at www.nfsp.org.uk/about-us now had additional text so that the final passages read as follows:

"No-one can represent subpostmasters more effectively, and our vision is to continue to fulfil that role, growing our influence for the benefit of our members.

You can read more about how the NFSP was established as a trade association in the Grant Framework Agreement and Deed of Novation and Variation."

This was also stated on the same page to be the "November 2018 Edition"

595. The Claimants sought an order for any document that would show when that final passage, referring to the GFA, was added to the website. It may have been after the date of Mr Beal's cross-examination, which was 15 November 2018. It must certainly have been after 12 October 2018. I refused to make such an order, because this would have been an order against the NFPS, who are not a party to the proceedings. It would also have been a distraction to have had a contested hearing against a non-party, though if highly relevant different considerations would apply. I did however make an order, limited in scope, in respect of any e mails between Mr Beal and the NFPS within the period 12 October 2018 and 26 November 2018. That did not shed any further light on the matter one way or the other.

596. My conclusions, based upon all that I heard and was shown about the NFPS, and in relation to the two matters I have identified at [574] and [594] above, are as follows:

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1. The NFPS is not an organisation independent of the Post Office, in the sense that the word "independent" is usually understood in the English language. It is not only dependent upon the Post Office for its funding, but that funding is subject to stringent and detailed conditions that enable the Post Office to restrict the activities of the NFPS. The Post Office effectively controls the NFPS. The agreement also enables the Post Office to seek repayment of funds already paid to the NFPS. The NFPS is a limited company and there was no evidence that it had any other source of funding. It is not likely to be able to repay any funds "clawed back" by the Post Office and therefore its very existence depends upon it not giving the Post Office grounds to challenge its activities. There is also evidence before the court that the NFPS has, in the past, put its own interests and the funding of its future above the interests of its members, in the e mail to which I have referred. In those circumstances, the fact that the NFPS does not support the Claimants in this litigation is entirely to be expected.

2. The NFPS had been a trade union at one time, and the organisation had a long historical background to representing SPMs. However, so far as the terms of the NTC is concerned, I have no confidence that there was any appreciable negotiation between the Post Office and the NFPS, and certainly not in the sense of the NFPS representing the interests of the SPMs in terms of the balance of risk and reward contained in that document. The two entities (the Post Office and the NFPS) were certainly not in a commercial bargaining position. This may, or may not, explain the difference in wording regarding how losses are dealt with in the two different documents, the SPMC and the NTC. So far as the Post Office's "interpretative spectrum" is concerned, the SPMC and the NTC were probably both professionally drafted, and certainly the NTC was. That latter document was, however, effectively drafted by the Post Office, for the Post Office, and has the Post Office's interests centrally within it.

597. Both documents do however represent the entering into by the SPMs of business obligations. So far as spectrum is concerned, in my judgment they are both to be found broadly in the middle. I do not accept either the SPMC or the NTC is at the "more sophisticated" end of the spectrum as the Post Office submits.

598. Finally, transparency is not something that seems to mean a great deal, if anything, to the Post Office, so far as its dealings with the NFPS is concerned. I reject the evidence that both the Post Office and the NFPS always intended that the GFA would be made public, notwithstanding the passing reference to this in the MOU. That assertion is verging on insulting the intelligence of anyone who has read the GFA itself. The drafting of the actual document itself – which has obviously been carefully done, by highly skilled legal advisers – is directly to the contrary. The assertion is also contrary to the Post Office's own initial responses to the Freedom of Information requests, from the very team at the Post Office whose specific role in life is to deal with such requests.

G. Contractual Formation

599. I find that each of the different Lead Claimants contracted with the Post Office on the following dates.

600. Mr Bates formed contractual relations with the Post Office on a date that is agreed by the parties, namely 31 March 1998. For the reasons that I have explained, the full terms of the SPMC did not apply, as Mr Bates did not have reasonable, or even any,

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notice of these by or upon that date. The documents he had received as of 31 March 1998 were the ARS 43 and ARS 44 documents, which stated "The Subpostmaster is personally responsible for all losses or gains incurred to Post Office cash or stock. Losses must normally be made good immediately they are discovered. Gains are normally retained by the Subpostmaster." SERV 135, which referred to clauses of which many SPMs were said to be unaware, did refer to clause 12.1 which stated responsibility for losses caused by fault (which the clauses in the ARS 43 did not) but he did not receive the SERV 135 until the day he acquired the branch in May, some weeks after the parties are agreed that the contract was formed.

601. In my judgment, however, Mr Bates' obligation in terms of losses is, in any event, the same as it is drafted in Section 12 Clause 12 (with the second part, dealing with assistants, as I have construed it), namely requiring fault on his part, even though he did not contract upon the terms in the SPMC. This is for two reasons. Firstly, the ARS 43 set out responsibility for losses. Applying conventional principles for construction, namely objective meaning of the words using the background knowledge available to the parties, the phrase "personally responsible for all losses or gains incurred" means, in my judgment, losses caused by fault on the part of the SPM. The intention of the parties, objectively ascertained, was not to impose strict liability upon an SPM. Secondly, if I am wrong about that, and the term in the ARS 43 did not form part of the agreement between the Post Office and Mr Bates, then there would be an implied term, necessary for business efficacy, to like effect of Section 12 Clause 12 as I have construed it above. This term would therefore be, using wording that reflects my findings above:

    The SPM is responsible for all losses caused through his or her own negligence, carelessness or error, and also for such losses caused by his or her Assistants.

    This is because there would, in those circumstances, be no express term dealing with the responsibility of Mr Bates for losses, or for his assistants. An implied term would therefore be necessary. Therefore, Mr Bates is responsible for all losses caused through his own negligence, carelessness or error, even though I have found he did not have the SPMC and did not contract on that basis. His scope of responsibility is therefore the same.

602. Mrs Stubbs contracted with the Post Office on 4 August 1999. This was the day after her husband had ceased to be the SPM, as he died on 3 August 1999. It is also the date upon which she agreed with Mr Woolbridge, who was plainly acting for the Post Office for these purposes, that she would become the SPM at that branch, from that date onwards. She signed a document on that date providing her bank details and the Post Office paid her from that date. There was no express term dealing with losses in her case, as she received no ARS 43. The terms of the SPMC did not apply; she did not have it, and its existence had not been brought to her attention. It is therefore necessary in her case to imply a term for reasons of business efficacy, but that is a term in the same words as in [601] above. She is responsible for all losses caused through her own negligence, carelessness or error. She is also responsible in the same way for her assistants, in the same way that I have construed the express clause. In both cases, however, the implied term requires that deficiencies due to such losses would be made good within a reasonable period. There is no business necessity that such losses be made good "without delay". What the length of a reasonable period would be, would depend upon the amount of the losses caused by the fault of the

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SPM. For very small losses of a few pounds such a period would be immediately; for losses of tens of thousands of pounds, the reasonable period would be longer.

603. It follows from my findings concerning Mr Bates and Mrs Stubbs that there are some SPMs whose appointment is not governed by the terms of the SPMC. It is not possible to say how many of those claimants there are in this litigation. Mr Bates' evidence was that there were 62, but that number is challenged by the Post Office. Whatever the number, for any in respect of whom there is no express term dealing with responsibility for losses, there is the need for an implied term, and I find that it is one to the same effect as [601] above, and that they are responsible for all losses caused through their own negligence, carelessness or error. Responsibility for assistants, for such claimants who did not contract upon the terms of the SPMC (regardless of how many there are) is also covered by an implied term to like effect for reasons of business necessity. They are also both strictly responsible for the safe custody of cash and stock, and were required to keep them in a place of security. This too is an implied term for reasons of business necessity, in like terms to Section 12 Clause 5.

604. Mr Sabir contracted with the Post Office on 19 July 2006. This was on the terms of the SPMC then current, which is called the 2006 Standard SPMC. The Post Office advanced an alternative case that the date of contracting was 8 September 2006 but I reject that. The Post Office's primary case in any event was that this occurred on 19 July 2006.

605. Mr Abdulla contracted with the Post Office on 11 December 2006, on the terms of the 2006 Modified SPMC. Again, the Post Office advanced an alternative case (its primary case was 11 December 2006) of 24 January 2007, but I reject that. Each of Mr Sabir, and Mr Abdulla, are SPMs who contracted in a more conventional way upon the terms of the SPMC, due to the way in which the procedures for contracting had improved from the time of Mr Bates. Mrs Stubbs, due to her personal situation, is (or at least one hopes she is) a special case. There are not likely to be many SPMs whose spouse died the day before they were visited by a manager from the Post Office, and invited to sign sparse documentation of which no copies survive.

606. The position concerning Mrs Stockdale and Mrs Dar is far more straightforward. Both of these contracted on the terms of the NTC and due to the different, and far improved, method of contract formation that was adopted in the Network Transformation Programme, this contract form had to be signed and returned. There is therefore a signed and dated document for each of them. Mrs Stockdale's date of contracting with the Post Office is 17 February 2014 and Mrs Dar's date of contracting with the Post Office is 2 July 2014. In both cases, this was on the terms of the NTC.

H. The Contractual Terms

607. As has been seen, different contracts were in force for different periods, all covered between the six Lead Claimants. The relevant passages of the SMPC and the NTC are the two contract forms that identify the framework within which what occurred to the

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six Lead Claimants took place, as do the factual circumstances in which (for example) Common Issue 13 arises.

608. In the SPMC the relevant terms so far as losses are concerned is in Section 12. This section is headed "Responsibility for Post Office Stock and Cash".

1. Section 12 Clause 5 states:

"The Subpostmaster is held strictly responsible for the safe custody of cash, stock of all kinds and other Post Office Counters Ltd property, papers and documents, whether held by himself or by his Assistants, and should keep them in a place of security, especially at night."

2. Section 12 Clause 12 states:

"The Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants. Deficiencies due to such losses must be made good without delay."

609. There is a considerable focus in these proceedings on the terms of Section 12 Clause 12. There has been a lesser focus on Section 12 Clause 5. However, the contract must be construed as a whole and that means that the meaning of Section 12 Clause 12 cannot be reached in isolation from the meaning of Section 12 Clause 5. I consider it notable that within Section 12 Clause 5 the words used are "strictly responsible", a phrase which does not appear in Section 12 Clause 12, either in respect of SPMs or their assistants.

610. Within the NTC, the terminology and the clauses are different to those used in the SPMC. Part 2, paragraph 4.1 of the NTC is relied upon by the parties but should be considered in the light of the other clauses in that part. An SPM is called an Operator in the NTC, which states:

"4. Liability for Post Office Cash and Stock

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

4.2 The Operator's responsibility for such items shall begin from the time at which the Post Office Cash and Stock are received by the Operator and shall end when the Post Office Cash and Stock are given to Customers in the proper conduct of the Branch or are returned to Post Office Ltd or, in the case of cash or financial instruments are collected by a cash in transit provider or are paid into a bank. Whilst the Post Office

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Cash and Stock are in the Operator's possession, it shall keep them in a place of security.

4.3 The Operator shall retain financial responsibility (in accordance with the Agreement) following the termination of the Agreement, and it will be required to make good any losses (including losses arising from Transaction corrections and stock losses) incurred during its operation of the Branch which may subsequently come to light."

611. The Claimants submit that the construction of the clauses, under the SPMC and the NTC, are the same and should have the same meaning. This meaning is that the SPMs are only responsible for losses caused by their own negligence, carelessness or fault. The Claimants do not consider that the difference in wording between the SPMC and the NTS is material. The Post Office submits that this is an instance of the "almost total disregard for the words of the contracts" and that the words are markedly different.

612. The Post Office accepted that the meaning of the two provisions *might* be the same, but drew attention to two particular differences. One is that the NTC does not draw any distinction between losses caused by acts of an SPM, and those of his or her assistants. The second, in paragraph 141(b) of its Written Opening, is that the NTC does not use the phrase "negligence, carelessness or error", in a way "to limit the SPM's liability for shortfalls that result from losses that she causes. It uses different words and creates a narrower exception to liability (ie where there is a criminal act by a third party)".

613. The Post Office also submitted – although this point arises on a number of the Common Issues – that it is entitled to rely upon what it calls "an inference" from the "general reliability of Horizon" such that it is for individual SPMs to demonstrate that deficiencies or shortfalls were *not* caused by the SPMs. This inference is deployed both for the SPMC and for the NTC.

614. The Post Office submitted, however, that there were certain common features between the clauses dealing with losses in the SPMC and in the NTC. These were as follows:

1. Both made the SMP liable for shortfalls/deficiencies "except in specified circumstances, creating exceptions to liability".

2. Both created an obligation "to make good shortfalls/deficiencies that result from losses other than those that are covered by the exception to liability".

3. Principles applicable to agency and accounting law provide the background to both the SPMC and the NTC. The SPMC represented an express choice by the SPM of a relationship with the Post Office of principal/agent. The SPM had a duty to maintain and produce accounts. Similarly, the NTC created an agency relationship, and the SPM was subject to an express duty to account by other terms of the NTC.

4. The Claimants advanced the same "burden of proof" argument on both agreements. It was not for the Post Office to prove that the "narrow exception to

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liability" in the NTC did not apply, as this would require the Post Office "to prove a negative…." which was "fanciful".

615. That fourth feature is correctly summarised by the Post Office – that is indeed the Claimants' case – but it is not a common feature between the clauses in terms of construction. It is a point consequential upon the actual submissions of the Claimants as to the effect of the clause. However, both the first and second "feature" above as advanced by the Post Office, which are said to be common to both the SPMC and the NTC, are not correct, in my judgment. Each of these features skilfully, but incorrectly, elide the "burden of proof" argument into both the agreements, without analysing the different words used in each, and the potentially different effect of each contractual provision. I will explain this further below.

616. It is important to start by reminding oneself that the SPMC and the NTC are entirely different agreements, on entirely different terms. The exercise of construing them is different. There are four different possible categories of SPMs in terms of the Network Transformation Programme, and in terms of the applicability of the NTC:

1. Those who were already contracted to the Post Office, who wished no longer to be involved with the Post Office after or upon the Network Transformation Programme, and who did not contract upon the terms of the NTC. Given Mr Bates' evidence (if his number is correct) there may be about 60 of these, if they are in the same situation as him in terms of contract formation.

2. Those who were already contracted to the Post Office on the terms of the SPMC, who wished to remain SPMs after or upon implementation of the Network Transformation Programme, but who did not contract upon the terms of the NTC. They remained in contract with the Post Office on the same terms they were before. In a sense these are "historic SPMC" cases. I am told there are some of these. The SPMC continued to govern their relationship with the Post Office.

3. Those who were already contracted to the Post Office, who wished to remain SPMs but did so on the new terms being offered by the Post Office in the NTC, rather than upon their existing terms, and who were engaged on the terms of the NTC.

4. Those who became SPMs after the introduction of the NTC, who were only ever engaged on the terms of the NTC.

617. It is only the 3rd and 4th category of these to whom the NTC has any relevance at all. The 1st category never contracted on the terms of the NTC, and ceased to be SPMs. The 2nd category remained on the terms of the SPMC. Further, those who were in the 3rd category were in no doubt – because the Post Office told them, and because some were offered and accepted compensation - that the NTC consisted of a wholly new set of contractual terms. The liability for losses under the NTC does not have to be same as that under the SPMC. It *may* turn out to be, but that depends upon the outcome of the separate exercise of construing the two types of contracts. Each contract– the SPMC, and the NTC – has to be construed separately. I do not consider that it is the correct approach to construe the terms of the NTC by taking account of the outcome of the exercise of construing the terms of the SPMC. They are entirely distinct contracts.

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618. I accept that the background to both the SPMC and the NTC includes the concept of agency in some respects, although this is tied up with other Common Issues. Indeed, so far as agency is concerned, that is bound up (inextricably, in my view) with any finding as to whether these contracts are relational ones or not. I have provided the factual matrix within which these clauses come to be construed (and against which there must be consideration of whether the contracts are relational contracts, and if so what that means). I have also provided a summary of the different ways in which each of the six Lead Claimants came to contract with the Post Office. The reason that I have adopted this approach is to provide, within this judgment, as much as possible to assist the parties in this complex group litigation, and also because there are certain common features to the situation where a person wishes to become a SPM, and the Post Office wishes that to occur too, and accepts that person as a SPM.

619. In terms of the legal approach to construction, the principles are well established. They were usefully set out by both parties, but I here adopt the summary advanced by the Post Office.

620. The "*court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement*": ***Wood v Capita Insurance Services Ltd*** [2017] A.C. 1173 *per* Lord Hodge at [10].

621. The language of the agreement is important. As it was put in a case that pre-dated both ***Wood v Capita*** and ***Arnold v Britton***, but which still applies, "*where the parties have used unambiguous language, the court must apply it*": ***Rainy Sky SA v Kookmin Bank*** [2011] 1 W.L.R. 2900 *per* Lord Clarke at [23]. The more difficult questions of construction only arise if the "*language used by the parties…*[has] *more than one potential meaning*", so that "*there are two possible constructions*" at [21].

622. When "*interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties*": ***Arnold v Britton*** [2015] A.C. 1619 *per* Lord Neuberger at [21] and *Lewison, The Interpretation of Contracts (6th Edition),* at 3.17(d) and (e).

623. I wish to emphasise that last principle in particular. As an exercise of contractual interpretation, one cannot adopt or apply hindsight, examine the way that matters have turned out for one party or another, and allow that to influence the process of construing the terms.

624. However, so far as knowledge of any "*clear and well known legal principles*" that are relevant to the parties' relationship and/or the transaction(s) at issue are concerned, there is a slightly different approach. This is because contracts are to be construed in light of the relevant law, even if it was *not* known to the parties at the time of contracting, at least where the legal position was clear at that time. This was recently confirmed by the Court of Appeal in ***First Abu Dhabi Bank v BP Oil International*** [2018] EWCA Civ 14, at [37] approving *dicta* of Vos J (as he then was) in ***Spencer v Secretary of State for Defence*** [2012] EWHC 120 (Ch) at [73] to [74].

625. The construction exercise proceeds by "*focussing on the meaning of the relevant words…in their documentary, factual and commercial context*": ***Arnold v Britton***, *per*

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Lord Neuberger at [15]. Even if that language is not wholly unambiguous, its ordinary meaning will generally be decisive as set out at [17] and [18]:

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

(emphasis added)

626. ***Arnold v Britton*** is obviously an important case and of high authority. The concept of "commercial common sense" had, arguably, in earlier cases been given more primacy than the actual words chosen by the parties. As Lord Neuberger stated in ***Arnold v Britton*** at [19] and [20]:

"The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made…

[A] court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

627. It should also be noted that SPMs did not have any "control over the language", but notwithstanding this the principles set out in ***Arnold v Britton*** make it clear that the first step is to consider the actual words themselves. The actual words in the two contracts – the SPMC and the NTC – are very different. The liability for losses under the NTC does not have to be same as that under the SPMC. It *may* turn out to be, but that depends upon the outcome of the exercise of construing the two types of contracts. Each type – the SPMC, and the NTC – has to be construed separately.

628. Lord Steyn made a similar point in a far earlier case, ***Mannai Investment v Eagle Star Life Assurance Co Ltd*** [1997] A.C. 749 at 768, by saying that the relevance of "*surrounding circumstances*" will be limited by "*what meanings the language read against the objective contextual scene will let in*".

629. Also, it should be remembered that the exercise of contractual construction is what has been called a "*unitary exercise*". It "*involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its*

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commercial consequences are investigated": ***Wood v Capita***, *per* Lord Hodge at [12]. In assessing what "*a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant*", the Court "*must have regard to all the relevant surrounding circumstances*": ***Rainy Sky***, *per* Lord Clarke at [21]. Also, the relative significance of the different factors will vary depending on the type of contract that is being construed. Lord Hodge explained this in ***Wood v Capita***, at [12]-[13].

630. As was stated by Lord Hodge there:

"To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type."

(emphasis added)

631. There is a passage in the Post Office's written opening that merits reproduction verbatim:

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

(emphasis added)

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632. The reason that this submission merits wholesale reproduction is to identify fully the boldness with which the emphasised sentence is made. In my judgment that submission is misplaced. This is because the evidence makes it very clear that these contracts were not negotiated at all. Indeed, the uncontroverted evidence of the Post Office itself is that even if a SPM had sought some specific amendments to the terms of the SPMC or NTC, these would not have been tolerated at all. There was simply no negotiation possible. If the spectrum is one which has highly detailed provisions at one end, and informal brief and loosely drafted terms at the other, then these are detailed terms. However, it would be wrong to approach the matter as though they were at the same place in the spectrum as carefully negotiated and/or professionally drafted by both parties (whether represented or not). Indeed, the ability of an incoming SPM to influence the contract terms of either the SPMC or the NTC was precisely zero.

633. Certainly the NTC was professionally drafted, although professionally drafted for the Post Office. The SPMC was drafted, but in an earlier era, and as a set of terms, it is entirely different in scope.

634. It has been necessary in Part F of this judgment to deal with the involvement of the National Federation of Subpostmasters or NFPS in the drafting of the contracts for two specific reasons. However, it should be noted that the Claimants rely upon the doctrine of *contra proferentem*. This is described by the Post Office as follows:

> "it is, or is close to, a principle of last resort: see *Chitty,* at 13-086; *Lewison*, at 7.08(h). It cannot do anything like the extreme work that Claimants want it to do in re-writing the contracts."

635. In my judgment, the modern approach to the *contra proferentem* rule, in commercial contracts at least, is something of a sceptical one. The "rule" (if rule is the correct word) requires ambiguity in a provision – for example, in an exemption clause - to be resolved against the party who put the clause forward and relies upon it. The rule has been subject to criticism, and is something of a historical remnant. The first and most difficult aspect of the rule is determining in a commercial contract which party is in fact the *proferens*. Here that is not so difficult, because it was only the Post Office who ever drafted any of the terms (subject to the involvement of the NFSP, which certainly was not occupying the position of an opposite negotiating party). However, even if it is clear that the Post Office is the *proferens,* there are in any event better ways of resolving problems of construction, not least construing the actual words used. As Lord Neuberger MR said in ***K/S Victoria Street v House of Fraser (Stores Management) Ltd*** [2011] EWCA Civ 904 at [68]:

> "…Quite apart from raising abstruse issues as to who is the *proferens* (and, in particular, whether the issue turns on the precise facts of the case or hypothetical analysis), "rules" of interpretation such as *contra proferentem* are rarely decisive as to the meaning of any provisions of a commercial contract. The words used, commercial sense, and the documentary and factual context, are, and should be, normally enough to determine the meaning of a contractual provision."

636. That dicta predated the decision in ***Arnold v Britton*** [2015] UKSC 36 to which reference has already been made, but in my judgment still holds good. As Lord

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Neuberger said in that latter case, a Supreme Court decision that (as one would expect) is consistent with ***K/S Victoria Street*** but of higher authority, at [17]:

"First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook*, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision."

(emphasis added)

637. Further, in ***Persimmon Homes Ltd and others v Ove Arup & Partners Ltd*** [2017] EWCA Civ 373 at [52] Jackson LJ stated that "in relation to commercial contracts, negotiated between parties of equal bargaining power, that rule [*contra proferentem*] now had a very limited role."

638. Here, the evidence from the Post Office makes it clear that the SPMs had no "control over the language used" because amendments to the standard wording would not be permitted. Additionally, I am not persuaded that the parties are of equal bargaining power. However, regardless of these points, I am very reluctant to apply the rule of *contra proferentem,* even if any part of that rule survives, which I doubt. Even if it does, I do not believe it is correct to apply it here. I therefore reject the submission of the Claimants that I should use this principle of construction, if there is such a principle. This is because in my judgment that rule no longer has widespread or general applicability to commercial (as opposed to consumer) contracts. Whatever the particular status of SPMs, they are not consumers and were undoubtedly setting up, or taking over Post Office branches, as businesses. This is not the place for an analysis of whether the rule still applies to other (non-commercial) contracts, but I do not consider it either necessary or desirable to apply it here. I accept the submissions of the Post Office that it is a principle of last resort, if anything remains of it as a principle at all.

639. Applying those principles to each of the SPMC and the NTC in turn, therefore, the following can be seen when the relevant express terms of each of the SPMC and NTC are considered. I shall deal with responsibility for losses first (even though it is Common Issue 8 for the SPMC, and Common Issue 9 for the NTC) as that is the point that the parties concentrated on predominantly.

The terms of the SPMC dealing with losses – Common Issue 9

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640. It is undoubtedly the case that in 1994, when the SPMC was used, and until Horizon was introduced, a Post Office branch would operate very differently from later years. It was in this environment that the terms of the SPMC came into existence. Accounting was entirely paper based. There was no widespread use of the internet, and the concept of "online", and cyber-crime barely existed. Physical security was important.

641. Section 12 Clause 5 dealt with this in the following terms:

"The Subpostmaster is held strictly responsible for the safe custody of cash, stock of all kinds and other Post Office Counters Ltd property, papers and documents, whether held by himself or by his Assistants, and should keep them in a place of security, especially at night."

642. This identifies physical things – "cash, stock of all kinds…. property, papers and documents" which had to be kept "in a place of security". For these tangible things, the SPM was "strictly responsible" to the Post Office. This is because the SPM was in the prime position to ensure that physical security. The branch was located in his (or her) premises, and security was in his (or her) hands. "Strict responsibility" uses the same language of "strict liability".

643. Section 12 Clause 12 is more widely worded than Section 12 Clause 5 in terms of using the phrase "all losses" – these could include, but would not necessarily be restricted to, physical things. That term is distinct from "safe custody" because losses could occur other than through a failure of keeping physical things safe. One example, beloved of both sides in this litigation and many witnesses, and used multiple times in the evidence, was the book of stamps. The archetypal book of first class stamps and its chequered life was often used in the evidence to illustrate a particular point. Continuing that example here, a book of stamps could simply be lost by an SPM because it was not put away safely, or because it was inadvertently put in the waste bin, or inadvertently given to a customer who bought two books of stamps, but was given three books by mistake (and did not notice at the time). This loss would become apparent at the end of a trading period. The SPM would be liable under both Section 12 Clause 5 and also Section 12 Clause 12, which stated:

"The Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants. Deficiencies due to such losses must be made good without delay."

644. However, losses could also be caused by the carelessness of a SPM but which did not involve the loss of a physical thing which was required to be kept safe. An example would be an incorrect entry in a savings book. A customer may deposit £30, but this might be recorded as £300 – this example of the "extra nought" was used by at least one interviewer, Mr Carpenter, in his evidence. The customer in this example would leave the branch with a notional gain of £270 in their savings book, to which he or she would not, given the amount of money deposited, be entitled, but the mistake in the book would mean the record showed that they were. So far as the branch was concerned, this would become evident at the end of the relevant trading period (as the cash in the branch would be £270 less than it ought to be, as the customer had only paid in £30 and not £300). That £270 would have to be made good from somewhere, and given the error would be on the part of the SPM, it would be his or her

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responsibility. I will consider the position of the SPM first, and then turn to the position of his or her assistants.

645. There are two notable elements to these clauses. Firstly, the "responsibility" element is not contractually dealt with in the same way for losses generally in Section 12 Clause 12, as it is for the safe custody of cash and physical stock in Section 12 Clause 5. Fault on the part of the SPM is necessary for losses that arose other than through cash and physical stock going missing because they were not kept safely. For the latter, the SPM was agreed to be "strictly responsible", a phrase not used in Section 12 Clause 12. I do not consider that the Post Office is correct in seeking to have Section 12 Clause 12 construed as making the SMP liable for "shortfalls/deficiencies except in specified circumstances, creating exceptions to liability". Such an approach would require a blanket imposition of liability, *unless* the SPM could bring the loss within an exception available to him or her. That is not in the words of Section 12 Clause 12. "Strictly responsible" is a phrase used in Section 12 Clause 5. That means that no matter the reason for the loss of (say) £100 out of the safe, the SPM is strictly responsible for that loss. "Responsible" in Section 12 Clause 12 should not be read as being "strictly responsible", given that phrase is expressly used in Section 12 Clause 5 but is not used in Section 12 Clause 12.

646. There is no such wording in Section 12 Clause 12. The wording is that "the Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error……". This is different to wording necessary to impose blanket liability, *unless* a loss can be brought within an exception to that blanket or strict liability. I consider that the correct meaning of Section 12 Clause 12 is that the SPM is responsible for losses that are caused by his own negligence, careless or error, and that it is for the Post Office to prove that any particular loss falls within that category. I consider that this is clear on the natural meaning of the words.

647. It might be thought that such a construction of the words ought not to be wholly controversial, but it is hotly controversial when one considers the argument advanced by the Post Office.

648. Mr Cavander explained this orally in his opening submissions on the 1st day of the trial as follows:

"So the first point is that clause 12(12) doesn't expressly, in my submission, allocate the burden of proof at all, save in one respect, and I will come back to that as it relates to assistants. But as you will have seen from our submissions, Post Office accepts that we have the persuasive burden of showing there is a loss arising obviously from a shortfall or deficiency. In the ordinary way, if you allege there is a loss you need to show it. He who asserts must prove. But it is not a matter of construction of the clause.

The Post Office will seek to discharge that persuasive burden by relying on signed accounts or evidence derived from audit or Horizon. But Horizon is just evidence here. It will either be good enough or not to prove a shortfall generally or in an individual case."

He also stated "In order to show loss we will need to show that this is a loss which is not a Horizon-generated event".

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649. However, that point, although it appeared to concede the construction contended for by the Claimants, turned out to be nothing of the sort. This was for three reasons. Firstly, it was joined with the inference adopted by the Post Office regarding the Horizon system, which is that Horizon-generated losses do not occur. The Post Office therefore argued that it is entitled to conduct itself as though shortfalls *are* the responsibility of SPMs, unless the SPM could prove the loss was *not* caused by his or her negligence, carelessness or error. Secondly, for both the SPMC and the NTC, the Post Office argued (in various places, but a useful starting place is paragraphs 89, 134, 139 to 143 of its Written Opening) that the Post Office did not have the burden of showing there was a loss.

650. Paragraph 89 stated: "…as a matter of making commercial sense of the clause, the words of clause 12 cannot legitimately be read as imposing a 'contractual burden' of proof on [the] Post Office to identify the specific losses underlying the shortfall and show them to have resulted from the SPM's negligence, carelessness or error (or that of an assistant). There is no express contractual allocation of the burden of proof on these matters."

651. There was a degree of interest in court when Mr Cavender made the oral submissions to which I have referred, perhaps because it appeared as though the Post Office's case had changed in some way, or was about to change. Upon consideration, however, it had not changed at all. It had become more complicated to unravel, and therefore to understand, but the fundamental point remained. This is set out in paragraph 89(a) of the Post Office's Written Opening which stated:

> "Crucially, on the plain meaning of these words, there is no 'deficiency' where Horizon shows only an apparent shortfall, attributable to a bug or error in the system. There is only liability where there is in fact a shortfall".

652. However, by creating a different category called "apparent shortfall, attributable to a bug or error" – and maintaining that does not fall in the meaning of Section 12 Clause 12 – the Post Office was not accepting the Claimant's case on construction. This is because it is also maintained by the Post Office that such a shortfall cannot and does not exist, hence there is no such thing. Accordingly, by entirely circular reasoning, the Post Office contends that it *can* rely upon Section 12 Clause 12 for what the Claimants called Horizon generated shortfalls, *unless* the SPM could show that such deficiencies were *not* due to his or her negligence carelessness or error. Whether there are Horizon generated shortfalls, or apparent shortfalls attributable to bugs or errors, will be resolved at the Horizon Issues trial.

653. In my judgment, the meaning of Section 12 Clause 12, so far as the responsibility of the SPM is concerned, is clear on the natural meaning of the words, and it is the Claimant's construction that I consider to be the correct one. It is not for a SPM to demonstrate that there was no negligence, carelessness or error on his or her part. It is for the Post Office to demonstrate that there is. It is only if the Post Office can demonstrate that there is a loss which falls within the scope of the clause, that it is entitled to rely upon the clause to establish liability on the part of the SPM for that loss. This means that the wording of the clause imposes a contractual burden upon the Post Office to do that. This is clear from the natural meaning of the words.

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654. Third of the three reasons I refer to at [649] is that the documents upon which the Post Office said it would rely upon are "the accounts, or evidence derived from audit or Horizon". The way in which the accounts were prepared after Horizon was introduced required a SPM to make a Branch Trading Statement even if it contained disputed items. It was also produced as part of the operation of the Horizon system. The auditors used Horizon to identify what the Post Office expected to find in the branch in terms of cash and stock. Shortfalls and discrepancies were identified against Horizon in all circumstances. Yet further, Mrs Stockdale did not even sign the Branch Trading Statement, and was careful not to do so. Finally, SPMs had to close a branch trading period every four (and sometimes five) weeks by producing a Branch Trading Statement in order to "roll over" into the next branch trading period and open the branch and continue trading. Whether the Post Office is entitled to rely upon the accounts, or evidence obtained in the audit or otherwise from Horizon is part of the dispute between the parties, but it does not affect the contractual construction of the clause. I consider there is a contractual burden upon the Post Office to demonstrate that the loss for which it seeks to hold a SPM responsible was caused by the negligence, carelessness or error of the SPM.

655. I then test my construction of the clause against commercial consequences or the implication of the rival constructions, to use Lord Hodge's expressions. For a SPM to demonstrate they were not at fault, if there was a loss, could be verging on nigh on impossible. Firstly, they would have to concentrate upon and analyse all of the branch records for every single transaction within the particular trading period. That would be an onerous burden for a single SPM. Secondly, those records would only be between the branch and the Post Office; SPMs have no access to data between the Post Office and its clients, and are not able to obtain it. A further factor – though far less important - is all of this would have to be done whilst the SPM was complying with their obligation to open and run the branch during working hours during the week. I am also confident, from the evidence in this trial but especially that of Mrs Stockdale, who appeared in my judgment to have done all that was humanly possible in order to work out what was happening, that a SPM simply does not have access to the type of information that would make such an onerous exercise possible even in theory.

656. For the Post Office, however, to do this, would be less difficult. All of the transactions of that branch could be analysed and compared with the relevant data between the Post Office and what it calls its clients, which include companies like Camelot. Secondly, that workload would be borne by the (or a) relevant department, and not by one sole individual, who would be trying to run a branch Post Office during normal business hours at the same time. Thirdly – and in contractual terms this is less important, but it is an implication of a rival construction, and hence appropriate to consider it - the Post Office is responsible for compiling evidence for prosecutions for offences of false accounting and theft by SPMs. As such, it bears the burden of proof of demonstrating to the appropriate criminal standard that conduct by SPMs is dishonest. It must therefore have the ability to demonstrate how a loss has been caused.

657. The sentence in Section 12 Clause 12 "deficiencies due to such losses must be made good without delay" makes it clear that the deficiency must be due to the losses, the

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responsibility for which is dealt with in the first sentence. There is also no distinction made between losses caused by a SPM and by an assistant.

658. I am satisfied that by construing the words, and also considering the commercial consequences and the implication of the rival constructions, the same result is reached. The Claimants' construction is to be preferred, and it is the one that I find applies to the SPMC.

659. The position regarding assistants is less clear on the natural meaning of the words. The clause states that "the Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants." The phrase "losses of all kinds caused by" has led the Post Office to argue that the SPM effectively has strict liability for the acts of his or her assistants, even though the SPM themselves have fault-based liability.

660. I remind myself here of what Lord Neuberger stated in ***Arnold v Britton*** "*The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader"* and also Lord Hodge's explanation in ***Wood v Capita*** **"**"*To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each*." The effect of the Post Office's construction of the liability in respect of assistants is that the SPM him or herself has a fault-based liability, whereas the same person has strict liability in respect of their assistants. The Claimants submit that the liability of an SPM for their assistants is exactly the same in scope as for the SPM themselves.

661. The Post Office rely on this phrase "losses of all kinds caused by" within the clause to justify the claim of strict liability for assistants. However, the first point to note is that "of all kinds" refers to the type of losses, and not to the cause of them. Secondly, although the second part of the provision simply states "caused by his Assistants", the main clause of the sentence is the first part. This expressly limits and defines "cause" by reference to the negligence, carelessness and error of the SPM. It would have been, in my judgment, surplus verbiage to have added "and also for losses of all kinds caused by his Assistants' negligence, careless and error". "Cause" in the second part of the sentence, which I consider (in grammatical terms) to be a subordinate clause to the main clause, should be read in conjunction with, and is limited by, the provisions concerning cause in that main clause which requires fault.

662. I consider the main clause is the first part. If the second part, which deals with assistants, is correctly read as a subordinate clause to that, then there is no difference in the wording, as the requirement for fault in that main clause operates upon, and governs, the whole sentence.

663. Secondly, under Section 12 Clause 5 – the clause that deals with "strict responsibility" for safe custody of cash and stock - the phrase "whether held by himself or by his Assistants" is included. As has been seen, there is no express wording of "strict responsibility" in Section 12 Clause 12, but the Post Office seek to have it construed as though there were. I do not consider, on the natural meaning of the wording of the

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two clauses construed together (as they must be) it can be construed in the manner for which the Post Office contends.

664. To balance the indication of each rival construction, as required by Lord Hodge, a SPM would (if the Post Office were right) be expressly assuming responsibility for losses caused by his own negligence for himself, yet have a far wider responsibility for his assistants and be strictly responsible for those, even though he would have less control over his assistants than he would over himself. The extent of responsibility of a SPM for what occurred in the branch cannot sensibly depend upon whether the SPM himself, or an assistant, is at the till or terminal on any particular occasion, when a non-fault based loss occurred.

665. One has only to state the Post Office's proposition to see how far it is from commercial reality. It can only be arrived at by treating the single clause as though it were two entirely separate and distinct provisions, and by construing the second in complete isolation from the first, and by reading the second part as though it included words that are not there.

666. There is another feature that also demonstrates why broader liability for assistants is contrary to the agreement of the parties. It is common ground that SPMs have responsibility for training their assistants. It would be most strange if an SPM would or could be expected to train their assistants to a higher level than the one to which they themselves had been trained; that would be wholly illogical. If therefore it is accepted – as it ought to be – that the level of training expected of the assistants is the same level as the SPM, then it would be strange if notwithstanding that, the level of responsibility were higher.

667. As a matter of the meaning of the words in the two clauses themselves, I find that the responsibility for assistants is therefore the same as that for the SPM, namely responsibility for losses caused by negligence, carelessness or error.

668. I therefore consider that the Claimants' case on construction for responsibility for losses under Section 12 Clause 12 is the correct one.

669. There is one particular argument that was presented by the Post Office on Section 12 Clause 12. It has its own particularly descriptive heading in the Opening namely "A loss caused by Horizon would not qualify under section 12, clause 12". In that section, an argument is presented that "the clause does not impose liability for any *apparent* deficiency that results instead from a bug or error in Horizon." This is because, it is said, liability under Section 12 Clause 12 must be one that results from a loss-causing event (or more than one such event) in the branch itself. This is argued by the Post Office as follows:

"If Horizon is affected by some bug or error that prevents it showing the true data for the branch transactions, what the system shows when it conducts a balance is not the comparison between the "actual" and "should be" positions for cash and stock that is essential to the concept of a deficiency or shortfall. If Horizon were to be affected by a bug that caused it to inject £100 into the derived cash figure for the branch, it may then show an apparent shortfall of £100, but that would not be the result of either a physical loss or a transaction loss at the branch, and there would be no "deficiency"

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within the meaning of clause 12. The SPM is liable for shortfalls that result from losses in the branch, not for whatever number may be shown on Horizon…..

[The Claimants] ignore this basic and important point because it suits them to suggest that Post Office's case is that clause 12 can somehow be used to impose liability for apparent shortfalls that are generated by Horizon, rather than resulting from the conduct of the branch. [The Claimants] use this to distract the Court from the true issues that arise under that clause. If Horizon fails to reflect the transactions that were conducted in the branch, its error does not create liability."

670. I reject the submission that the Claimants ignored "a basic and important point" or they were using that to distract the court from the true issues that arise under Section 12 Clause 12. This argument mounted in its Opening verges on misrepresenting the Post Office's own case. It wholly ignores that the Post Office denies that there can be any "loss caused by Horizon". It also wholly ignores that Section 12 Clause 12 in the SPMC is precisely the clause relied upon by the Post Office to impose liability upon the four Lead Claimants when they were chased for unexplained discrepancies and shortfalls, which they maintained had been caused by Horizon. Further, it ignores the fact that there is no other separate clause within the SPMC which would make a SPM liable for a "loss caused by Horizon" as defined or explained by the Post Office. This section of the Post Office Opening ends with the sentence "If Horizon fails to reflect the transactions that were conducted in the branch, its error does not create liability". The Claimants' whole case is that the figures shown on Horizon did not reflect the transactions conducted in the branch, yet the Post Office still used the loss provisions of the SPMC to demand sums from SPMs, and on many occasions suspend and terminate their engagement.

671. This argument by the Post Office is, in my judgment, both circular, and is an overly intricate attempt to sow confusion and obscure the true issues in the case. It is not often in a lengthy judgment, after a long trial, that it is necessary to turn to the pleadings to work out exactly what a party's case is on construction, but here I consider it to be necessary.

672. In paragraph 54 of the Amended Generic Particulars of Claim the Claimants pleaded the following:

"Accounts and Liability for Loss

54. The written terms of the Defendant's contracts with Subpostmasters included terms which the Defendant (wrongly) applied and operated so as to hold Subpostmasters strictly liable for all cash and stock and apparent or alleged shortfalls, and with wide ranging responsibility for losses (the clauses are then set out…..).

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 not so strictly liable and 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;

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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."

673. These two paragraphs are pleaded to by the Post Office in its Amended Generic Defence and Counterclaim:

"Accounts and Liability for Loss

92. (after admitting the terms as terms) These terms imposed on Subpostmasters responsibility for losses at their branches. In circumstances where Subpostmasters were in control of and they and/or their Assistants had first-hand knowledge of the transactions effected on Post Office's behalf and the cash and stock belonging to Post Office held at their branches, such terms were to be expected. It is denied that Post Office applied them wrongly.

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 not 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.

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(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.

(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, Clause 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."

(emphasis added)

674. These paragraphs of the pleading make it clear exactly what the case being argued by the Post Office in the Common Issues trial was in this respect, and that the Claimants were not trying to distract the court by meeting that case. These paragraphs in the Amended Defence are specifically pleaded in relation to the Claimants' case on Section 12 Clause 12. Given "their branch accounts" included information generated by Horizon, I simply do not see how it can be sensibly argued by the Post Office that figures shown on the Horizon system were not, prior to this trial, sought to be imposed upon SPMs as part of a loss claimed by the Post Office under this clause in the SPMC, or that the Post Office had relied upon the clause to recover such sums. One of the main disputes in this litigation is whether the figures shown on the Horizon system at the end of a branch trading period accurately represented the state of the branch's accounts, and whether the Horizon system was sufficiently accurate in that respect.

675. I reject this attempt by the Post Office to gloss over the fact that the evidence clearly shows that the Post Office was acting in precisely the manner to recover losses which the Post Office now claim, as a matter of construction, could never fall within the clause at all. Whether shortfalls or discrepancies are "Horizon generated losses" or not will, as I have stated, be decided in a later trial.

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676. The reason for this volte face by the Post Office on this important point can only be guessed at, and the motivation is not important.

The terms of the NTC dealing with losses – Common Issue 9

677. The Network Transformation Programme led to new and different (and improved) methods of contracting with SPMs, and a new contract called the NTC with wholly different terms. Whoever drafted the NTC blended the two separate provisions dealing with cash and stock, and losses, that had been included in the SPMC in the two separate clauses I have considered above, together into a single clause.

678. Part 2, Paragraph 4.1 states:

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

679. This has the following components:

> 1. An SPM is "fully liable for any loss of, or damage to" cash and stock,
>
> 2. This is so "however this occurs, whether as a result of negligence…. or otherwise, or as a result of any breach" of the NTC;
>
> 3. This does not apply if the loss arises from criminal acts: "except for losses arising from criminal acts which" the SPM "could not have prevented (or mitigated) by following" Post Office security procedures or by taking reasonable care.
>
> 4. Any deficiencies in stocks of products "and/or any resulting shortfall in the money payable to" the Post Office must be made good (which effectively means paid) without delay.

680. The important express words are "fully liable"; "however this occurs"; "whether as a result of negligence…. or otherwise"; "any deficiencies"; and finally "and/or any resulting shortfall in the money payable to" the Post Office.

681. This is a very wide ranging provision, and must have been deliberately drafted in very wide terms. The difference in the terminology, compared to the SPMC, is stark (although as I have said the exercise of construing the terms is to be done separately for each contract form). Indeed, given the drafting, construing this term in the NTC is a far more straightforward exercise.

682. On the natural meaning of the words, I consider that as a matter of construction this clause in the NTC imposes full liability upon a SPM for any losses to cash and stock,

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whether by as a result of negligence or otherwise, with the sole exception being losses arising from criminal acts which could not have been prevented.

683. I reject the Claimants' submission that this has the same meaning as Section 12 Clause 12 of the SPMC. I accept the submission of the Post Office that there is no general fault requirement for liability, and the SPM is liable for all shortfalls, whatever the cause of the underlying loss. The sole exception relates to a criminal act.

684. I bear in mind the cautionary words of Lord Neuberger in ***Arnold v Britton***, and that the court should not be influenced, in cases of clear words, that the potential consequences for one contracting party are very detrimental.

685. For completeness I would simply identify that security of the cash and stock (which belongs to the Post Office, it must be remembered) also has its own section in the NTC at Part 2, Paragraph 3.7.

686. Given my conclusion on the natural meaning of the words, there is no doubt that this clause at Part 2, Paragraph 4.1 in respect of liability for losses has very wide ranging implications for a SPM contracting on this basis. The Claimants had alternative submissions based upon the clause being construed in the way that I have, which is that it is onerous, oppressive and unfair. I shall deal with those submissions in respect of the relevant Common Issues, essentially in Parts O and P.

687. The Post Office must, however, demonstrate that there is a "loss" and "a resulting shortfall". This means a real and actual loss. A Horizon generated figure that was incorrect due to a bug or software glitch would not be a real and actual loss. However, if the Post Office has done that, and satisfied the contractual burden upon it to show that it has suffered a loss or such a loss has occurred, then the SPM is liable, unless it can be brought into the sole exception. I consider that the contractual burden would then be upon the SPM to bring that loss (demonstrated by the Post Office) within the exception. In most situations, a loss caused by a physical crime such as a robbery or burglary would not require enormous consideration as to how the loss arose. It would be obvious. Criminal acts of Personnel (which is a defined term, and means assistants) are not caught by the exception, so if (say) an assistant was stealing from the Post Office, the SPM would be liable for those losses.

688. Finally, on the point of training of Assistants which I have dealt with above on the SPMC, just for completeness I would record that in the NTC the obligation upon the SPM to train his or her assistants is contained expressly in Part 2, "Assistants and Training", which states at Part 2 Paragraph 2.4:

> "The Operator [ie the SPM] shall ensure that the first Manager cascades the training to all other Assistants and to any replacement Manager in order to ensure that all subsequent Managers and all other Assistants receive sufficient initial training from properly trained Managers."
>
> (emphasis added)

689. The notion of "cascading" training can only sensibly be interpreted as passing on the training received. The terms of the NTC cannot, in any respect, be used in any way to construe the terms of the SPMC, and I have not done so. I merely draw attention to

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the fact that my conclusion on assistants and training in the SPMC, which is reached separately above, is one similar to the express terms of the NTC. It is also, I consider, wholly logical, whereas the contrary construction, expecting a SPM to be able to train an assistant to a higher level than he or she have themselves been trained, is not.

I. Express and implied terms

690. The parties are agreed, and it is well established, that one must first deal with express terms (including any resolving any contested issues of construction on them) before considering the question of implied terms.

691. There are two types of implied terms. This was made clear by Baroness Hale in ***Geys v Société Générale*** [2013] 1 AC 523.

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

692. The Post Office submits that for any of the terms alleged by the Claimants to be found to be implied, they must fall into the first category. It is certainly correct that SPMs are not employees, and so the law does not imply terms as a necessary incident of the specific relationship between the Post Office and an SPM being one of employer/employee. The nature of the relationship is not entirely free of some characteristics that are found in employer/employee relations, for example SPMs could qualify, under the SPMC, for payment during holidays (although it is an allowance, and is not called "holiday pay"), as long as they provided at least 18 hours of personal service in their branch per week. The interview process included ascertainment by the Post Office of whether this amount of personal service was intended, in which case it would be required. All the Post Office witnesses who were asked about it were clear that the Post Office was very sensitive about SPMs *not* being seen as employees. However, notwithstanding that, I do not consider that the law imposes into these contracts implied terms as a necessary incident in the same way as employment contracts. That statement must however be subject to my conclusion on Common Issue 1.

693. This therefore means that the correct place to start in terms of implication of terms in this case is the test of necessity as set out in ***Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*** [2015] UKSC 72. In that case, under the terms of four commercial leases, each lease contained a break clause allowing the tenant to terminate the lease on 24 January 2012. This had to be done by giving the landlords six months' prior written notice, provided that, on the break date, there were no arrears of rent and the tenant had paid the landlords a break premium equivalent to

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one year's rent. In early July 2011 the tenant served a break notice on the landlords. It then paid a full quarter's rent in December 2011, and the break premium a few weeks later. As a result of those payments the break notice was effective and the lease determined on 24 January 2012. However, the tenant then claimed repayment of rent which it had already paid for the period after the termination of the lease on the basis that a term entitling it to such repayment should be implied into the lease. Morgan J allowed the claim at [2013] EWHC 1279 (Ch). The landlords appealed, and the Court of Appeal allowed the appeal at [2014] EWCA Civ 603. The Supreme Court dismissed the tenant's appeal.

694. This case decided that a term would be implied into a detailed commercial contract only if that were necessary to give the contract business efficacy, or so obvious that it went without saying. The implication of a term was not critically dependent on proof of an actual intention of the parties when negotiating the contract but was concerned with what notional reasonable people, in the position of the parties at the time at which they had been contracting, would have agreed; and that it was a necessary but not sufficient condition for implying a term that it appeared fair or that the court considered that the parties would have agreed it if it had been suggested to them. This test for the implication of terms is referred to by the Post Office, usefully, as the test of necessity. When I refer to business necessity, or implication of a term being required for business efficacy, that is the test that I am applying. Since closing submissions in this case, and whilst this judgment was being drafted, ***Wells v Divani*** [2019] UKSC 4 was handed down by the Supreme Court. This case considered ***Marks and Spencer plc v BNP Paribas*** at [27] to [29]. However, it did not change the principles set down in that case, it merely considered them, and for that reason I did not call for further submissions from the parties.

695. One example of the application of ***Marks and Spencer plc v BNP Paribas*** in the Court of Appeal is at [26] in the judgment of Hildyard J in ***JN Hipwell & Son v Szurek*** [2018] EWCA Civ 674, (with whom Gross LJ agreed) who said:

"…..it is well established, and was not disputed before us, that a term may be implied where it is necessary to give business efficacy to the contract in question. In such a context, the touchstone is always necessity and not merely reasonableness, and the term is implied as a matter of fact in the particular case, rather than as a matter of law and as a legal incident of contracts of an identified type."

696. The useful summary in that case of the approach to implication of terms is at [30]:

"Drawing on a number of cases, Lord Neuberger of Abbotsbury PSC (with whom Lord Sumption and Lord Hodge JJSC agreed) identified or emphasised the following principles:

(1) The starting point is to determine whether there is any provision in the agreement in question (in that case also, a lease) which expressly covers the point: only if there is not can the implication of a term be appropriate, for the jurisdiction is to restore efficacy not improve that which, though not optimal, is workable (my phraseology). As Lord Neuberger put it, "it is only after the process of construing the express terms is complete that the issue of an implied term falls to be considered" (at [28]).

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(2) The Court must take into account the possibility that the parties deliberately decided not to include the term sought to be implied: it is tempting but wrong to fashion and interpolate a term simply to reflect the merits of the situation as they appear when the issue arises: see [19] and the quotation from Lord Bingham MR's judgment in ***Philips Electronique Grand Public SA v British Sky Broadcasting Ltd*** [1995] EMLR 472 at 481-2.

(3) The question whether a term is to be implied is to be judged at the date when the contract is made (see [23]).

(4) The test is necessity, not reasonableness; but "absolute necessity" may put the bar too high, and it may be more helpful to ask the question whether without the term the contract would lack commercial or practical coherence (see [21]).

(5) Although the process of construction and the process of implying terms both involve determining the scope and meaning of the contract (see ***Attorney-General of Belize v Belize Telecom Ltd*** [2009] 1 WLR 1988, and [26] in ***Marks & Spencer***), the process of implication involves a rather different exercise from that of construction, and calls for strict restraint: see per Lord Bingham MR in the ***Philips*** case at page 481 and per Lord Neuberger in Marks & Spencer at [29]."

697. Two implied terms are agreed. The Post Office contended for the implication of two terms, which were admitted by the Claimants.

698. These were pleaded in the following way, and were said to apply to both the SPMC and the NTC. They were that each of the agreements:

"….contained the following implied terms (implied as being so obvious as to go without saying and/ or necessary to the business efficacy of the agreements):

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

(2) Each party would provide the other with such reasonable cooperation as was necessary to the performance of that other's obligations under or by virtue of the contract (the "Necessary Cooperation Term")."

699. Common Issue 2 contains no fewer than 21 different terms, said to be implied terms of incidents of implied terms, if the contracts were relational ones. The Post Office denies that they are terms to be implied into the contract, and partly relies upon the large number of terms, said to be implied, to justify a submission that this great number cannot possibly be necessary. The agreed introductory wording to that Common Issue is potentially misleading, because it states "Which, if any, of the terms in the paragraphs listed below were implied terms (or incidents of such implied terms) of the contracts between Post Office and Subpostmasters?" (emphasis added)

700. In my judgment, the issue of whether terms are to be implied, and if so which ones, in Common Issue 2, is inextricably linked with consideration of Common Issue 1, namely whether the contracts are relational contracts. This is because, if the correct conclusion is that the contracts between the Post Office and the SPMs are relational

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contracts, then a great many (if not all) of the "implied terms" at Common Issue 2 are not individual implied terms in themselves, but "incidents", examples or consequences of the operation of duties of good faith, fair dealing, transparency, co-operation, and trust and confidence (if that is what relational contracts are).

701. In my judgment, the fact that the parties are agreed on the implication of ***Stirling v Maitland*** Term, and the Necessary Co-operation Term, is not determinative of whether these contracts are relational contracts. Nor, in my judgment, is the presence of notice provisions in the SPMC and the NTC determinative of that issue either, which is another point argued by the Post Office. I therefore deal with the question of implied terms further below, after considering Common Issue 1, and whether these contracts are relational contracts.

J. Relational Contracts

702. The first Common Issue is whether the agreement between a sub-postmaster and the Post Office is a relational contract. This is a term which was used by Leggatt J (as he then was) in the case of ***Yam Seng Ptd Ltd v International Trade Corporation Ltd*** [2013] EWHC 111 (QB). Although I consider the law relating to that issue here, it is necessary to consider the express terms before coming to a firm conclusion on the matter. This is because of what the authorities state. It is however convenient to address the legal principles now.

703. There was a great deal of detailed debate in both the opening and closing submissions of the parties concerning what a relational contract is; or put another way, if there is such a specie of contract, what its characteristics are. At one point in opening submissions it appeared to me that the Post Office was arguing that there was no such thing.

704. This was partly based e Post Office also relied upon a passage in *Chitty on Contracts* (2018) 33rd. ed. Sweet & Maxwell, at 1-058, to which I will return.

705. The following cases make it clear, in my judgment, that the concept of relational contracts is an established one in English law. Even putting ***Yam Seng*** to one side (and there is no reason to do so) each of the following cases accepts that it exists, dealing with the most recent appellate authority first.

1. In ***Amey Birmingham Highways Ltd v Birmingham City Council*** [2018] EWCA Civ 264 Jackson LJ stated:

"[92] The contract before the court is a PFI contract intended to run for 25 years. It may therefore be classified as a relational contract. In recent years there has been much academic literature on relational contracts and on the question whether they are subject to special rules. See, for example, Professor Hugh Collins' paper "Is a relational contract a legal concept?" in *Contracts in Commercial Law* (Degeling and others, Thomson Reuters 2016). For good reason, none of that literature has been cited to us and I do not venture into those contentious issues."

2. In ***Globe Motors v TRW Lucas Varity Electric Steering*** [2016] EWCA Civ 396 Beatson LJ stated at [67] to [68] as follows:

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

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

(emphasis added)

3. In ***MSC Mediterranean Shipping Co v Cottonex Anstalt*** [2016] EWCA Civ 789, an appeal from Leggatt J at first instance, Moore-Bick LJ said at [45]:

"The judge drew support for his conclusion from what he described as an increasing recognition in the common law world of the need for good faith in contractual dealings. The recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences and I do not think it is necessary or desirable to resort to it in order to decide the outcome of the present case."

It should be noted that Moore-Bick LJ did *not* say that there was no such concept, but rather it was neither necessary nor desirable to resort to it in that case. I consider this

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as consistent with, and further support for, the concept of relational contracts in English law, that is to say those that have an implied duty of good faith.

4. In ***D&G Cars Ltd v Essex Police Authority*** [2015] EWHC 226 (QB), Dove J decided a case in which the police authority had contracted with a company to recover damaged cars, and had discovered that they were being repaired and commercially disposed of by that company. He stated:

"[175] It will be clear from what has been set out above that both the existence and the content of an implied condition in relation to honesty and integrity is highly sensitive to the context of the contract itself. By the use of the term 'integrity', rather as Leggatt J uses the term 'good faith', the intention is to capture the requirements of fair dealing and transparency which are no doubt required (and would, to the parties, go without saying) in a contract which creates a long-standing relationship between the parties lasting some years and which has the qualities and features to which I shall turn shortly. There may well be acts which breach the requirement of undertaking the contract with integrity which it would be difficult to characterise definitively as dishonest. Such acts would compromise the mutual trust and confidence between the parties in this long-term relationship without necessarily amounting to the telling of lies, stealing or other definitive examples of dishonest behaviour. They would amount to behaviour which the parties would, had they been asked, have identified as obvious acts which were inconsistent with the maintenance of their intended long-term relationship of fair and open dealing and therefore would amount to a breach of their contract.

[176] As noted above, there are particular features of this contract which warrant the inclusion of this implied term. Firstly, as already noted, the contract created a relatively lengthy period of contractual relationship between the parties, during which there were going to be a very large number of individual transactions undertaken under the auspices of the contract. It was, in my view, a 'relational' contract *par excellence."*

(emphasis added)

5. In ***Sheikh Al Nehayan v Kent*** [2018] EWHC 333 (Comm) Leggatt J himself stated:

"[167] It does not follow from the conclusion that he did not owe any fiduciary duties to Mr Kent that the Sheikh's entitlement to pursue his own self-interest was untrammelled. I have previously suggested in ***Yam Seng Pte Ltd v International Trade Corp*** [2013] EWHC 111 (QB), at [142], that it is a mistake to draw a simple dichotomy between relationships which give rise to fiduciary duties and other contractual relationships and to treat the latter as all alike. In particular, I drew attention to a category of contract in which the parties are committed to collaborating with each other, typically on a long term basis, in ways which respect the spirit and objectives of their venture but which they have not tried to specify, and which it may be impossible to specify, exhaustively in a written contract. Such 'relational' contracts involve trust and confidence but of a different kind from that involved in fiduciary relationships. The trust is not in the loyal subordination by one party of its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of cooperation. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith."

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6. In ***Bristol Groundschool Ltd v Intelligent Data Capture Ltd*** [2014] EWHC 2145 (Ch) the parties agreed to collaborate to produce training manuals for pilots. The claimant provided the content, and the defendant converted that into an electronic application, which was jointly published and marketed. When the parties fell out, and in anticipation of their joint venture coming to an end, the claimant secretly accessed the defendant's database and downloaded material, later using this downloaded material to continue selling the electronic training manuals. One issue was whether the secret download was a breach of contract. There was no express term of the contract which prohibited it. But Mr Richard Spearman QC, sitting as a deputy High Court judge, characterised the joint venture agreement as a relational contract and held that there was an implied term of the contract requiring good faith in its performance. The defendant had breached that term by engaging in conduct that "would be regarded as commercially unacceptable by reasonable and honest people".

706. Further, and dealing with the specific submission by the Post Office that good faith means only honesty, I consider that this is in direct conflict with the dicta of Leggatt J at [175] in ***Sheikh Al Nehayan v Kent*** [2018] EWHC 333 (Comm) where he said:

"…..In ***Paciocco v Australia and New Zealand Banking Group Limited*** [2015] FCAFC 50, para 288, in the Federal Court of Australia, Allsop CJ summarised the usual content of the obligation of good faith as an obligation to act honestly and with fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained. In my view, this summary is also consistent with the English case law as it has so far developed, with the *caveat* that the obligation of fair dealing is not a demanding one and does no more than require a party to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people"

(emphasis added)

707. The submission of the Post Office that good faith means honesty also directly ignores the dicta of Dove J in ***D&G Cars Ltd v Essex Police Authority*** [2015] EWHC 226 (QB) who said at [175] "By the use of the term 'integrity', rather as Leggatt J uses the term 'good faith', the intention is to capture the requirements of fair dealing and transparency which are no doubt required…..There may well be acts which breach the requirement of undertaking the contract with integrity which it would be difficult to characterise definitively as dishonest. Such acts would compromise the mutual trust and confidence between the parties in this long-term relationship without necessarily amounting to the telling of lies, stealing or other definitive examples of dishonest behaviour." It is clear that in that case there was considered to be more to such an obligation than acting honestly (or not acting dishonestly).

708. The passage to which I refer above at [704], which took up some time in oral openings when it became clear the degree to which the Post Office relied upon it, is where the editors of that respected work considered the dicta of Leggatt J in the case of ***Yam Seng*** itself. *Chitty* states as follows on this important subject:

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> "In his view, for this purpose, while good faith may have the significance of honesty, "not all bad faith conduct would necessarily be described as dishonest. Other epithets which might be used to describe such conduct include 'improper', 'commercially unacceptable' or 'unconscionable'". With respect, the implication of such an implied term applicable generally (or even widely) to commercial contracts would undermine to an unjustified extent English law's general position rejecting a general legal requirement of good faith. Subsequent judicial comments on Leggatt J. 's discussion have suggested that it should not be seen as establishing a principle of general application to all commercial contracts, but rather as recognising a particular example of a contract where a term as to good faith (meaning honesty) should be implied. In particular, in ***Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)*** Jackson L.J. noted that, while there is no general doctrine of "good faith" in English contract law, a duty of good faith may be implied by law as an incident of certain categories of contract, citing Yam Seng Pte Ltd as an example."
>
> (emphasis added)

709. Academic learning, and the views of academics and legal authors, do have persuasive effect in our system of law. At [180] and [181] in ***SRCL Ltd v NHS England*** [2018] EWHC 1985 (TCC) I considered the modern position of academics in legal argument before the courts, by reference to the text of a lecture given by Lord Neuberger in July 2012 at the Max Planck Institute when he was Master of the Rolls. The title was "Judges and Professors – Ships passing in the night?" and Lord Neuberger made clear what I believe to be non-controversial, that the historic hostility of judges to the views of academics is long gone, and academic opinion is of very great assistance.

710. However, in this respect I must disagree with the learned editors of *Chitty* in the passage I quote at [708] on the subject of relational contracts, and a duty of good faith. There are two distinct respects in which I disagree. Firstly, a term requiring good faith does not mean honesty. That emphasised sentence in the passage in *Chitty* is, in my judgment, simply wrong, and ignores statements in the cases explaining what a term requiring good faith means. There is more to a duty of good faith than a requirement to act honestly. It includes honesty, but there is more to it than that. Secondly, by stating that English law generally *rejects* a legal requirement of good faith, the passage at 1-058 uses its opposition to the doctrine as a justification for why that doctrine is said not to be of application. It is a wholly circular argument, and ignores a number of cases, not only ***Yam Seng*** itself but the subsequent cases. I do not consider that, on the authorities I have identified, English law rejects a legal requirement of good faith. What the cases make clear is that such a duty will not be routinely applied to all commercial contracts.

711. I therefore consider that in this respect, the learned editors of *Chitty* do not correctly summarise the jurisprudence in this area of the law. I consider that there is a specie of contracts, which are most usefully termed "relational contracts", in which there is implied an obligation of good faith (which is also termed "fair dealing" in some of the cases). This means that the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. An implied duty of good faith does not mean solely that the parties must be honest.

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712. There are some decisions at first instance where the courts have declined to find a relational contract, or the existence of such an implied term. The Post Office submits that these do not follow the approach in ***Yam Sang,*** which the Post Office argues shows that the case does not stand as authority for some general principle as to implied duties of good faith. These include the following: ***Hamsard 3147 v Boots UK*** [2013] EWHC 3251 (Pat), a judgment of Norris J in respect of which the Post Office drew my attention to [86]. The case concerned the supply of childrenswear to Boots by Hamsard 3147 (although the action started off as a passing-off claim, that part was abandoned). Perusal of [83] and [84] show that the judge cited ***Yam Seng*** without casting any doubt on its applicability, and only concluded, that the contract *in that case* was not a relational one, as follows:

"[84] I do not accept that submission on the facts. The 2007 Agreement was a true joint-venture which was contemplated to last for a considerable period: and it made appropriate express provision (though not in unqualified terms) about the approach each party should adopt to the relationship. The implicit contract entered into in February 2009 was brought about by force of circumstance, and is plainly an interim arrangement affording the different parties an opportunity to negotiate a new joint-venture. Its terms do not depend upon the subjective intention of the parties, but upon what was communicated by words or conduct. An objective observer looking at what Boots and Hamsard said and did would be bound to conclude that they recognised the necessity for such an immediate, interim contractual arrangement (and that, so far as it was necessary to give commercial effect to that interim arrangement, would refer to the financial and operational terms of the 2007 Agreement). But the observer would conclude that they did not regard themselves as in a long-term arrangement governed by all of the terms of the 2007 Agreement. It is not obvious that they would have intended a clause about "good faith" directed to the conduct of a long-term joint-venture to form part of their interim bargain."

(emphasis added)

713. Rather than undermining the ratio of ***Yam Seng***, in my judgment this case supports it, as the judge did not question the existence of a duty of good faith in some long term contracts; all he did was reject it in that case on the specific facts. His comments at [86] have to be seen as meaning all commercial contracts:

"I do not regard the decision in ***Yam Seng Pte Ltd v International Trade Corporation*** as authority for the proposition that in commercial contracts it may be taken to be the presumed intention of the parties that there is a general obligation of "good faith". I readily accept that there will generally be an implied term not to do anything to frustrate the purpose of the contract. But I do not accept that there is to be routinely implied some positive obligation upon a contracting party to subordinate its own commercial interests to those of the other contracting party."

(emphasis added)

714. In ***Greenclose Ltd v National Westminster Bank plc*** [2014] EWHC 1146 (Ch) Andrews J, far from doubting the existence of such types of contracts, gave support for the views of Leggatt J. She said at [150]:

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

(emphasis added)

715. ***Carewatch Care Services v Focus Caring Services*** [2014] EWHC 2313 (Ch) is a decision of Henderson J (as he then was). He agreed with Norris J in ***Hamsard*****,** and he also found that there were specific express terms in the ***Carewatch*** case that militated against the implication of such a term. This case does not undermine the proposition that there are some contracts that are relational ones, and indeed is specifically mentioned by Beatson LJ at [68] in ***Globe Motors v TRW Lucas Varity Electric Steering*** [2016] EWCA Civ 396.

716. In ***Myers v Kestrel Acquisitions*** [2015] EWHC 916 (Ch) Sir William Blackburne considered a dispute in relation to a sale and purchase agreement for the sale of the whole of the issued capital in a company's sub-prime lending business. He agreed with the approach of Andrews J in ***Greenclose.*** The first sentence in the headnote reproduces verbatim part of [40]:

"It was common ground that there was no general duty of good faith in commercial contracts but that such a duty could be implied where it was in accordance with the presumed intention of the parties."

Again, this does not undermine or question the rationale of ***Yam Seng***, and in my judgment supports relational contracts as a separate type of contract.

717. Sir William Blackburne continued, in deciding whether such a term should be implied in that case (which is another way of saying in deciding whether the contract was a relational contract or not), as follows:

"[50] In assessing whether to imply the good faith term I remind myself that, as Lord Hoffmann said in ***Belize*** [2009] UKPC 10, [2009] 2 BCLC 148, [2009] 2 All ER 1127, at [16], the court has no power to introduce terms to make the instrument it is asked to construe fairer or more reasonable and that the most usual inference, if the instrument does not expressly provide for what is to happen when some event occurs, is that nothing is to happen and that where the event causes loss, the loss lies where it falls."

(emphasis added)

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718. The last case relied upon by the Post Office in this series, is ***Monde Petroleum v Westernzagros*** [2017] 1 All ER (Comm) 1009, a decision of Mr Richard Salter QC sitting as a Deputy High Court judge. He considered an agreement for consultancy services between a BVI company and a Cypriot registered company (albeit with its headquarters in Canada). He stated at [250] that the "mere fact that the contract is a long term" contract is not sufficient to imply a duty of good faith.

719. The Deputy Judge also said at [255]:

"In my judgment, it is impossible in the present case to identify any facts forming part of the commercial background, or any aspects of the relationship between the parties as set out in the CSA itself, which indicate that the CSA would lack commercial or practical coherence without the implication of a 'good faith' term of the kind contended for by Monde."

(emphasis added)

720. Another case in which relational contracts were considered concerned an agreement between distributors of financial products and independent financial advisers. Elisabeth Laing J in ***Acer Investment Management Ltd v Mansion Group Ltd*** [2014] EWHC 3011 (QB) decided the case, and this judgment provides another example of consideration of relational contracts. In that case, having considered ***Yam Seng*** and the question of whether one party was a fiduciary and/or whether there was a contractual obligation of good faith, she said:

"[107] I do not accept the submissions that this agreement gave rise, either, to fiduciary obligations on Acer's part, or to a "relational contract". Those submissions are not grounded in the commercial reality of the relationship between the parties, or in the express terms which I have held that they agreed."

And at [109]

"This is reinforced by the fact that neither side saw this as an exclusive relationship. The sorts of obligations and commitments that would be expected in a relational contract are absent. It was not a long-term relationship: either party could end it by giving a relatively short period of notice. Neither party was required to spend significant sums in reliance on the continuation of the relationship. In the circumstances of that relationship, defined by the terms of the agreement, set in its commercial context, there is no scope for the implication of a term of good faith. The terms of agreement, in its context, make it impossible for me to hold that Acer owed any relevant fiduciary duties to Mansion."

(emphasis added)

This reinforces – if reinforcement were necessary – that some contracts will be categorised as relational contracts, and this has the effect of implying a term of good faith.

721. These cases, both appellate and first instance, all demonstrate in my judgment that there is no general duty of good faith in all commercial contracts, but that such a duty could be implied into some contracts, where it was in accordance with the presumed

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intention of the parties. Whether any contract is relational is heavily dependent upon context, as well as the terms. The circumstances of the relationship, defined by the terms of the agreement, set in its commercial context, is what decides whether a contract is relational or not.

722. It follows that I therefore do not consider that what the Claimants refer to as "the imbalance of power" has any effect upon whether the contracts are relational ones. This appears to me to be equivalent to saying "the contract terms are unfair; please re-balance them by finding they are relational contracts". That is the wrong approach. The Claimants, in different ways and in respect of different Common Issues, drew regular attention to what was identified as a dramatic imbalance of power between the parties. These features are that the Post Office decides the terms upon which SPMs contract, having had those terms drafted for themselves by their legal advisers (subject only to the nominal involvement of the NFSP). They impose their draconian effect upon SPMs, and behave with impunity and oppressively, as demonstrated (it is said) by their behaviour towards the Lead Claimants.

723. I agree that there is a lot to be desired from the Post Office's behaviour as identified in the cases of the Lead Claimants. I shall give four examples only.

1. Even though the Post Office's own case on the relevant provision in the SPMC dealing with liability for losses requires negligence or fault on the part of a SPMC, this was routinely and comprehensively ignored by the Post Office, who sent letters of demand for disputed sums in express terms as though the SPM had strict liability for losses. These letters entirely misstated the legal basis of a SPM's liability, even where they had been appointed under the SPMC.

2. Legal representation is not permitted by the Post Office at interviews which deal with whether a suspended SPM is to have their engagement terminated – which effectively ends that part of their livelihood. Regardless of whether this is justified or not, the specific grounds and proper particulars of why they face potential termination are not even clearly identified in advance to the SPM in question. Additionally, information directly relevant to the grounds (or at least what the Post Office is concerned about, in the absence of properly identified grounds) is not provided to the SPM either, or at least not in the case of the Lead Claimants who faced such procedures. Mr Abdulla tried at his interview to explain the situation regarding TCs and the Lottery. He was disbelieved. The documents available in the trial show that, whatever else he had done, he was telling the truth about the existence of these TCs. Neither he nor the interviewer had this information available to them at the time.

3. I have already dealt with what happened to Mrs Stockdale after she was one of the first claimants in the litigation. Mrs Stubbs' evidence, which I accept, was that the Temporary SPM who replaced her was told to destroy all documentation in the branch that related to her appointment. There can never, in my judgment, be any sensible rational for such destruction of important documents, and I cannot understand why the Post Office would wish to behave in such a way.

4. The approach of the Post Office is to brook no dissent, and it will adopt whatever measures are necessary to achieve this. An example of this is in the Modified SPMC, which in Section 15 clause 19 deals with something called an Investigation Division Interview. This Division includes investigation of potential criminal offences against

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the Post Office. One part deals with the presence at such an interview of a friend of the SPM. The relevant clause states:

Modified SPMC Section 15 clause 19:

"A friend may only attend and listen to the questions and answers. He must not interrupt in any way, either by word or signal; if he does interrupt he will be required to leave at once and the interview will proceed without him. Whatever is said at the interview is to be treated as in strictest confidence. The friend may take notes of the interview but he must keep the notes in the strictest confidence. The only communication the friend is entitled to make on behalf of the person who has been questioned will be in the form of a written "in strictest confidence" statement which may be submitted by the latter, in support of any official appeal which the person questioned may desire to make in connection with the methods followed at the enquiry. No other communication about the interview is allowed (unless made by permission of the Post Office) as it might constitute a breach of the Official Secrets Acts."

(emphasis added)

Other parts of Section 15 deals with the requirement for a caution and so on, but I find it somewhat unusual, and potentially oppressive, that the Post Office could seek to use the Official Secrets Acts in this way. I do not see how, in a routine case, these Acts could possibly apply in the way suggested by the Post Office in this contract.

724. There is no doubt that the Post Office is in an extraordinarily powerful position compared to each and every one of its SPMs. It appears to wield that power with a degree of impunity. However, I do not consider any of the complaints of imbalance of power are relevant to the determination of the correct categorisation of the contractual relationship, and whether the contracts are relational ones. Onerous and unusual terms, incorporation thereof and considerations of the applicability of the Unfair Contract Terms Act 1977 are dealt with separately, but I repeat that it is the circumstances of the relationship, defined by the terms of the agreement, set in its commercial context, that is what decides whether a contract is relational or not. This plainly must be considered at the time of contracting.

725. What then, are the specific characteristics that are expected to be present in order to determine whether a contract between commercial parties ought to be considered a relational contract? I consider the following characteristics are relevant as to whether a contract is a relational one or not:

1. There must be no specific express terms in the contract that prevent a duty of good faith being implied into the contract.

2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.

3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.

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4. The parties will be committed to collaborating with one another in the performance of the contract.

5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.

6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.

7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.

8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.

9. Exclusivity of the relationship may also be present.

726. I hesitate to describe this as an exhaustive list. No single one of the above list is determinative, with the exception of the first one. This is because if the express terms prevent the implication of a duty of good faith, then that will be the end of the matter. However, many of these characteristics will be found to be present where a contract is a relational one. In other cases on entirely different facts, it may be that there are other features which I have not identified above which are relevant to those cases.

727. I consider that all of the above features are all present in this case, between the SPMs and the Post Office, both under the SPMC and the NTC. I would also emphasise that accepting the concept of the existence of relational contracts, and finding that these contracts with the Post Office are relational, does not mean there will be automatic and widespread application of an implied duty of good faith to all commercial relationships. Very specific characteristics are necessary in order that a commercial contract is categorised as a relational one.

728. I find that there are also the other following features of the Post Office/SPM relationship that influence these particular contracts being categorised as relational contracts. These are:

1. In a great many cases, the investment of the SPMs in buying or leasing premises for the branch represented a major and significant financial personal commitment to running that branch, which operates for the joint benefit of the SPM and the Post Office. This is more than merely "a significant degree of investment". For many (if not all) SPMs, this investment would represent the most significant investment they would make

2. The Post Office knew not only of the size of this investment, but the source of an incoming SPM's funds, as these were included in the business plans submitted by the SPMs. If the source of funds was not identified, this information would be sought by the Post Office.

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3. The role of a SPM providing personal service entitled that SPM to benefits that had similar characteristics to that of an employment contract, such as entitlement to holiday substitution allowance.

4. The Post Office was careful, when considering potential SPMs for appointment, to assess the financial viability of the applicant for appointment. An element of approval, or "vetting", was therefore involved in the Post Office deciding that an SPM's business plan was viable.

5. As the Post Office put it in its Opening, the Post Office is required by the Government to maintain a broad network of branches across the country, even in locations that would not normally be commercially viable. There was therefore an aspect to this relationship that was other than purely commercial.

6. Trust is integral to almost all of the Post Office's activities carried out in a branch between the SPM and members of the public wishing to use that branch Post Office.

7. The Post Office itself submits that it is essential that it can repose trust in its SPMs. I find that it is similarly essential that SPMs can repose trust in the Post Office, and I find as a fact that all six of the Lead Claimants did so.

729. There are other secondary features that are relevant, for example in a great many instances, that the branch premises included residential accommodation in which the SPM themselves (and potentially other family members) would live. However, this is not essential and I consider that even SPMs who were not going to live in (or above, or connected to) the business premises would still be in a relational contract with the Post Office.

730. I would also add that Post Office Ltd, the corporate defendant in these proceedings, is ultimately owned by the Government, admittedly through a corporate chain and a Government Department. It therefore either is, or shares a large number of features with, a public body. That is not to say that its decisions are subject (for example) to judicial review (and that point was not argued at all, so I am not expressing any view) but it cannot be seen as entirely private and wholly commercial. One of the characteristics of the contract in ***D&G Cars v Essex Police Authority*** which the judge found to be a particular feature which warranted the inclusion of the implied term of good faith, was that the claimant was performing certain acts (in that case, recovery of vehicles) on behalf of a law enforcement agency. I consider it to be a particular feature in this case that SPMs are engaged by the Post Office, ultimately a publicly funded body, and perform transactions in the branch on its behalf, and also that the public require access to Post Office services. This might however be expressing the same point at [728](5) above, but in different terms.

731. The Post Office is also trusted to investigate potential crimes, in the sense that its auditors will perform and audit a branch where a SPM is suspected (for example) of a criminal offence such as false accounting. This is not the place to embark upon any analysis of what happens after that, if charges are brought and a SPM is prosecuted, but in my judgment, given the activities of the Post Office and SPMs, trust is integral to their relationship.

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732. The existence of notice provisions that entitle the Post Office to bring the relationship to an end is a relevant consideration, and relied upon heavily by the Post Office, but it is not determinative in favour of the contracts not being relational ones. Many long term contracts may have notice provisions within them. Further, I find that the notice provisions do not undermine the correctly ascertained objective intention of the parties when contracting, namely that the post of SPM at a particular branch was intended by both parties to be a long term one. This point is further reinforced by the fact that under the SPMC for the first 12 months, a SPM's remuneration would be only 75% of the usual annual total. The parties' relationship had all the features necessary to be a relational contract.

733. Also, although some SPMs are companies (although in terms of claimants in this Group Litigation, there are only a tiny handful) contracts can be relational even though they are between limited companies. This is obvious from the cases to which I have referred above. I therefore find that the existence of some corporate SPMs does not mean the contracts are not relational ones.

734. The Post Office would also, in different places in their submissions, use the phrase "business to business". This phrase is simply, in my judgment, another way of saying that these are commercial contracts. However, I do not consider my review of the cases leads to the conclusion that commercial contracts cannot be relational contracts. On the contrary, I consider that the authorities demonstrate that commercial contracts *can* be relational contracts.

735. In ***Amey Birmingham Highways Ltd v Birmingham City Council*** [2018] EWCA Civ 264 Jackson LJ stated at [7] that the PFI contract in that case was 5,190 pages long, excluding discs, plans, and documents incorporated by reference. For those not used to counting pages, that number equates (approximately) to between 12 and 15 lever arch files, excluding the discs, plans and other documents. Detailed and lengthy contract terms do not of themselves mean that a contract cannot be a relational one, as is clear from that case at [92].

736. Finally, in relation to that most recent appellate authority that uses the expression "relational contracts", this refers to Professor Hugh Collins' paper "Is a relational contract a legal concept?" in *Contracts in Commercial Law* (Degeling and others, Thomson Reuters 2016). At the conclusion of oral submissions, I invited the parties to consider this paper and make such further submissions on it as they considered necessary, because I intended to read it. They did so, and the submissions I received were interesting, as indeed is the article itself. It proceeds predominantly upon consideration of ***Yam Seng***, ***Bristol Groundschool*** and ***D&G Cars***. It is written from a somewhat sceptical point of view. For example, at one point it states "it is possible that this usage of the label 'relational contract' is a passing fad that will soon be forgotten". I do not consider that to be correct. To be fair to the author, it was published in 2016. I refer to it for completeness, and to show that I have considered it. Its analysis does not however advance the matter any further, in my judgment.

737. It is necessary, and I have explained above, first to consider whether there are any specific express terms in the contract that prevent a duty of good faith being implied into these contracts. I have referred to this exercise at [702] above. I have carefully considered both the SPMC, the Modified SPMC and the NTC. I find that there are no such terms, in any of them. If there were, then it is clear that these contracts could not,

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on my analysis, be relational contracts. However, that exercise is resolved in favour of the claimants.

738. In all the circumstances therefore, and in the context of the commercial relationship between each SPM and the Post Office, I find that these were relational contracts. I find that this means the contracts included an implied obligation of good faith. This means that both the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. Transparency, co-operation, and trust and confidence are, in my judgment, implicit within the implied obligation of good faith.

739. The Post Office has argued that because of the two implied terms which are agreed (the *"Stirling v Maitland"* term, and the Necessary Co-operation term), there is no scope for further implied terms (including an obligation of good faith). In other words (it was put more elegantly than this, but this is the essence of the argument) the "Stirling v Maitland" and the Necessary Co-operation terms encompass the necessary (and therefore, according to the Post Office, the fullest extent of) co-operation. The argument is that because co-operation is required under the Necessary Co-operation term, there is neither room nor necessity for further co-operation.

740. I reject these arguments. Firstly, the *Stirling v Maitland* term deals with inhibition and prevention. Simply because it is agreed by the parties that they would not inhibit or prevent one another does not amount, in my judgment, to coming even close to the type of relationship considered to exist for a relational contract. Secondly, there is more to an obligation of good faith than necessary co-operation, as I have explained. Co-operation is part of it, but I do not consider it is limited to co-operation. The Necessary Co-operation term only goes, as the name suggests, to co-operation that is necessary. Even if an obligation of good faith were limited to co-operation (which I find it is not) such a term of co-operation would be wider than simply necessary co-operation. Finally, I very much formed the impression that this argument was a forensic device based on an overly technical and unjustified pleading point.

741. I should also deal with any suggestion by the Post Office that by agreeing or admitting these implied terms, the Claimants somehow shut out or undermined their arguments on relational contracts. This Group Litigation is hotly contested and has some very fundamental and highly contentious legal issues dividing the parties. I do not intend to decide it on a technical pleading point in any event, and certainly not this one, which I do not consider to be justified. I find that the two implied terms that were admitted do not mean that, applying the test I have identified above, these contracts were not relational ones.

742. This answers Common Issue 1.

743. Of the 21 different implied terms identified in Common Issue 2 (lettered by the parties for some reason (i)(a) to (i)(t), and (ii)(a), rather than numerically (1) to (21)), a number are, in my judgment, consequential upon these contracts being found to be relational, namely to include an implied obligation of good faith. However, it would be wrong to conclude that they all are. In my judgment, it is necessary to consider each of them individually to consider firstly, are they simply consequential upon my finding that these are relational contracts; and secondly, if not, are they to be implied terms because they are necessary to give business efficacy to the contracts, in other

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words, under the first category as set out by Baroness Hale in ***Geys v Société Générale.*** It must also be remembered that the question of whether or not a term is necessary is to be judged at the date the contract is made. As Lord Neuberger stated in ***Marks & Spencer*** at [23]:

"First, the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy."

744. That the exercise must be performed as at the time the contract is made is essential. The pitfalls of doing otherwise were made clear in ***Bou-Simon v BGC Brokers LP*** [2018] EWCA Civ 1525**.** Asplin LJ stated at [18], giving the leading judgment:

"[18] In my view, therefore, the reasonable reader, taking into account all of the express terms of the Agreement and the surrounding circumstances at the time it was executed and applying commercial common sense, would not consider the Implied Term either so obvious that it goes without saying or to be necessary for business efficacy in the sense that the Agreement would lack commercial or practical coherence without it."

And at [22]

"It follows that I do not consider the term which was implied to be obvious, if as a reasonable reader one construes the Agreement as it stood in the light of the surrounding circumstances. Further, I agree with Mr Pearce that, contrary to Lord Neuberger's warning, the judge failed to exercise the utmost care when formulating the question which one ought to pose to an officious bystander. The question posed at [93] of the judgment assumes the premise which it is intended to prove or support. It is not based upon the Agreement as drafted. As Lord Neuberger pointed out, a term which is not necessary to give business efficacy to a contract is very unlikely to be so obvious that it goes without saying."

745. The existence of all and any of these different implied terms is each denied by the Post Office. The tests I apply are those set out in the authorities to which I have referred. I must be astute to guard against hindsight, and also – even though I have expressed some disapproval above about the way the Post Office has conducted itself – it is no part of the court's role to "rebalance" an agreement in a way it considers would be more fair.

746. Having considered the different terms in the light of my finding there is an implied obligation of good faith, those that are consequential upon, in my judgment, or incidents of that finding that these are relational contracts are those identified as terms in Common Issue 2 at (i)(c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n)(as amended by me), (o)(as amended by me), (p), (q), (r) and (s).

747. The amendment to (n) which I consider is required is to include a narrower implied term than the one currently pleaded, which is in the following terms:

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"Not to suspend Claimants: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and proper cause; and/or (iii) in circumstances where the Defendant was itself in material breach of duty."

748. I consider that this should be narrowed in the following way. The final sub-clause should be "in circumstances where the Defendant was itself in material breach of duty in respect of the matters which the Defendant considered gave it the right to suspend". A similar narrowing of the implied term at (o) should be to the same phraseology, so that term reads "in circumstances where the Defendant was itself in material breach of duty in respect of the matters which the Defendant considered gave it the right to terminate". The reason for this narrowing in both instances is because it is where the Post Office itself is in material breach in respect of the matters it considers gives rise to the right to suspend, and terminate, that is important. It is this that is the necessary incident of the implied duty of good faith. It is not necessary for the Post Office not to suspend (or terminate) a SPM if the Post Office was in material breach in respect of different matters entirely unrelated to the ones under consideration as justifying suspension (or termination).

749. Of the others, there are four which I have found are not consequential upon the contracts being relational contracts. The first two of those are as follows.

(a) To provide adequate training and support (particularly if and when the Defendant imposed new working practices or systems or required the provision of new services)

(b) To provide a system which was reasonably fit for purpose, including any or adequate error.

The phrase "a system" should in my judgment, for the purposes of this judgment, be particularised as meaning the Horizon system.

750. I find that these two terms are to be implied, not as consequential upon the finding that the contracts are relational ones, but as part of the exercise necessary to consider whether they are necessary for business efficacy. It is perfectly possible that a party acting in good faith may provide inadequate training – they might be wholly well-intentioned in doing so, and be attempting to be wholly co-operative with the venture in which they are involved with the other contracting party, but objectively provide wholly deficient training. The relevant term that is required for business efficacy is that the Post Office provide adequate training and support for its SPMs when it imposed new working practices, but particularly new systems such as the Horizon system. It is also necessary for business efficacy that the Horizon system, which was provided by the Post Office, be reasonably fit for purpose, including any or adequate error repellency (which is a technical computer term meaning the way the system deals with errors).

751. The next one of the four is:

(t) that the Post Office take reasonable care in performing its functions and/or exercising its functions within the relationship, particularly those which could affect the accounts (and therefore liability for alleged shortfalls), business, health and reputation of Claimants.

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752. I consider that there is a term to be implied into the contracts, necessary for business efficacy, that the Post Office would take reasonable care in performing and exercising its functions within the relationship, particularly those which could affect the accounts (and therefore liability to alleged shortfalls) of SPMs. For what it is worth, I consider that there is a such a term also to be implied upon SPMs to take reasonable care in performing their functions. I do not consider that implied term extends to including matters which could affect the business, health and/or reputation of the SPMs. So far as business is concerned, SPMs were conducting a variety of other businesses on the same premises. These would all be different. Haberdashers, newsagents and convenience stores all featured in the evidence before me. Furthermore, an extension of this term to include the health and/or reputation of the SPMs cannot, in my judgment, be justified. A term of this nature extending to an SPM's business, health and/or reputation is not *necessary* for business efficacy. An implied term in respect of the Post Office functions within the relationship which particularly affected the accounts of an SPM, and therefore his or her liability for alleged shortfalls, is necessary in my judgment.

753. The final one was pleaded in the Reply and is at (ii)(a), namely:

> (ii)(a) The ability of the Defendant to recover and/or seek to recover any alleged shortfalls, whether while the relevant Claimant was a Subpostmaster or post-termination, was subject to an implied term requiring Post Office to do the same within a reasonable time of discovery or the date by which, with reasonable diligence, Post Office could have made such discovery.

754. I do not consider that such a term is necessary for business efficacy and I find that such a term is not to be implied into either the SPMC or the NTC. Nor is it an incident of, or consequential upon, a finding that these are relational contracts. Such a term might be desirable (subjectively from the point of view of a SPM) but it cannot, in my judgment, be said to be necessary. Subjectivity and desirability are not the test.

755. I would also add that, in relation to the terms that I have found *are* consequential upon my relational contracts finding (which, to use the slightly different language used in the Common Issue, means they are incidents of implied terms) at (i)(c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r) and (s), a number of these specifically deal with the Post Office suspending, terminating, or exercising discretion not arbitrarily, irrationally or capriciously. These are at (i)(n), (o) and (r). A further, but associated one, is at (i)(q), namely that the Post Office should exercise contractual, or other powers, honestly and in good faith for the purpose for which it was conferred.

756. The existence of these other four terms, similar in scope to one another but directed to the exercise by the Post Office of its powers under the contracts, is denied by the Post Office. They are in the following terms:

> (n) Not to suspend Claimants: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and proper cause; and/or (iii) in circumstances where the Defendant was itself in material breach of duty. I have amended this to add a restriction "in respect of the matters which the Defendant considered gave it the right to suspend."
>
> (o) Not to terminate Claimants' contracts: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and proper cause; and/or (iii) in circumstances where the

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Defendant was itself in material breach of duty. I have amended this to add a restriction "in respect of the matters which the Defendant considered gave it the right to terminate."

(q) To exercise any contractual, or other power, honestly and in good faith for the purpose for which it was conferred.

(r) Not to exercise any discretion arbitrarily, capriciously or unreasonably.

757. In particular in respect of these four, if I am wrong in my finding that these are relational contracts, and/or if I am wrong that these terms are consequential upon that finding, then I find that these four would be implied into the contract in any event, and separately from the issue of relational contracts, as being necessary to give business efficacy to the contracts.

758. I am surprised that the Post Office denies their existence as implied terms.

759. As Lord Sumption JSC stated in ***British Telecommunications plc v Telefónica O2 UK Ltd*** [2014] UKSC 42 at [37]:

'… it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously: ***Abu Dhabi National Tanker Co v Product Star Shipping Ltd, The Product Star (No 2)*** [1993] 1 Lloyd's Rep 397 (per Leggatt LJ at 404); ***Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)*** [2001] EWCA Civ 1047, [2001] 2 All ER (Comm) 299 (at [67]) per Mance LJ; ***Paragon Finance plc v Staunton, Paragon Finance plc v Nash*** [2001] EWCA Civ 1466, [2001] 2 All ER (Comm) 1025, [2002] 1 WLR 685 (at [39]–[41] per Dyson LJ). This will normally mean that it must be exercised consistently with its contractual purpose: see ***Ludgate Insurance Co Ltd v Citibank NA*** [1998] Lloyd's Rep IR 221 (per Brooke LJ at 239–240); ***Equitable Life Assurance Society v Hyman*** [2000] 3 All ER 961, 972 (per Lord Steyn and Lord Cooke of Thorndon)"

(emphasis added)

760. This exact passage is reproduced in the judgment of Mr Richard Salter QC sitting as a Deputy High Court judge at [234] of ***Monde Petroleum***, a case which was fully argued before me.

761. I find that there is no clear language to the contrary in either the SPMC, the Modified SPMC, or the NTC. Indeed, the extreme nature of the Post Office's denial of these implied terms (and in my judgment, a stance that is wholly incorrect in law) can be tested in a was consistent with common sense as follows. The Post Office's submission amounts to one that it *is* contractually entitled to suspend and/or terminate SPMs arbitrarily, capriciously, irrationally and without reasonable or proper cause, and to exercise contractual powers other than honestly. The necessity for these terms to be implied to give business efficacy is clearly established, in my judgment, even if I am wrong about these contracts being relational and the consequences of that finding.

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762. A further number relate to accurate record keeping on the part of the Post Office, for example those at (c) and (d). The express terms in both the SPMC and the NTC make the SPM liable (in different terms in each) for losses caused to the Post Office. Such losses have to be remedied by the SPM paying money to the Post Office to make those losses good. That simply cannot be done without proper and accurate records. These two terms are to be implied into the contract, even if I am wrong in my finding that these are relational contracts, and/or if I am wrong that these terms are consequential upon that finding. They are plainly necessary to give business efficacy to the contracts.

763. Finally, one of the terms contended for, which is at (m), is that the Post Office would not seek recovery from Claimants unless and until: (i) the Defendant had complied with its duties above (or some of them); (ii) the Defendant had established that the alleged shortfall represented a genuine loss to the Defendant; and (iii) the Defendant had carried out a reasonable and fair investigation as to the cause and reason for the alleged shortfall and whether it was properly attributed to the Claimant under the terms of the Subpostmaster contract. I consider that a variation of this term (but not the precise term) is necessary for business efficacy, and the reasoning for this is (as with those in respect of record keeping) that the contracts imposed liability upon the SPMs for losses. The part of the term which I do not consider is necessary for business efficacy is that at (i) "unless and until the Defendant had complied with its duties above (or some of them)".

764. Therefore, if I am wrong that these are relational contracts, and/or wrong that as a result of that the list of terms I have identified are consequential upon that finding, the variant of the term at (m) which I consider is to be implied as necessary for business efficacy is:

> "the Post Office would not seek recovery from Claimants unless and until the Post Office had established that the alleged shortfall represented a genuine loss to the Post Office, and the Post Office had carried out a reasonable and fair investigation (proportionate to the amount in issue) as to the cause and reason for the alleged shortfall, and whether it was properly attributed to the Claimant under the terms of the Subpostmaster contract."

765. The addition in parentheses may be unnecessary, and may be implicit in the words "reasonable and fair investigation" as reasonable must depend upon all the circumstances of an individual case, which would include the amount in issue. However, just in case there is seen as being a distinction between whether something is reasonable, and proportionate, the clause in parentheses makes it clear that the same degree of investigation would not be required under this term for a loss of (say) £50 as it would be for a loss of £20,000.

766. I do not consider that the term alleged at Common Issue 2(ii)(a), namely the ability of the Post Office to recover and or seek to recover alleged shortfalls, should be subject to an implied term to do so within a reasonable time of discovery as alleged. This is not necessary for business efficacy. Nor is it an incident of the contracts being relational ones.

767. That concludes consideration of implied terms under Common Issue 2.

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768. Common Issue 3 is concerned with the consequences of the terms alleged at Common Issue 2(a)(q), (r), (s) and (t) being found to be implied for reasons of business efficacy, or as incidents of the contracts being relational contracts. The answer is that the implied duty of good faith applies to the exercise by the Post Office of all its contractual powers and discretions under both the SPMC and the NTC, including the four identified in this Common Issue. The four sub-paragraphs of Common Issue 3 all involve the exercise of powers, discretion and function by the Post Office, and are consequential upon the findings I have made in respect of Common Issues 1 and 2. However, I have found that the term at Common Issue 2(i)(t) does not extend to the business, health and reputation of the Claimants. Accordingly, Common Issue 3(d) should be similarly restricted to accounts only in the same way, and only therefore includes accounts (and therefore liability to alleged shortfalls).

K. Supply of Goods and Services Act 1982

769. This arises under Common Issue 4. The Claimants maintain that a term is to be implied into the contracts with SPMs whereby Horizon, the Helpline, training and/or training materials were supplied as services within the meaning of section 12(1) of the Supply of Goods and Services Act 1982, such that there is a term to be implied under section 13 of that Act that the Post Office would provide such services with reasonable skill and care.

770. I have already found, when considering Common Issue 2, that certain terms are to be implied. The majority of them were found by me to be necessary incidents of my finding that these are relational contracts, with an implied obligation of good faith. However, those at Common Issue 2(i)(a) and (i)(b) were found by me to be implied out of business efficacy. The first of those has as its subject matter training; the second, the Horizon system, with the necessary implied term being that it was fit for purpose. Originally the term contended for used the term "a system" but I have found and explained that should be read as the Horizon system.

771. Accordingly, therefore, separate arguments in respect of a statutory implied term under this separate Common Issue do not arise in respect of the Horizon system, or the training.

772. That leaves the Helpline and the materials provided as part of the training.

773. In ***Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB*** [2012] EWHC 584 (Comm), Gloster J (as she then was) considered the exercise by a bank of what is called a close-out of the claimant fund's portfolio. This followed a failure by the fund to deposit a contractually mandated margin payment. The fund argued that the bank had performed the close-out negligently. One issue was whether there was a term to be implied under section 13 of the Supply of Goods and Services Act 1982.

774. The judge stated at:

> "[111] In my judgment, SEB's rights under the mandate to impose limits on Euroption's activities under clause 6, to close out Euroption's positions under clause 11, or to refuse instructions under clause 12(c) cannot be characterised as 'services' within the definition contained in section 12(1) of the 1982 Act. The definition in section 12(1) of 'contract for the supply of a service' is (subject to exclusions) 'a

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contract under which a person ('the supplier') agrees to carry out a service'. Thus the 'Implied term about care and skill' imposed by section 13 of the 1982 Act only applies to services agreed to be provided under a contract for services and not to all rights and obligations under such a contract. Section 13 provides:

'13 Implied term about care and skill

In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.' (Emphasis added.)

[112] The mandate contemplated that two types of services might be provided by SEB. These were set out at clause 6 (subject to the provisions of clause 7) as follows: (i) advisory services regarding dealing in exchange traded futures and options (and securities where the securities transaction in question was ancillary to a transaction in futures or options); and (ii) settlement and exchange services whereby SEB acted as clearing broker for trades executed by or on behalf of Euroption. These services were to be provided in the course of SEBÕs business and, accordingly, section 13 of the 1982 Act would have applied to the provision of them.

[113] However, there is no basis in the 1982 Act or otherwise to suggest that a similar implied term applied to SEBÕs right to impose limits, its right to refuse instructions, or its right to close out, since these were not on any basis services which SEB had agreed to carry out under the mandate. First, it is difficult to see how, in ordinary language, the exercise of such rights by SEB, at its discretion, for the purposes of protecting its own position, could be characterised as a 'service' being provided 'to' Euroption. Even if, contrary to my view, the exercise of such rights could arguably be so characterised, since SEB had not agreed under the mandate, to provide any such 'service', it is difficult to see how rights exercisable at SEB's discretion could be said to be 'services' for the purpose of section 13."

775. This reasoning was followed by Field J in ***Marex Financial v Creative Finance*** [2013] EWHC 2155 (Comm), another case about a broker closing out an investor's account.

776. I find that there are therefore two steps that have to be considered. Firstly, are the SPMC and/or the NTC contracts under which the Post Office agrees to carry out a service (for the purposes of the Act) at all? If so, is the Helpline such a service?

777. I consider that the claimants fail at the first of those two steps, because neither the SPMC nor the NTC are contracts under which the Post Office agrees to carry out a service. Rather to the contrary, it is the SPMs who are carrying out a service for the Post Office, namely running the branch. However, I find that such a term is to be implied in any event, but not by reason of the operation of the statute.

778. Firstly, the Helpline is an integral part of Horizon. All of the evidence, from all of the Lead Claimants, all of the Post Office witnesses, and in all of the documents, show that the Helpline was part of the Horizon system. Disputes were to be reported through the Helpline. It was not an ancillary and separate system or process; it was an important component of Horizon itself. It is now agreed by the parties in Appendices 3 and 4 that it was the method required for a SPM to report disputes. As such,

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therefore, I consider that it falls within the implied term I have found under Common Issue 2(i)(b).

779. Secondly, even if I were wrong about that, and the Helpline were not an integral component of Horizon itself, then business necessity would require the implication of such a term. There would be no commercial sense whatsoever in the Post Office providing the Helpline, with the functions ascribed to it, unless the Helpline were to be operated with reasonable care and skill. Indeed, given the importance that the Post Office itself attributed to the Helpline, from when Horizon was introduced in 2000 onwards, it would be contrary to the objective intention of the parties if that were to be operated in any other way.

780. I therefore reject the Claimants' attempt to imply such a term by the statutory route, but the term to like effect is to be implied in any event.

781. Turning to training materials, there is no sensible reason for differentiating materials provided as part of the training, from other elements of the training itself. In my judgment, such materials fall within the implied term at Common Issue 2(i)(a).

L. Agency, Accounting and Horizon

782. These issues encompass consideration of Common Issues 12 and 13, and also Common Issues 10 and 11, which deal with part of the Claimants' case that the Post Office was the agent of the SPMs. These issues are not however limited solely to matters of contractual construction. This is because Common Issue 13 encompassed matters of fact, not least what a Branch Trading Statement under Horizon in fact was, and the options that were available to a SPM in terms of "agreeing" a Branch Trading Statement at the end of a branch trading period. As has been seen from the sections of this judgment that deals with the evidence of fact (and also the post-hearing agreement that resulted in the two flow charts in Appendices 3 and 4) it is now effectively accepted by the Post Office that a SPM had no choice but to "accept now" to close one trading period and rollover to the next one, even when they disputed the Horizon data, whether as TCs which they did not accept or by way of shortfall or discrepancies. This means that the Branch Trading Statement included disputed items.

783. This puts the issue concerning the Branch Trading Statement into a rather different light than it was far earlier in the proceedings. This is because initially in evidence the matter was approached by the Post Office as though the Branch Trading Statement was freely agreed by an SPM, and would *not* include disputed items. This is not correct. I will deal with the position of an SPM as agent of the Post Office first, and then address the reverse position in Common Issues 10 and 11 (which is the claim that the Post Office is the agent of the SPMs).

784. Common Issue 12 relates to three principles of agency that were pleaded by the Post Office in its Defence. Common Issue 13 falls to be considered with those principles. The four components of these two Common Issues are therefore (slightly streamlining the wording to avoid reference to the pleading itself) as follows, reminding oneself that the terms of the SPMC and the NTC are not the same:

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Common Issues 12 and 13. Was the extent and effect of the agency of Subpostmasters to the Post Office such that the following principles of agency can be relied upon or applied by the Post Office?

1. As the Post Office's agents: (i) Subpostmasters owed fiduciary duties to Post Office, including a duty to act in Post Office's interests in relation to the functions they undertook on the Post Office's behalf (which functions included holding and dealing with Post Office cash and stock, effecting and recording Post Office transactions, generating liabilities for Post Office, maintaining proper and accurate records and preparing and rendering accounts); (ii) Subpostmasters owed a duty to account to the Post Office.

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.

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

785. The claimants admit that SPMs are agents of the Post Office. However, the word agency can have a range of different meanings. What is important is the terms of the contract between the parties, for obvious reasons. It is also admitted that SPMs owe fiduciary duties to the Post Office. SPMs handle cash on behalf of the Post Office, and are in a position of trust when doing so.

786. Elisabeth Laing J said, concerning agency, at [94] in ***Acer Investment Management Ltd v Mansion Group Ltd*** [2014] EWHC 3011 (QB), a case which I have already considered above on the question of relational contracts:

"There are many different types of relationship which are labelled 'agency', but the label does not determine the incidents of the relationship. It is necessary to see in each case exactly what type of relationship exists between an agent and his 'principal' (for want of a better word). A critical factor in defining any relationship is the terms of any contract between the parties."

(emphasis added)

787. Agency is a relationship which may be implied from the conduct of the parties and in all the circumstances of the relationship; ***Garnac Grain Company Inc v HMF Faure & Fairclough Ltd and Ors*** [1968] AC 1130, 1137. That passage is as follows:

"The relationship of principal and agent can only be established by the consent of the principal and 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 be given by each of them, either expressly or by implication from their words

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and conduct. Primarily one looks at 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. As to the content of the relationship, the question to be asked is: 'What is it that the supposed agent is alleged to have done on behalf of the supposed principal?'"

788. Subjective assent is not required and, indeed, the parties may create an agency relationship in law even where they *both* positively disclaim it. However, here, the agency (however it is characterised) was created as the date of contracting between each SPM and the Post Office.

789. In my judgment, it is relevant to consider the conduct of the parties and all the circumstances of the relationship in order correctly to characterise the full extent of the agency. Post-contractual conduct or events is inadmissible and irrelevant in terms of construing each of the terms in the SPMC and NTC that deal with the word "agent". However, the terms stating that the SPM is an agent are not the only ones relevant to the duty to account, although the parties argue these Common Issues as though they were. There are specific terms dealing with the obligation to account in both the SPMC and the NTC, as will be seen.

790. So far as the duty to account, and the reopening of accounts, is concerned, *Bowstead & Reynolds on Agency* (2018) 21st edition Sweet & Maxwell at 6-096 to 6-098 states

"**6-096 Substantive significance:**

The duty to account is in this sense simply a liability to the exercise of certain sorts of procedures used in courts of equity for the ascertainment of the true position between trustee or other fiduciary and beneficiary. As such it can be regarded as no more than a procedure ancillary to the ascertainment of other rights: though the remedy does of course provide a sanction for, and hence the basis of, the duty to keep accounts and make them available to the principal….."

"6-097 The account:

…An agent will usually be held to be bound by his own accounts; thus if they show that he has credited his principal with money received, the agent will be presumed to have received that money and will be liable for it to his principal. But the agent will not be liable if the account shows that the money has not, in fact, been received or if the principal's accounts show that the agent has not received the money. Similarly, if the agent. after submitting an account which shows money in his hands, later corrects the account and the principal does not disagree with such correction or if the agent shows he has made a mistake, he will not be accountable to his principal."

"6-098 Account stated:

If an account is agreed, the principal can sue on an account stated. This may be a mere acknowledgement of a debt, and in that case the agent may show that no such debt in fact existed; or it may be an account containing debts on both sides in which the parties have agreed that the debts of one should be set against the debts of the other

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and only the balance paid. In the latter case the agent may only dispute the account where there are items which, if paid, would be recoverable by him on the basis of a total failure of consideration. This second form of an account stated is also called a settled account. It is not always clear when an account will be held a settled account. There must be mutual debts, since if all the accounting has to be done by one party, there cannot be a settling of accounts. Once the principal has approved the accounts, they are settled, and if the principal enters the account as agreed in his books and either pays the balance or recognises in some other way that the account is correct, there is also a settled account….

The general rule is that settled accounts will not be reopened."

(emphasis added)

791. Agency is expressly dealt with in the SPMC but only in one single clause. Section 1 Clause 1 states the SPM is an agent and not an employee of the Post Office in the following terms:

"The contract is a contract for services and consequently the Subpostmaster is an agent and not an employee of Post Office Counters Ltd."

792. However, even though the SPMC contract terms deal with some matters in extraordinary detail – there are whole sections dealing with National Insurance, and Infectious Diseases, for example – there are precious few express terms dealing with this subject.

793. The NTC deals with the matter similarly in Part 2 Paragraph 1.2:

"The Agreement is a contract for services and the Operator is an agent and not an employee of Post Office Ltd. The Operator acknowledges that no relationship of employer and employee exists between Post Office Ltd and the Operator, or between Post Office Ltd and any Assistant."

794. This sparseness of express terms dealing with the subject is recognised by the Post Office in its useful and comprehensive written submissions. The only express terms to which it can point at [99] in the relevant section of its closing submissions, are the two to which I have just referred, namely Section 1 Clause 1 of the SPMC, and Part 2 Paragraph 1.2 of the NTC:

"SPMs are Post Office's agents under the express terms of the contracts [Section 1 Clause 1 SPMC and Part 2 Paragraph 1.2 NTC are referenced]. The parties expressly chose that relationship and the ordinary legal incidents of it. The common law rules and principles that apply to agency relationships are also admissible background to the construction of the contracts."

795. The phraseology in the two contracts on this point is almost identical. In the SPMC it is stated that the contract "is a contract for services and consequently the Subpostmaster is an agent and not an employee": in the NTC it is stated that the agreement "is a contract for services and the Operator is an agent and not an employee." The only difference is "Operator" rather than "Subpostmaster" (which is no difference at all) and the word "consequently" in the SPMC. The NTC then goes

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on to recite an acknowledgement that "no relationship of employer and employee exists with the Post Office".

796. Common law rules and principles are admissible background. The Post Office relies upon the introductory passages of *Chitty* at 31-006, which states:

"On the orthodox and accepted common law analysis, the full paradigm relationship of principal and agent arises where one party, the principal, consents that another party, the agent, shall act on his behalf, and the agent consents so to act."

It is a matter of contractual interpretation, which means the clauses which deal with agency must be construed together within the contract as a whole, and in the commercial context known to the parties at the time, as well as in accordance with the legal principles (whether subjectively one party even knew at the time of contracting what those principles were). But the passage in *Chitty* continues:

"This double consent is said to confer "authority" on the agent; and from this authority stems his power to affect the principal's legal position. The relationship between principal and agent need not be contractual: an agent can act gratuitously, as many do under powers of attorney. There will usually however be a contract accompanying the grant of authority, but the grant itself is conceptually separate. An extension of this reasoning is that the consent may also be given subsequently, by ratification. Except perhaps in the case of agency of necessity, such consent is however essential for the full agency relationship"

797. An agent has the power to affect the principal's legal position. Conceptually, the grant of authority is separate from the contract between the agent and principal. Here, the contractual terminology dealing with "agent" does not identify any limit on the agent's authority. However, when construed in its commercial context, there are, as a matter of construction, limits on that authority. If, as a matter of construction, there were no limits, the SPMs (the agents) would have the power to bind the Post Office in all respects. I do not accept that, when considering the words in the contract with the necessary background knowledge and applying the correct legal test, the answer could be otherwise than that there are limits on the SPMs' authority. I consider that the scope of the agency is clearly defined, and limited, by the meaning of the term considered in its contractual context.

798. The word "agent" is used to differentiate the status of the SPM from that of an employee. The word "consequently" makes this clear in the SPMC. The "acknowledgement" that follows in the NTC also makes this very clear. In both contracts, the word "agent" is used to distinguish the SPM from an employee, and in the context of the correct legal categorisation of the SPM's employment status. This is made very clear from the statement in both the SPMC and the NTC that the contract or agreement "is a contract for services". That is a term well-known as being relevant to employment law, and the status of workers as being, or not being, employees.

799. I consider that the Post Office attempts to hang too much on this single word, and use the term (which is limited in its context) to mean a far wider scope of agency than the word permits in its contractual context. I find that the correct construction of the term in both contracts is that an SPM is the agent of the Post Office in limited respects. What those respects are has to be analysed.

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800. Given that there are, as a matter of construction, limits on the "agency" of SPMs, one has to turn to consider whether the full range of principles would apply to this particular type of agency, or whether these principles have been modified or excluded by the parties' agreement. Both parties on this particular point (as with so many others) are poles apart even as to the starting point to decide this issue. The Post Office stated:

"It is not clear on what basis the Claimants contend that SPMs are not presumptively bound by the accounts that they render to Post Office. In the [Individual Particulars of Claim], it is contended that Post Office is wrong to draw an "analogy with traditional accounting by an agent… to his principal". But Post Office does not rely on analogy; it relies on the express terms and the common law principles that are imported by the parties' express choice of an agency accounting relationship."

(emphasis added)

801. This passage is telling for two reasons. Firstly, it is clear that the Post Office relies on "the express terms" and the "express choice of an agency accounting relationship". Secondly, it is also clear that the Post Office relies on common law principles that it says are imported into that relationship.

802. The Claimants, on the other hand, point to some of the other terms in the NTC to demonstrate the correct extent and scope of the agency to which an SPM was contracting.

803. It is necessary to consider the SPMC and the NTC separately.

Agency in the terms of the SPMC

804. The only reference is the one to which I have referred, namely Section 1 Clause 1.

805. The SPM had a duty to account to the Post Office. However, this does not arise consequentially from the common law principles arising because of the use of the word "agent" (as the Post Office argues), it is an express contractual term in Section 12 Clause 4, in the following terms:

"ACCOUNTS

4 The Subpostmaster must ensure that accounts of all stock and cash entrusted to him by Post Office Counters Ltd are kept in the form prescribed by Post Office Counters Ltd. He must immediately produce these accounts, and the whole of his sub-office cash and stock for inspection whenever so requested by a person duly authorised by the District Manager."

806. No formal variation was made to the terms of the SPMC when Horizon was brought in, in the year 2000. The ability of an SPM to consider and investigate shortfalls and discrepancies was wholly different; in a paper-based system, they could do so, as the evidence of Mr Bates and Mrs Stubbs (which I accept) made clear. When Horizon was introduced, the process of accounting to the Post Office changed, and Branch Trading Statements upon which the Post Office seeks to rely cannot, in my judgment, be properly characterised as agreed accounts rendered to a principal (the Post Office) by its agent (the SPM) for two reasons.

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807. Firstly, there would be no reason to apply a common law principle to this effect, as the method and status of accounting is imposed expressly by the terms of the contract. Section 12 Clause 4 required a SPM to keep these "in the form prescribed by" the Post Office. The Post Office required them to be prepared or "agreed" using Horizon, which as has been seen meant that even disputed items were included in the Branch Trading Statement. Common law principles cannot take precedence over what is actually agreed in the SPMC itself.

808. Secondly, the way that Horizon was designed required disputed items to be "accepted" and included in the Branch Trading Statement by an SPM. Therefore, a Branch Trading Statement with (for example) £3,000 of non-agreed and disputed items arising in the branch trading period would look exactly the same as one which included no disputed items and was wholly agreed by the SPM.

809. The accounting function which the SPM was required to perform was one which the Post Office instructed, as shown in Section 12 Clause 4. If the Post Office chose – as it did – to prescribe a system that would lead to the inclusion of disputed items, the SPM contractually would have to comply with that instruction. In this case, that happened when Horizon was introduced. The Manual was changed to require Horizon to be used within the branch. However, that does not entitle the Post Office to apply common law principles that apply to a freely agreed account rendered to a principal by an agent upon a Branch Trading Statement, even though the system instructed to the agent to be used would include disputed items. That would have the effect of granting it a status to which it is not entitled.

810. The SPMC was drafted, and so far as branch operations prior to 2000, the branches were operated, without Horizon being used at all. During preparation of this judgment I invited the parties to draw to my attention any reference in their submissions that dealt with specific contractual variations to the SPMC that occurred on the introduction of Horizon. Given there were none, there were no references, but the Post Office correctly drew my attention to the Manual which it stated "had contractual effect". I consider this is correct. The Manual did have contractual effect, and the Manual required the accounting approach I have explained to be adopted when Horizon was introduced. This therefore means, in my judgment, that the Branch Trading Statement did not have the status of an agreed account between agent and principal if it included disputed items.

Agency in the terms of the NTC

811. This contractual agreement is rather more detailed than the SPMC, and has other provisions relating to agency. For example at Part 2 Paragraph 3.3 the following is stated:

> **"Limit of Operator's Role**
>
> 3.3 The Operator shall not:
>
> 3.3.1 involve Post Office Ltd in any debts;
>
> 3.3.2 represent himself as being Post Office Ltd or a partner of Post Office Ltd;

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3.3.3 other than as required to provide the Products and Services, represent himself as being an agent of Post Office Ltd or permit any person connected with the Operator to represent the Operator in such a way that others dealing with the Operator may regard him as authorised to act on behalf of Post Office Ltd or Post Office Group;

3.3.4 make any representation or submission regarding any Product or Service and/or the Branch to HMRC or any Government authority or body, other than as may be required by law. The Operator shall notify Post Office Ltd in advance of any such requirement;

3.3.5 make any statements, representations or claims or give any warranties to any Customer or prospective Customer in respect of the Products, the Services or the System except such as have been specifically authorised by Post Office Ltd in writing or as provided in the Agreement."

(bold present in original; underlining added)

812. Under Part 7, Paragraph 1.8, the contract states

"Where the Operator engages contractors it shall do so as principal and not as agent for Post Office Ltd."

813. So far as accounting is concerned, the NTC has a section that deals with this expressly at Part 2, clause 3.6:

"Recording, provision of information, accounting and settling

3.6 The Operator shall:

3.6.1. record such data and information relating to the Branch as Post Office Ltd may require;

3.6.2 at the request of Post Office Ltd, promptly provide either Post Office Ltd or any third party with such information and data as Post Office Ltd may reasonably require;

3.6.3 maintain an accounting system, prepare, sign and maintain financial statements and accounts, record Transactions and maintain all records in accordance with the provisions contained in the Manual, in particular paragraphs 9.2 to 9.4 (inclusive);

3.6.4 provide Post Office Ltd with the information regarding the Basic Business prescribed by the Manual, in particular paragraph 10.2;

3.6.5 permit Post Office Ltd (or its nominee) at any time during business hours to inspect and take copies of all records (including any accounts) relating to the Branch;

3.6.6 account for and remit to Post Office Ltd all monies collected from Customers in connection with Transactions in accordance with the Manual. Any cash which Post Office Ltd provides to the Operator or which the Operator collects as a result of Transactions does not belong to the Operator and shall be held by the Operator (at the Operator's risk) on behalf of, and in trust for, Post Office Ltd and the Clients. Any such cash shall not form part of the assets of the Operator. The Operator acknowledges that it is expressly forbidden from making use of any such amount due

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to Post Office Ltd for any purpose other than the operation of the Branch and it must on no account apply to its own private use, for however short a period, any portion of funds belonging to Post Office Ltd entrusted to it. Any breach of this clause 3.6.6 and/or any misuse of Post Office Ltd cash by the Operator or its Personnel shall be deemed to be a material breach of the Agreement which cannot be remedied and may render the offender liable to prosecution."

(bold present in original; underlining added)

814. Under the NTC therefore, the SPM is not permitted to represent himself as an agent "other than as required to provide the Products and Services". He is also expressly required to "account for and remit to [the Post Office] all monies collected from Customers in connection with Transactions in accordance with the Manual".

815. Clause 9.3 of the Operating Manual (which I find is what is meant by the "The Manual") referred to in Paragraph 3.6.6 above states:

"The Operator must balance and complete a Branch Trading Statement at the end of each Branch Trading Period and on termination of the Agreement.

There are twelve Branch Trading Periods in a year, running from April through to March and they follow a cycle of 5 weeks, 4 weeks, 4 weeks. The dates on which each Operator must produce a Branch Trading Statement will be notified to the Operator by Post Office Ltd.

The Branch Trading Statement must be filed and kept at the Branch.

It is the responsibility of the Operator to 'make good' in cash any discrepancies found within the Horizon stock unit when balancing. Unless other arrangements are agreed between Post Office Ltd and the Operator, the "making good" of any discrepancy must be done at the time of balancing (i.e at the end of each Branch Trading Period and upon termination of the Agreement)."

816. It is here, therefore, that as far as the NTC is concerned, the express accounting obligation upon the SPM is to be found. This makes the Post Office's position that common law principles impose these upon the SMP more difficult to sustain. The NTC imposes an express obligation upon a SPM to account for and remit to the Post Office all monies collected, in accordance with the Manual. The Manual requires this to be done using the Horizon system. The Horizon system has (as has been extensively explored) no mechanism for disputing shortfalls, discrepancies, and TCs which are not agreed, other than through the Helpline, and even then the Branch Trading Statement is produced separately from those disputes – in other words, the Branch Trading Statement is the same whether component elements of it are disputed or not.

817. The SPMs' duty to account to the Post Office under the NTC does not arise under the common law principle of agency and duty to account, but rather under the express terms of the NTC dealing with this. Because of the way that Horizon works, that "account" (the Branch Trading Statement) is not one agreed by the SPM in the sense of being either compiled, agreed or rendered by the agent, or in the sense of being a

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settled account. Indeed, in my judgment, it does come close to being such an account at all. The SPM has no option but to "agree" it, or "accept now".

818. Therefore, although the contractual route is different between the SPMC and the NTC, because their terms are different and the obligation to account is worded differently, both of these routes lead to the Horizon system and the necessity for the Branch Trading Statement to be completed in the manner required by the Post Office, as set down in the Manual.

819. That Branch Trading Statement (whether by a SPM under the SPMC, or one under the NTC) is not therefore subject to the same common law principles that would apply as though it were such an account, namely that the SPM 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. Indeed, the imposition of such a principle would, in my judgment, not only be entirely wrong and unfair, it would be contrary to the express terms of the contracts. The Horizon system, and the options available to a SPM who disagreed with (for example) a Transaction Correction, were designed by the Post Office and whichever company was responsible for the IT architecture. There was no ability on the part of any SPM to demonstrate there were "mistakes" in the "account" (that is to say the Branch Trading Statement), or it identity within that Branch Trading Statement items or amounts that were disputed. The whole issue with the information available to an SPM on Horizon is that they could not identify discrepancies or shortfalls, or understand the basis on which TCs with which they disagreed were issued. Telephoning the Helpline was something that was entirely outside the Branch Trading Statement.

820. I consider that if and insofar as, during or at the end of any branch trading period, any SPM contacted the Helpline in relation to any shortfall, discrepancy or disputed TC, the Branch Trading Statement for that period cannot be treated as an account rendered by an agent to the principal which can only be opened up if the SPM can demonstrate a mistake. I also consider that this conclusion applies regardless of whether the matter is approached (correctly) through the contractual obligation upon a SPM in either the SPMC or the NTC, or whether the Post Office's approach relying upon common law principles were applied (although I do not consider this to be the correct approach).

821. The issue of an SPM as agent deliberately rendering a false account to his or her principal, in relation to any such Branch Trading Statement for such a period therefore simply does not, in my judgment, arise.

822. I turn then to the issue of whether SPMs bear the burden of <u>proving</u> (my emphasis) that any Branch Trading Statement account they signed and/or returned to the Post Office was incorrect. I simply do not see how it can sensibly be suggested that SPMs bear such a burden, for any branch trading period when a SPM has called the Helpline and sought help for an unexplained shortfall, discrepancy or disputed TC. This is for the following reasons.

823. Firstly, for an unexplained discrepancy or shortfall, the very point of dispute by a SPM is that they could not work out the cause of the discrepancy. That is why it was an unexplained shortfall or discrepancy. It is no answer to this point for the Post Office to require a SPM to identify the time and/or product when it occurred, in order that it could be investigated. That is simply a more refined way of requiring the SPM

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to do the impossible. Branch Trading Statements are done on a cycle of 5 weeks, 4 weeks, 4 weeks. These shortfalls and discrepancies would not be likely to become apparent until the end of the particular trading period.

824. This point was, perhaps presciently, identified by Mr Bates himself as long ago as 2000. With his background knowledge in IT systems, and his high degree of attention to detail, he attempted to get to the root cause of the first unexplained shortfall in his case, and he realised that the information for him to do so was simply not available to him, or any SPM in a branch. The Horizon system did not allow him to do this.

825. The Post Office's answer to that was, eventually, to write off the amount in question. In my judgment, that was no "answer" at all, in logical terms. All that approach did, for that unexplained shortfall on that occasion, was entirely to avoid addressing the issue.

826. The Post Office seeks, in this Common Issues trial, to treat the Branch Trading Statement as though it were an account stated, and/or a settled account, both of which are concepts in the law of agency as has been seen from the extracts from *Bowstead* above. However, I do not consider that such an approach is correct, in either law or fact, for a Branch Trading Statement for any period in respect of which a SPM notified or called the Helpline concerning a dispute. This could be by way of seeking assistance on a disputed item, unexplained shortfall or discrepancy, or otherwise drawing to the Post Office's attention that the trading statement was not agreed, but this had to be done through the Helpline. Further, and for completeness (and to provide maximum utility to the Group Litigation) there can be no requirement for any magic phrase that had to be uttered by an SPM when doing so. This is to deal with a situation which Mrs Stubbs experienced, after she had phoned the Helpline multiple times, disputing the shortfall shown. Eventually she was asked by the Helpline whether she wanted to report this particular issue as "a dispute". This surprised her, as she was fairly certain that was what she had been doing all along, in her many phone calls on the same subject. If there were such a magic phrase, the SPMs should have been told what it was, and the evidence is that they were not told any such thing. It may transpire, in later trials, that internally at the Helpline an item was only treated as being disputed if certain words or phrases were used. Alternatively, it may transpire that different Helpline operators behaved differently.

827. I turn therefore to the final common law principle which the Post Office seeks to deploy under this Common Issue, namely 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."

828. This principle applies where an agent "deliberately renders a false account to his or her principal". However, I do not consider that it can be said to apply where the account in question is a Branch Trading Statement, for a branch trading period when the SPM in question has notified the Helpline of a dispute. Such a SPM would not be "deliberately rendering" a false account. They would be rendering an account in the form in which they were contractually required to render it, due to the express terms in their contracts. This is for the reasons already explained in this judgment about the correct characterisation of a Branch Trading Statement for such a period. It would, as

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a result of the options available to a SPM when using Horizon, and clearly shown now in Appendices 3 and 4 to this judgment, contain disputed items.

829. The Post Office submitted the following in its Closing Submissions:

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

(emphasis added)

830. This passage demonstrates the following.

831. Firstly, the statement that "the amount is then taken out of the branch trading account" is contrary to the evidence of Mrs Van Den Bogerd, and also contrary to Appendices 3 and 4. I find as a fact that amounts disputed and notified to the Post Office through the Helpline were not taken out of the branch trading account. If and in so far as the statement in [829] may be argued in the future by the Post Office as not being contrary to the contents of those agreed Appendices, I find that it is. Mrs Ven Den Bogerd readily accepted that amounts that were notified in dispute to the Helpline that were settled centrally were still treated as debts due to the Post Office.

832. Secondly, the meaning which the Post Office ascribes to the phrase "settled centrally" was at the time, and still is, as set out in the various internal documents I have identified in this judgment. It clear means a debt that was due to the Post Office, but which the SPM either could not, or did not wish to, pay immediately. A considerable amount of time was spent at the trial, with both the Lead Claimants and Post Office witnesses, working out exactly what options were open to a SPM at the end of a branch trading statement, and what "settle centrally" actually meant to the Post Office. I find that in the circumstances of this case it means a debt which the Post Office considered was due to it by the SPM, but which the SPM either could not, or did not wish to, pay immediately. This was clear both from the evidence of Mrs Van Den Bogerd and internal Post Office documents.

833. Thirdly, contrary to the submission above by the Post Office, the Post Office did treat amounts settled centrally as part of the account stated. This is because the SPM would only reach the stage of the process where they could settle centrally by use of the function "accept now" in Horizon.

834. Fourthly, taken at face value, the submissions of the Post Office that I have reproduced at [829] could be construed as though there were no dispute between the parties that the Branch Trading Statement for any branch trading period when disputes, shortfalls and discrepancies were notified to the Helpline, was not treated as an account stated by the Post Office. *If* that is the submission being made by the Post Office, it is directly contrary to the way the Post Office behaved with the Lead Claimants, it is directly contrary to the case that was originally put to the Lead Claimants in cross-examination, and in my judgment would represent a volte face in

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the way that the Post Office's claim is pleaded. The Post Office treated, and attempts to persuade the court that it should be entitled to continue treating a Branch Trading Statement as a settled account, unless an individual SPM demonstrates why that Branch Trading Statement is wrong. This is in circumstances where items disputed by the SPM are included within that statement.

835. The claimants have also relied upon three older cases to justify its attempts to reopen the accounts of the SPMs. They are all nineteenth century cases, namely ***Watson v Rodwell*** [1879] 11 Ch.D 150; ***Coleman v Mellersh*** [1850] 2 Mac & G 309; and ***Lewes v Morgan*** [1817] 5 Price 42.

836. The first case, ***Watson***, concerned was a case in which an account was settled between a solicitor and his client principal, who was an elderly lady. The account was reopened because it was found that the principal had acted under undue influence and without sufficient information when she agreed the account. She was dependent on the solicitor's advice, and he had abused her trust.

837. The second case, ***Coleman***, also concerned an account settled between solicitors and their client principal. This account was reopened on the basis that the solicitor (the agent) had put in a false charge. The Court, per Lord Cottenham LC (at 317) stated that this was "not only an error in the sense in which the term is used for the purpose of opening accounts, but a misstatement and a false representation designedly made." He also stated that the Court could direct "the taking of an open account" if it would be "inequitable for the accounting party to take advantage of it". He explained this by stating "Amongst the grounds on which the Court rests the application of this principle, none are stronger than the fact that the accounting party was the solicitor or agent of the party sought to be charged, or that the circumstances gave him a commanding power or influence over him, or that the facts prove that he possessed and abused the confidence which had been reposed in him"

838. Finally, the third case is a historical series is ***Lewes***. This again concerned an attorney, who in a mortgage case was acting as agent for both mortgagor and mortgagee, and quasi-banker for one of them. This again concerned actions by the agent, rather than the principal.

839. The Post Office relies upon that feature of all three cases as concerning acts (or it could be said to be misconduct) by the agent, rather than the principal, as permitting the account to be re-opened. It could also be observed that given each agent was an attorney of the principal, and the degree of trust and confidence reposed in such a profession, equity demanded that the accounts be re-opened in each case.

840. In ***Re Webb*** [1894] 1 Ch.D 73, Davey LJ stated referring to ***Coleman***:

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

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841. Firstly, I do not consider the Branch Trading Statements for the periods I have identified – namely those in which, or at the end of which, the SPMs notified the Helpline of disputed items – have the status of settled accounts. The Post Office plainly does not treat them as such, given the evidence in the Common Issues trial of TCs being issued a lengthy period after the end of branch trading periods to which those TCs relate. This is made clear by fact 42 in [569] above.

842. Further, I do not consider that it is necessary for the claimants to rely upon the principle of re-opening settled accounts in any of these cases in order for the SPMs in this Group Litigation to be entitled to avoid the consequence sought by the Post Office, namely to keep the SPMs to the Branch Trading Statements for the periods in question (which in almost all cases contained disputed items and unexplained shortfalls and discrepancies). For the avoidance of doubt, I do not consider that the Post Office can hold the SPMs to their Branch Trading Statements as though they were settled accounts in the way the Post Office contends.

843. I should also deal with one authority upon which the Post Office seeks to rely in this respect, which is ***Post Office Ltd v Castleton*** [2007] EWHC 5 (QB). In that case the Post Office brought proceedings to recover the sum of £25,800 approximately from Mr Castleton. Mr Castleton represented himself. He had been the SPM at a branch in Bridlington in Yorkshire, which was called Marine Drive, until following an audit he was suspended and then terminated. His explanation for the shortfalls is encapsulated at [4] in the judgment of HHJ Havery QC, who gave judgment for the Post Office:

> "Mr. Castleton admits that on 23rd March 2004 there was an apparent shortfall in the account of Marine Drive in the sum of £25,758.75. He admits that he produced weekly Balance Lists (the documents in question are headed "Final Balance") and personally produced, signed off and submitted to the claimant Cash Accounts (Final) up to week 51. His case was that the losses apparently shown by the Balance Lists and Cash Accounts (Final) were illusory not real. It was entirely the product of problems with the Horizon computer and accounting system used by the claimant. The apparent shortfalls were nothing more than accounting errors arising from the operation of the Horizon system."
>
> (emphasis added)

844. The Post Office seeks to rely upon this case as authority for the proposition that the burden is upon a SPM to demonstrate an account is wrong. However, in my judgment they are unable to do so for the following reasons:

> 1. The statement of the account in that case was *admitted* by Mr Castleton as made clear at [1] in the judgment.
>
> 2. The judge also stated at [2] "the burden of proof on Mr. Castleton can relate only to the figure of £22,963.34. In the event, as will appear, the identity of the party on whom lies the burden of proof is not important in this case."
>
> 3. It was neither argued before the judge, nor explained, so far as one can tell from the judgment, that the method of accounting using Horizon meant that there was no separate mechanism or process for disputing items, or that the "account" (which it must be remembered was admitted) included disputed items.

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845. Who had the burden of proof was not therefore even in issue, and was certainly not fully argued before the judge.

846. I ought for completeness to identify three further passages in ***Post Office Ltd v Castleton.*** At [22] the judge stated:

> "During the hearing, Mr. Castleton sought to adduce evidence of other complaints from subpostmasters of other post offices about the Horizon system. I admitted in evidence the fact that there were a few such complaints, but I refused to admit evidence of the facts underlying such complaints, since that would have involved a trial within a trial."

847. Also at [23]:

> "I heard evidence from Anne Chambers, a system specialist employed by Fujitsu, the company that provides the Horizon service. She has a working knowledge of the Horizon computer system used by the claimant. She said that calls from postmasters relating to potential system problems are initially taken and logged by the Horizon system Helpdesk. I accept evidence of Mr. Castleton that he contacted the Helpdesk over problems with discrepancies in balancing accounts at Marine Drive on a number of occasions. If the helpdesks are unable to resolve the problem, calls may be passed to the System Support Centre, where Mrs. Chambers works. In this case, her first involvement with Marine Drive was on 26th February 2004. Mrs. Chambers examined the questions raised and concluded that there was no evidence whatsoever of any problem with the system. She was unable to identify any basis upon which the Horizon system could have caused the losses."

848. This led to the conclusion which the judge included earlier in the judgment at [11]:

> "Since Mr. Castleton accepts the accuracy of his entries in the accounts and the correctness of the arithmetic, and since the logic of the system is correct, the conclusion is inescapable that the Horizon system was working properly in all material respects, and that the shortfall of £22,963.34 is real, not illusory."

849. These passages above identify that the ***Castleton*** case was argued on a completely different basis to this Group Litigation, and the legal issue upon which the Post Office seek to rely upon it as support, namely burden of proof in reopening accounts, together with the correct status of the trading statement (then called Final Balance and Cash Account (Final)) was not even in issue or argued. In any event, this judgment would be only persuasive and not binding upon me, and I consider I am in a better position than HHJ Havery QC in terms of deciding a point that was not even argued before him.

850. I therefore do not take into account the judgment in ***Castleton*** as being supportive of the Post Office's arguments on the status of a Branch Trading Account, as I consider it distinguishable. Even if it were not distinguishable, and the point had been argued, I would not follow it.

851. However, if I am wrong, and the Branch Trading Statement is a settled account, and it is necessary for the claimants to rely upon these older cases in the way that they seek, then I would identify the principle in those cases as being no more specific than this.

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The law will permit an account between an agent and a principal to be re-opened where it is unconscionable for it to remain otherwise. In that alternative scenario, I would hold that it is unconscionable here for account represented by the Branch Trading Statement not to be reopened for any trading period when the SPM had contacted the Helpline to report an unexplained shortfall, discrepancy or dispute a TC.

852. I have also considered, as a separate exercise, uninfluenced by my findings above, whether (if there were such a burden upon the SPMs as alleged by the Post Office) SPMs could ever satisfy it. I find, on the evidence before me in this trial, that imposing such a burden upon an SPM would be requiring them to perform the impossible. As was clear from all the evidence of both the SPMs and the Post Office witnesses who actually knew about how Horizon worked, unexplained shortfalls or discrepancies became apparent at the end of a branch trading period. It was simply not possible, on the information available to a SPM on the Horizon system, for them to identify the day, product, and still less the time of day, that was responsible for this. This was exactly what was identified by Mr Bates as a problem in the very earliest days of Horizon. The prolonged and extraordinary efforts of Mrs Stubbs and Mrs Stockdale showed that this burden simply could never be discharged by a reasonable and diligent SPM. This is not an answer to a question of construction, as it deals with post-contractual events, but it is telling that the Post Office argue for a construction that would impose an impossible burden upon SPMs.

853. Returning therefore to the issue of whether the SPMs bear the burden of proving that any Branch Trading Statement account they signed and/or returned to the Post Office was incorrect, if I am incorrect in my finding above, and they do bear such a burden, this can be satisfied as follows. That burden would be discharged by their showing (either by reference to Helpline call logs, or by the evidence of individual SPMs, or otherwise) that they contacted the Helpline in respect of shortfalls, discrepancies and/or TCs, in any particular branch trading period.

The Post Office as agent of SPMs

854. Turning therefore to the next agency issue, the Claimants argue that the Post Office was the agent of the SPMs, in the limited respects identified in Common Issue 10(a) and 10(b).

855. The Post Office admits that it "effected, recorded and managed the reconciliation of transactions effected by the Claimants" (subject to some exceptions) and that it possessed and/or controlled and/or oversaw the underlying transaction data in relation to such transactions. Even if this were not admitted, I would find these propositions as facts. However, the Post Office denies that there was an agency in the respects contended for.

856. These admissions (or factual findings) do not of themselves mean that in law the Post Office was acting as the SPMs' agent.

857. There are two different routes that have to be considered in order to arrive at the correct answer to this point, which is contained within Common Issues 10 and 11. The first is the express terms of each of the SPMC and the NTC. The second, dependent upon the answer to that first route, is the conduct of the parties, bearing in mind the

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principle in ***Garnac Grain*** that the parties can act in such a way whereby an agency is created by implication by their conduct.

858. There is nothing in the express terms of either the SPMC or the NTC that justifies a finding that the Post Office acted as the agent of the SPMs.

859. Turning therefore to the second route, there is nothing in the conduct of the parties that would justify such a finding either, in my judgment. As a method of testing the correctness of this conclusion – any by reference to an example used by Mr Green in cross-examination – when the Post Office and Camelot have the accounting between the two of them for lottery sales, the Post Office is not accounting as the agent of a SPM, whom as principal has contracted with Camelot to sell a number of lottery tickets. Rather, the SPM has sold lottery tickets to the public on behalf of the Post Office, who is the principal in that transaction.

860. Because of the way in which these Common Issues (those numbered 10, 11, 12 and 13) are ordered by the parties, it might be thought that they have been considered in an unhelpful or incorrect order, as I have considered the position of SPMs as agents of the Post Office prior to the position of the Post Office as agent of the SPMs. I have done this for the following reasons. Firstly, SPMs as agents of the Post Office (and their contractual duty to account) is included in the SPMC and NTC expressly, which in my judgment makes that a more logical starting point. Secondly, the issues in this case generally are more concerned with the former, rather than the Post Office as agent of SPMs. Thirdly, in my judgment some of the contended for elements of Common Issue 11 arise in any event based upon my conclusion on Common Issue 1.

861. However, in case this is incorrect, I have re-tested my conclusions by considering these issues in the order they arise in the list of Common Issues, to see if a different result would be arrived at by considering the status of the Post Office as agent (or not) of the SPMs. Having done so, I reach the same conclusions regardless of the order in which these matters are considered. The Post Office was not acting as the agent of the SPMs in the manner contended for by the Claimants.

862. Finally, the two limited purposes for which the Claimants maintain the Post Office was acting as the agent of the SPMs was "for the purpose of rendering and making available accounts and/or was under an equitable duty to render accounts" and "for the specific purpose of effecting, reconciling and recording transactions initiated by the Claimants."

863. A number of similar (but not identical) obligations upon the Post Office have been found by me, consequential upon my finding that these are relational contracts under Common Issue. However, the obligations at Common Issue 10(a) and 10(b) do not arise as a function of any finding that the Post Office was acting as the agent of SPMs in the manner alleged.

864. That resolves Common Issues 10 to 13.

M. Suspension and Termination

865. This section deals with the subject matter of Common Issues 14 to 21. These are suspension, termination (either summarily or with notice), the true agreement (which

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was called by the parties the ***Autoclenz v Belcher*** [2011] UKSC 41 issue), compensation, certain heads of loss, and restrictions on the Post Office's discretion concerning appointment of prospective purchasers. They are, for the most part, matters of construction. The differences between the parties concerning these issues will be somewhat narrower as a result of my finding as to relational contracts. However, I will go on to consider the points of construction in any event in case I am wrong about that finding.

Suspension

866. The power to suspend SPMs is given to the Post Office by reason of the terms of the SPMC, in particular Section 19 Clause 4 which provides that

"A Subpostmaster may be suspended from office at any time if that course is considered desirable in the interests of [the Defendant] in consequence of his: (a) being arrested, (b) having civil or criminal proceedings brought or made against him, (c) where irregularities or misconduct at the office(s) where he holds appointment(s) have been established to the satisfaction of [the Defendant], or are admitted, or are suspected and are being investigated."

867. There is a similar provision in the NTC, which is to be found at Part 2 Paragraph 15.1. It also makes provision in the event of arrest, legal proceedings, misconduct and suspicions of these. The terms are:

"[The Defendant] may suspend the Operator from operating the Branch (and/or, acting reasonably, require the Operator to suspend all or any of its Assistants engaged in the Branch from working in the Branch), where [the Defendant] considers this to be necessary in the interests of [the Defendant] as a result of:

15.1.1 the Operator and/or any Assistant being arrested, charged or investigated by the police or [the Defendant] in connection with any offence or alleged offence; 15.1.2 civil proceedings being brought against the Operator and/or any Assistant; or 15.1.3 there being grounds to suspect that the Operator is insolvent, to suspect that the Operator has committed any material or persistent breach of the Agreement, or to suspect any irregularities or misconduct in the operation of the Branch, the Basic Business or any other Post Office® branches with which the Operator and/or any Assistant is connected (including any financial irregularities or misconduct)."

868. The wording of Common Issue 14 poses the question "in what circumstances and/or on what basis was Post Office entitled to suspend" SPMs under each of these provisions?

869. The Post Office submits that the circumstances are set out in the clauses themselves; the claimants submit that the Post Office could not suspend on what is called a "knee jerk" basis and also could not suspend without first giving "fair consideration to all relevant circumstances and to whether or not to suspend the Claimant even if the threshold for doing so was established". It is also argued that the Post Office should not be entitled to suspend if itself it were in material breach.

870. It is not possible to provide a list of exhaustive circumstances, and I do not consider that is what the Common Issue intends or requires. Further, there is no legal

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definition, of which I am aware of what "knee jerk", means. I interpret the claimants' case on this to mean that the Post Office cannot or should not suspend the SPMs precipitately, without proper consideration of the relevant factors.

871. The Post Office makes a perfectly sensible point that it is unable to supervise SPMs on a day-to-day basis. It maintains that the Post Office requires and is entitled to insist upon a right to suspend on suspicion alone, given the obvious need to preserve its cash and stock and, more generally, the integrity of its business. It also draws attention to the fact that the of the suspension provisions make it clear that the Post Office is entitled to act in its own interests and is under no duty to attempt to balance its interests against those of the SPM. It argues that there "is no scope for implying a term which would impose the substantial constraints on the power to suspend that" the Claimants propose.

872. I consider that both the SPMC and the NTC terms concerning suspension can be considered conveniently together in terms of the commercial justification for the power to suspend. The words are however different. The former has the concept that suspension is desirable in the interests of the Post Office, the latter that the suspension is necessary. However, in both cases, the clauses must be considered as containing (both as a result of construction of terms in the commercial and contractual context of the agreements as a whole, and if not then by means of necessary implication) the "*legitimate* interests" of the Post Office.

873. I reach that conclusion for three reasons. Firstly, if the words used are construed within the contracts as a whole, it is clear that this is their meaning. All of the occasions that give rise to the power being available – arrest, charge, investigations, criminal and civil legal proceedings, insolvency – have the power to harm the Post Office's legitimate business interests. It if therefore, in my judgment, obviously the case that these legitimate business interests can be protected, by means of the exercise of this power. I do not consider that there is any substantial difference between a test whereby such an exercise of power is "desirable" to protect such legitimate interests, or "necessary" to do so. What is necessary would be desirable; equally, what would be desirable would be broadly equivalent to what is necessary. I do not consider that there is any appreciable difference between the power in each form of contract.

874. If I am wrong about that as a matter of construction of the express terms, I would reach the same conclusion as a matter of necessary implication, for the purposes of obvious business necessity. When applying the correct legal test for implication of terms, if my exercise of contractual construction does not lead to the conclusion that it has as I have explained, then the term legitimate should be implied as qualifying "interests" in both sets of contract terms.

875. The third reason that I would reach the same conclusion is that as a result of my finding that these are relational contracts, the Post Office would have to have regard only to its legitimate interests if it were to conduct itself in accordance with the implied obligation of good faith.

876. Finally, it is worth considering these findings and testing them against commercial common sense. It is only the legitimate interests of the Post Office that the parties would, objectively analysed with the background information available to them at the time, have considered might need protecting by reason of the power to suspend in the

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future, at the time of contracting. They certainly would not have considered the question of protecting Post Office interests that were otherwise than legitimate.

877. There are two further points that are notable. Firstly, exercise of the power to suspend, and the way that can be exercised, is also a function of my findings in relation to the terms at Common Issue 2(i)(a), (n)(as amended), (q), (r) and (s) and the consequences of these being relational contracts.

878. Secondly, I have also found in respect of (i)(n), (q) and (r) of those terms in Common Issue 2 that these are to be implied in any event (even if my finding of relational contracts is wrong). This is because of the dicta of Lord Sumption JSC in ***British Telecommunications plc v Telefónica O2 UK Ltd*** [2014] UKSC 42 at [37] which stated that "in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously" and this will normally mean that it must be exercised consistently with its contractual purpose.

879. The fact that the SPMC states that the SPM "may be suspended" by the Post Office, and the NTC that the Post Office "may suspend" the SPM means that it is discretionary whether the Post Office exercises the power that it has under each contract to suspend a SPM. This discretion must be exercised in good faith, and not arbitrarily or capriciously.

880. This is effectively conceded by the Post Office in any event, as in [429] of its Closing Submissions it accepted that the Post Office's decision to suspend should be reasonably based on one of the specified contractual grounds, that is reasonably and properly related to one or more of the grounds stated in the clause for suspension.

881. Finally, the argument was raised by the claimants that the Post Office's power to suspend should not be available if the Post Office were itself in material breach. Given there is a wide range of ways that the Post Office could itself be in "material breach of duty", wholly unconnected to the grounds upon which the Post Office may be entitled to suspend, I find it difficult to accept this submission by use of the simple phrase "material breach". I do however consider that the limitation contended for by the Claimants arises as a matter of construction of the clause in its commercial context, and is in any event both justified and required by adding "material breach in respect of the matters which the Defendant consider give it the right to suspend."

882. I do not see why this should be seen as a fetter on its power to suspend, which based on the construction I have found, could only in any event be exercised reasonably and on proper grounds.

883. The approach of the claimants, which is to try and import into the Post Office/SPM relationship certain aspects of an employer/employee relationship (shown by their reliance on cases such as ***Gogay v Hertfordshire County Council*** [2000] IRLR 703 and ***McClory v Post Office*** [1993] 1 All ER 457) is of no assistance in this regard.

884. The claimants also submit that the power to suspend gives the Post Office what is called "a draconian power". There is no doubt that the ability to suspend the SPM contained in the contractual terms give the Post Office a powerful weapon with potentially severe consequences for a SPM, not only in terms of their remuneration (which is substantially reduced, if not stopped altogether, in order to fund a

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Temporary SPM, although the clauses doing so are considered further in Part O, Onerous and Unusual Terms) but also the impact upon their wider business.

885. It must therefore be used properly. I do not however consider that because it is a power of particularly potent effect, the process of construing the words should be a different one than would conventionally occur. My findings on relational contracts and the finding of an obligation of good faith governs the suspension provisions in both contracts in any event.

886. There are policies that the Post Office has adopted, which it deploys in parallel with suspension, which I do not consider justified on the terms of the contract, even without the finding that they are relational. Suspended SPMs are not only entirely excluded from the Post Office part of their premises, they appear to be excluded (in some cases) from the entire premises, and also are completely denied access to any information or records. Given the severe effect upon a SPM of having their appointment terminated, it is not only important, but I would go so far as to say crucial, that they are given a reasonable opportunity to meet the case being brought against them by the Post Office. It is difficult to see how they can have such an opportunity if they are denied access even to copies of information or records. The experience of Mr Abdulla shows that he was, at his interview with Mrs Ridge, not given access to documents that showed his account concerning the TC and the lottery in the sum of £1,092 was substantiated by internal Post Office records. Mrs Ridge did not have these either. I do not see how a decision about a SPM's future can sensibly be taken on proper grounds in the absence of such a document being made available either to the SPM, or to the Post Office personnel tasked with taking such a decision. Such an approach is not justified on the terms of either the SPMC or the NTC.

887. This answers Common Issue 14.

Termination

888. The relevant provisions in the two forms of contract are as follows. The SPMC Section 1, Clause 10 states:

> "… The Agreement may be determined by [the Defendant] <u>at any time</u> in case of Breach of Condition by [the Subpostmaster], or non-performance of his obligation or non-provision of Post Office Services, but otherwise may be determined by [the Defendant] on not less than three months notice."
>
> (emphasis added)

889. The NTC has a provision of 6 months' notice in Part 2, Paragraph 16.1 which states:

> "Following the Commencement Date the Agreement will continue until:
>
> 16.1.1 either Party gives to the other not less than 6 months' written notice (unless otherwise agreed between the Parties in writing), which cannot be given so as to expire before the first anniversary of the Start Date; or
>
> 16.1.2 it is terminated at any time in accordance with its terms."

890. It also has a more detailed provision in Part 2, Paragraph 16.2:

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"16.2 In addition to any other rights of termination contained in other Parts, [the Defendant] may terminate the Agreement immediately on giving written notice to the Operator if the Operator:

16.2.1 commits any material breach of the provisions of the Agreement or any other contract or arrangement between the Parties and fails to remedy the breach (if capable of remedy) within 14 days of a written notice from [the Defendant] specifying the breach and requiring the same to be remedied. Any references in these Standard Conditions to a breach of a particular obligation by the Operator being deemed to be material and/or irremediable are not intended to be exhaustive and shall not prevent [the Defendant] from exercising its rights under this clause in respect of any other breach of the Agreement which is material and/or irremediable;

16.2.2 fails to provide the Products or Services to the standards required by [the Defendant] as set out in the Manual and fails to remedy the failure (if capable of remedy) within 14 days of a written notice from [the Defendant] specifying the failure and requiring the same to be remedied; …

16.2.16 fails to pay any sum due to [the Defendant] under the Agreement by the due date".

891. Each of these different contractual termination provisions need to be considered separately. Both contracts give the Post Office the right to terminate, both on notice and summarily.

The SPMC

892. I will first deal upon the part of the clause that deals with termination on notice. The evidence of Mr Breeden was that this would be done very rarely for commercial reasons, and if there were "performance issues" these would be explored firstly with the SPM who would be given the opportunity to remedy them first. It is also the case that the Network Transformation Programme which led to the rationalisation of the Post Office branch network paid compensation to SPMs. This was up to 28 months' remuneration, with an average of 12 months, a figure reached eventually in conjunction with the NFSP. In a contract which provides for "not less than" 3 months' notice, that is obviously far in excess of the strict contractual entitlement, if it is construed as the Post Office contends. However, the way that the Post Office stated in evidence this provision would or may be applied, is not an answer to a disputed contractual construction.

893. The claimants maintain that there is ambiguity in the provision, which so far as the words "otherwise may be determined by [the Defendant] on not less than three months notice" I find difficult to follow. There is no ambiguity. The period of notice has to be a minimum of three months. However, that does not mean that it should be construed as the Post Office wish it to be, which is to the effect that it is the Post Office who can unilaterally decide to terminate on exactly 3 months at any time, and also whether any particular SPM is granted a longer period than 3 months, on consideration of vague and non-specified factors that are not dealt with in the clause.

894. The claimants rely upon the words "not less than" to submit that the Post Office was required "conscientiously to consider" what the correct period of notice was that

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should be given, in other words it should not automatically be only three months. It could (and the claimants by extension argue that it should) be longer in some circumstances. I accept that submission. If the notice provision was intended always to be one of precisely three months, it would not use the term "not less than three months." If the words "not less than" are to have any meaning at all – which in my judgment they plainly must - they must require consideration of what the appropriate period of notice should be. If consideration has to be given to what the period of notice should be (with the absolute minimum always being three months) then there has to some conscious thought given to that decision. It cannot be decided arbitrarily.

895. That consideration by the Post Office in a termination on notice scenario must be undertaken in compliance with its duty of good faith, as explained above, and take into account all relevant factors, and not take account of irrelevant ones. In a non-exhaustive list, relevant factors would include the reasons that the Post Office wanted to close the branch; the length of time a SPM had been in post; their investment in purchasing the business; and whether they had residential accommodation as part of the business premises in which they themselves lived. Examples of irrelevant ones would be whether they are claimants in the Group Litigation, and whether they were asking awkward questions about the ability of the Horizon system to account properly or sufficiently.

896. Turning therefore to the provisions in the SPMC for termination without notice, in other word, summary termination. The SPMC uses the phrases "Breach of Condition" by the SPM, or "non-performance of obligation" or "non-provision of" Post Office Services. The first of those, breach of condition, uses the language of repudiatory breach. Under the law of England and Wales, a contract does not have to contain a term entitling a party to bring that contract to an immediate end if the other party is in repudiatory breach; this is a right that contracting parties have generally.

897. However, the latter part of the clause, non-performance of obligation and/or non-provision of Post Office services, is more problematic. These are, on the face of them, very wide words, which on the Post Office's initial case would entitle it to bring a SPM's appointment to an immediate end by terminating without any notice at all. In other words, minor breaches of non-performance of obligation or non-provision of Services would give the Post Office the right to behave as though they were repudiatory breaches.

898. I do not consider this to be the correct construction of the clause. The answer to this is to interpret the whole of this part of the clause as being limited to repudiatory breaches. This approach is consistent with the views expressed in *The Interpretation of Contracts*, *Lewison* (2017) 6th ed. Sweet & Maxwell at 17-16, and I consider it to be an uncontroversial approach in terms of interpretation. This is effectively accepted by the Post Office.

899. I consider that in both instances – termination without notice, and also termination summarily – the Post Office must take the decision in accordance with the obligation of good faith. The decision to terminate without notice can only be taken if the contractual right to do so has arisen, which on the construction that I have considered, means a SPM must be in repudiatory breach of contract.

The NTC

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900. The notice provision in Part 2 Paragraph 16.1 contains the words "not less than 6 months' written notice". The same point of construction arises as under the SPMC – should this be construed as meaning 6 months' notice, or is there a requirement upon the Post Office to address its mind to what the correct period of notice should be?

901. I consider the same reasoning applies to the words "not less than 6 months" in the NTC as it does to the words "not less than three months" in the SPMC. If the words "not less than" are to mean anything, there must be a process whereby the Post Office decides what the period of notice should be. In this contract, these words in their contractual and commercial context, cannot be construed as meaning "exactly".

902. Accordingly, my conclusion on the provisions in the NTC for termination upon notice is the same as that for the SPMC, although the exercise of construction is different because the two contracts are different. The decision must be taken in accordance with the obligation of good faith, and be one that takes account of all relevant factors and does not take account of irrelevant ones. I have already identified in [895] above in relation to the SPMC the factors I consider relevant, and irrelevant, in a non-exhaustive list.

903. Paragraph 16.4 contains a change of control provision which permits termination on notice and there is nothing objectionable in that at all. I refer to it for completeness.

904. Turning to summary termination, the clauses of the NTC that deals with this has a very fulsome list of matters specified at Part 2 Paragraph 16.2.1 to 16.2.16. These are in the sub-clauses to Paragraph 16.2:

"16.2.1. commits any material breach of the provisions of the Agreement or any other contract or arrangement between the Parties and fails to remedy the breach (if capable of remedy) within 14 days of a written notice from Post Office Ltd specifying the breach and requiring the same to be remedied. Any references in these Standard Conditions to a breach of a particular obligation by the Operator being deemed to be material and/or irremediable are not intended to be exhaustive and shall not prevent Post Office Ltd from exercising its rights under this clause in respect of any other breach of the Agreement which is material and/or irremediable;

16.2.2. fails to provide the Products or Services to the standards required by Post Office Ltd as set out in the Manual and fails to remedy the failure (if capable of remedy) within 14 days of a written notice from Post Office Ltd specifying the failure and requiring the same to be remedied;

16.2.3 ceases to operate the Basic Business [a defined term which essentially means the business premises of which the Post Office is a part];

16.2.4 prior to entering into the Agreement, provided Post Office Ltd with any false or misleading information or omits any material fact;

16.2.5 is a company and the Operator: becomes insolvent, enters into liquidation, whether compulsorily or voluntarily, otherwise than for the purpose of amalgamation or reconstruction or if an administration order is made in respect of the Operator;

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16.2.6 is a single director company and the director: dies; or by reason of illness or incapacity (whether mental or physical), becomes incapable of managing the Operator's affairs or becomes a patient under any mental health legislation;

16.2.7 is an individual and the Operator: becomes the subject of a bankruptcy petition or order; dies; or by reason of illness or incapacity (whether mental or physical), becomes incapable of managing his own affairs or becomes a patient under any mental health legislation;

16.2.8 is a partnership and the partnership is dissolved;

16.2.9 makes any arrangement or composition with its creditors or shall have a receiver (including an administrative receiver) or administrator appointed over all or any part of its assets or if the Operator takes any similar action in consequence of debt;

16.2.10 has failed to acquire or enter into a Valid Property Interest prior to taking up occupation of the Branch Premises;

16.2.11 changes the use of the Branch Premises in contravention of the terms of the Valid Property Interest;

16.2.12 commits any other breach of the terms of, or the requirement to have, a Valid Property Interest and/or commits any breach of the Operator's interest in the Branch Premises being a breach of any tenancy lease or freehold interest which could give rise to the termination of that interest or which could render the Operator unable to comply with all the terms of the Agreement;

16.2.13 itself, or the Manager or a director of the Operator, is charged with any criminal offence (other than a Road Traffic Offence not involving imprisonment);

16.2.14 challenges the validity of any of the Post Office Intellectual Property or the title of Post Office Ltd or Royal Mail Group to the Post Office Intellectual Property;

16.2.15 fails to properly account for any money due to, or stock of, Post Office Ltd or the Clients; or

16.2.16 fails to pay any sum due to Post Office Ltd under the Agreement by the due date."

905. There is a further provision at Paragraph 16.3 immediately following:

"If any Manager or Assistant does not at all times attain a standard acceptable to Post Office Ltd, and the Operator is unable or refuses to provide a substitute Manager or Assistant who does meet the standard, Post Office Ltd shall have the right upon notice in writing to the Operator to immediately terminate the Agreement."

906. This is, as the Post Office rightly submits, an exhaustive list. Paragraphs 16.2.3, and 16.2.5 to 12, all relate to a change in financial or legal status (whether an individual or company) and are unobjectionable; Paragraph 16.2.13 relates to criminal charges; and clause 16.2.4 relates to providing false and misleading information to obtain the

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appointment in the first place. For all of these, their words are clear and the Post Office has the right to terminate summarily as a matter of construction.

907. The first two, Paragraphs 16.2.1 and 16.2.2, refer to material breaches (whether capable of being remedied, or incapable of remedy), a failure to provide the Services or Products to the standard required and for that failure to be maintained after 14 days notification of remedy. The last two relate to failure to account (Paragraph 16.2.15) and finally Paragraph 16.2.16 relates to failure to pay. I consider that these provisions should properly be construed as being limited to repudiatory breaches, in the way identified by and consistent with the views expressed in *The Interpretation of Contracts, Lewison* (2017) 6th ed. Sweet & Maxwell at 17-16. and I consider it to be an uncontroversial and conventional approach in terms of interpretation. The phrase "material breach" in Paragraph 16.2.1 identifies that this is the subject matter of the provision. A minor or consequential failure to provide the Services or Products would not, in my judgment, fall to be considered within this clause, entitling the Post Office summarily to terminate the appointment.

908. The end result of the process of separately considering the SPMC and NTC provisions for summary termination therefore individually lead to similar conclusions, albeit after considering differently worded provisions in two different contracts. This concludes consideration of Common Issues 16 and 15 together.

The "true agreement"

909. This issue arises in relation both to Common Issues 17 and 18. It is advanced by the claimants further or in the alternative to its case on the termination provisions in the preceding two issues, Common Issues 15 and 16. It has been referred to in the submissions from time to time as the ***Autoclenz*** point, as the claimants rely on the Supreme Court authority of ***Autoclenz v Belcher*** [2011] UKSC 41 as part of their argument in challenging whether the true agreement as to termination is to be contained in the express terms of the SPMC and NTC.

910. The claimants argue that it is not, and the true agreement is to be found in paragraph 71 of the Generic Particulars of Claim. This is effectively that the Post Office would not terminate without substantial cause or reason, established after a fair investigation and consideration; if the Post Office itself was in material breach of contract; vindictively, capriciously or arbitrarily; or in response to reasonable correspondence (of the kind engaged in by Mr Bates) about the difficulties of working with, and the shortcomings in, the Horizon system. It is also contended for by the claimants in its pleading that this means that the Post Office could never terminate "without giving such notice as the court may hold to be reasonable (which the claimants will contend was, on any view, never to be less than 12 months)."

911. It is in relation to this part of the case that a light is shone on the way in which the Post Office is contesting parts of this litigation. One of the areas of dispute in this Common Issue is whether the Post Office is entitled to terminate the appointment of a SPM vindictively, capriciously or arbitrarily. That is denied by the Post Office; in other words, the Post Office argues that contractually it is entitled to act in this way. Although that is a surprising position, in my judgment it is also an obviously incorrect position. I have dealt already in this judgment with why that is so. Firstly, these

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contracts are relational contracts. Secondly, as stated by Lord Sumption JSC in ***British Telecommunications plc v Telefónica O2 UK Ltd*** [2014] UKSC 42 at [37], absence very clear words to the contrary, a contractual discretion has to be exercised consistently with its contractual purpose, and in good faith and not arbitrarily or capriciously. Thirdly, I have considered as a matter of construction the termination on notice provisions in both the SPMC and the NTC, and concluded on the words used, considered within the contracts at a whole and in accordance with their commercial purpose, how the power to terminate on notice should be exercised.

912. I do not therefore consider that the "true agreement" and ***Autoclenz*** issues arise for determination. However, I will briefly address them out of deference to the arguments by both parties.

913. The case of ***Autoclenz v Belcher*** [2011] UKSC 41 concerned a claim by people who were engaged to provide car cleaning services on behalf of Autoclenz. In order to obtain the work, these people had to sign contracts stating that they were sub-contractors not employees, that they had to provide their own materials, that they were not obliged to provide services to the company, now was the company obliged to offer work to them, and they could provide suitably qualified substitutes in their stead. The claimants brought proceedings claiming they were "workers" for the purposes of the National Minimum Wage Regulations 1999 and the Working Time Regulations 1998, and that accordingly they were entitled to be paid the national minimum wage and to receive statutory paid leave. An employment tribunal found that the true agreement was not contained in the contractual documents and that they were employees. The Employment Appeal Tribunal dismissed an appeal by the company, holding that the claimants were not working under contracts of employment, but were working under contracts for services and hence fell within the regulations. The Court of Appeal dismissed the appeal of the company, and allowed a cross-appeal by the claimants, holding that they were "workers" under both limbs of the definition.

914. The company's appeal to the Supreme Court failed. The judgment (with whom all the members of the Supreme Court agreed) was given by Lord Clarke. The critical question, he considered, was what was the true agreement between the parties? In considering that, he approved statements in other cases that identified the importance of looking at the reality of the situation. The following passages are of most assistance:

"29 However, the question for this court is not whether the two approaches are consistent but what is the correct principle. I unhesitatingly prefer the approach of Elias J in *Kalwak* and of the Court of Appeal in Szilagyi and in this case to that of the Court of Appeal in *Kalwak*. The question in every case is, as Aikens LJ put it [2010] IRLR 70, para 88, quoted above [the Court of Appeal judgment in the instant case], what was the true agreement between the parties. I do not perceive any distinction between his approach and the approaches of Elias J in *Kalwak*, of Smith and Sedley LJJ in *Szilagyi* and this case and of Aikens LJ in this case.

30 In para 57 of *Kalwak* (set out above) Elias J quoted Peter Gibson LJ's reference to the importance of looking at the reality of the obligations and in para 58 to the reality of the situation."

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(emphasis added)

915. After quoting passages from Smith LJ in *Szilagyi,* Lord Clarke continued:

"32 Aikens LJ stressed at paras 90—92 the importance of identifying what were the actual legal obligations of the parties. He expressly agreed with Smith LJ's analysis of the legal position in the *Szilagyi* case and in paras 47—53 in this case. In addition, he correctly warned against focusing on the "true intentions" or "true expectations" of the parties because of the risk of concentrating too much on what were the private intentions of the parties. He added:

"What the parties privately intended or expected (either before or after the contract was agreed) may be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the *Chartbrook* case [2009] AC 1101, paras 64—65. But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed."

I agree.

33 At para 103 Sedley LJ said that he was entirely content to adopt the reasoning of Aikens LJ:

"recognising as it does that while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm's length commercial contract."

I agree.

34 The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 as follows:

"I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so."

35 So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."

(emphasis added)

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916. The Post Office mounts a range of objections to the approach urged on the court by the claimants relying upon ***Autoclenz***, not least that this is an employment law case, and that SPMs are not employees. It is also said that these are commercial contracts, and the phrase "business to business" was used to describe them, with a SPM (or a limited company, in a few cases) contracting with the Post Office for business purposes.

917. So far as the status of SPMs is concerned, there are certainly similarities with the employment law field, but also some differences. SPMs, for the most part, provided personal service, but were not obliged to do so, although whether they were intending to or not was an important point that the Post Office was anxious to ascertain at interview. Personal service entitled a SPM to some benefits similar to that of an employee. An SPM providing personal service was not entitled to be absent for more than 3 days without permission. Hours of opening were dictated. The Post Office witnesses accepted that there was a "sensitivity" within the Post Office about the employment status of SPMs. It was evident that the Post Office was anxious that SPMs remain on the "non-employee" side of that line.

918. On the other hand, very few (if any) employees invest many tens of thousands of pounds in purchasing or leasing premises, and purchasing businesses, to carry out their activities.

919. The statement of Lord Clarke at [35] that "the relative bargaining power of the parties must be taken into account in decidi ng whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part" is, in my judgment, not limited to the employment law field, but will be of particular resonance in that area of the law. This is because individual people looking for work will be in a particularly weak bargaining position. The claimants in the ***Autoclenz*** case were seeking declarations that they were entitled to the national minimum wage. That alone should identify the strength, or otherwise, of their bargaining position with a company prepared to offer them work, but only on contract terms that expressly stated that they were *not* employees (and hence not entitled to the regulations governing the national minimum wage).

920. The Post Office relied, partly, upon the sort of submission that an employer such as Autoclenz might have attempted to rely upon, but seems not to have done. This is that nobody forced prospective SPMs to contract with the Post Office; they had a freedom of choice as to whether to contract on the terms offered, or not to contract at all. Putting entirely to one side the position of SPMs such as Mr Bates, who were never shown the terms of the SPMC in full prior to contracting, I reject that approach by the Post Office for this reason. I consider that English law is rather more developed and sophisticated – and not simply in the employment law field – than this rather crude "like it or lump it" approach from the Post Office. The approach of the law to standard business terms, the Unfair Contract Terms Act 1977 and relative bargaining power are features that must be considered in a variety of different contexts, as can be seen from this judgment alone.

921. I consider the dicta in ***Autoclenz*** to have application wider than the field of employment law, and its application is this. There is no magic in a label, and the court will consider all the relevant circumstances including the terms of any written

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agreement in arriving at the true agreement between the parties. It is similar, if not identical, to the court's approach when the word "agent" is used, as has been seen above. The label used by the parties is not determinative. However, when one is considering "all the circumstances of the case", as Lord Clarke states at [35], this must be done at the time of contracting. Hindsight cannot be used, as that contravenes the general principles of contractual construction.

922. I also consider that this view of the judgment in ***Autoclenz*** is consistent with the views of Lord Neuberger as expressed in ***Secret Hotels2 v HMRC*** [2014] UKSC 16 at [31], where he stated the correct approach to be as follows:

"Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of the relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless is established that it constitutes a sham."

923. Lord Clarke considered the question of a sham at [28], before he provided identification of the "correct principle", which he stated to be "what was the true agreement of the parties?". If a written contract is a sham, and states within it that one party is not an employee, by definition that written contract cannot be the true agreement of the parties. That is arrived at as a matter of interpretation of the contract in its context, including facts and circumstances not contained in its written terms. I do not consider the two authorities to be inconsistent, whether they are argued in this way or not.

924. It would never have been in the reasonable contemplation of the parties at the time of contracting that the Post Office could, or would, give notice to a newly appointed SPM who had paid (say) £80,000 or even more to purchase branch premises, just two weeks after they were appointed so that (under the NTC) that appointment came to an end 6 months and 2 weeks after the purchase. The appointment of a SPM was intended to be a long term one, to the mutual benefit of both the parties. If this principle were to be applied, the same considerations would be required as those in my approach to termination upon notice.

925. If therefore, these Common Issues fell to be determined because the answers to Common Issue 16 were other than I have decided them, I would have followed the approach argued in the alternative by the claimants. However, this could only ever apply to termination upon notice; I accept the submission made by the Post Office at footnote 248 of its Closing Submissions. I do not accept the arguments of the claimants that application of the principles would always result in a minimum period of notice of 12 months. That seems to me simply to be another arbitrary period, merely fixed as a longer period than the one in the contracts themselves. I consider 12 months would be the very longest period of notice to which a SPM could be entitled; depending upon the factors I have identified above (length of service, price paid and so on) it may be less than that. The parties would therefore, on the terms of the NTC, be in dispute about periods between 6 and 12 months long; on the SPMC, the range is a little longer, but not by very much.

926. However, these Common Issues only arise in the alternative, and on my findings of construction on the termination on notice provisions in Common Issue 16, these do

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not arise. I have provided my views in outline above for completeness and to address, in summary terms, the arguments by the parties.

Compensation for loss of office

927. The next two Common Issues both concern loss. The first concerns compensation for loss of office upon termination (with or without notice); the second concerns heads of loss. The claimants confirmed in their written opening that no separate consideration arises under these Common Issues, and the arguments in respect of them are contained in Common Issues 5, 6 and 7.

928. It is not therefore necessary to deal with them separately and I do not do so.

Restrictions upon appointment of prospective purchaser

929. This arises under Common Issue 21. There is no construction issue on the form of words contained, the argument between the parties relates to the implication of a term.

930. Each of the contracts contained express terms – in the SPMC it was at Section 1, Clause 9, in the NTC at Part 2 Paragraph 19 – which stated that when a SPM came to leave, if they wished to dispose of their related business, the incoming purchaser would not be entitled to preferential treatment when being considered for appointment as a SPM.

931. The claimants' case states that the Post Office has a discretion whether to appoint a purchaser as the next SPM, but not a veto, and that resolution of this Common Issue crucially requires consideration of whether appointment of a new SPM is subject to a veto or not. The claimants rely upon a decision of Waksman J in ***Watson v Watchfinder.co.uk*** [2017] EWHC 1275 (Comm) in which an ability to exercise an option in a share option agreement was held not to be "an unconditional right of veto" but conferred a discretion. The case therefore, as one would expect, contains a detailed consideration of the way in which that discretion should be exercised.

932. Veto comes from the Latin, and means "I forbid", its origin being from Roman times of the Republic and a legislative one. It has come to be used widely in the English language, and the six permanent members of the UN Security Council have a veto over resolutions. The President of the United States has a veto, although it can be over-ridden with a two-thirds majority of both houses in that jurisdiction. Its use is essentially a preventative one. Absence exercise of a veto, legislation or resolutions will otherwise pass.

933. To characterise the Post Office's ability in terms of approval or otherwise as a veto is essentially misleading, as it suggests that absence exercise of the veto, the purchaser would otherwise become a SPM in the stead of the selling (and outgoing) SPM. That is not correct. No SPM has the ability to pass their status as SPM on to another as part of a commercial transaction between the seller and purchaser. That would be akin to a novation, however a novation without the consent of the other contracting party, the Post Office.

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934. I disagree with the characterisation of the ability of the Post Office to choose whether to contract with a prospective purchaser or not as being a veto. Use of that term suggests that absent exercise of the veto a purchaser would have some entitlement to be appointed. They do not. I also do not find the ***Watchfinder*** case to be of assistance. All the wording of each of these clauses do is to make the position vis-à-vis a future purchaser of the business clear, so far as the SPM with whom the Post Office is contracting is concerned. That prospective purchaser will have to take their chances on an application to the Post Office to be a SPM is concerned. The SPM, if they come to sell, will have to leave matters between the incoming purchaser and the Post Office as to whether than purchaser will be approved as a SPM. I find nothing in any of the terms of either the SPM or the NTC that would suggest that the Post Office's ability to choose the identity of those whom it would wish to appoint as SPMs should be subject to some sort of restriction or duty that has to be exercised in a particular way. The discretion to which the clauses refer means the commercial freedom of the Post Office to contract with whom it chooses. The words do not create or confer a right or discretion upon the Post Office.

935. The Post Office, in its written submissions on this Common Issue, subject the arguments advanced by the claimants in this respect somewhat short shrift. Words and phrases such as wrong, perverse, commercially bizarre and fundamentally misconceived are used. I do not adopt those terms in dismissing the claimants' arguments in favour of what is contended for; however, I would observe that the arguments advanced by the claimants ignore the Post Office's freedom to appoint suitable persons as SPMs, whether or not they are purchasers of an existing branch Post Office or not. The claimants' grounds, such as they are, for justifying this approach are somewhat whimsical. They are not, so far as I can tell, grounded in any contractual analysis. There is no reason either contained within the contracts, or without, to grant some sort of special status to prospective purchasers as applicants to become SPMs.

936. In reality, a prospective purchaser would have a slight practical advantage over other applicants, as the branch would be an existing one. A commercial purchase agreement could also, in any event, be entered into by the SPM and prospective purchaser, contingent upon approval by the Post Office of the incoming purchaser as suitable. I therefore reject the claimants' case on this Common Issue.

937. Finally, this judgment does not deal with breaches, causation or loss. Mrs Stubbs gave evidence that she was required by the Post Office to resign as a SPM before the Post Office was prepared to market her branch. That sort of behaviour by the Post Office does not come within its ability freely to contract with suitable applicants who are prospective purchasers, and I do not consider that it falls within the subject matter of this Common Issue at all. Nor does it appear to come within any power the Post Office has within the terms of the SPMC, although I have found that the SPMC did not govern Mrs Stubbs' appointment in any event. However, any discretion available to the Post Office would still have to be exercised for a proper purpose and in accordance with the implied duty of good faith. That is because both Mrs Stubbs and Mr Bates each had relational contracts with the Post Office.

N. Assistants

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938. Common Issues 22 and 23 both concern the responsibility of an SPM for their assistants. The first of these Common Issues is whether Section 15, Clause 7.1 of the SPMC, and/or Part 2 Paragraphs 2.3 and 2.5 of the NTC, and/or any of the implied terms, purported to confer a benefit upon Assistants for the purposes of section 1 of the Contracts (Rights of Third Parties) Act 1999, and if so, which ones. The second is what was the responsibility of SPMs under each of the SPMC and the NTC to train their assistants.

939. I shall deal with each in turn. The relevant clause of the SPMC was added in July 2006 (what is called the Modified SPMC) and states at Section 15, Clause 7.1:

"[The Defendant] will:

7.1.1 provide the Subpostmaster with relevant training materials and processes to carry out the required training of his Assistants on the Post Office® Products and Services;

7.1.2 inform the Subpostmaster as soon as possible where new or revised training will be necessary as a result of changes in either the law or Post Office® Products and Services; and

7.1.3 where appropriate … update the training materials (or processes) or provide new training materials (or processes) to the Subpostmaster. However, it is the Subpostmaster's responsibility to ensure the proper deployment within his Post Office® branch of any materials and processes provided by [the Defendant] and to ensure that his Assistants receive all the training which is necessary in order to be able to properly provide the Post Office® Products and Services and to perform any other tasks required in connection with the operation of the Post Office® branch."

(emphasis added)

940. The NTC Paragraphs are as follows:

Part 2, Paragraph 2.3: "Where [the Defendant] considers it necessary, it shall initially train the first Manager and such number of Assistants as [the Defendant] shall determine, in the operation of the System at the Branch."

Part 2, Paragraph 2.4: "The Operator [ie the SPM] shall ensure that the first Manager cascades the training to all other Assistants and to any replacement Manager in order to ensure that all subsequent Managers and all other Assistants receive sufficient initial training from properly trained Managers."

Part 2, Paragraph 2.5: "[the Defendant] may require the Manager and/or the Assistants to undertake further training at any reasonable location and time during the Term if [the Defendant]

2.5.1 reasonably considers such training to be essential; or

2.5.2 wishes to train them in new and improved techniques which have been devised and which the Operator will be required to use in operating the System."

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(emphasis added)

941. A finding in the terms sought by the claimants would mean that the third parties in question, namely the assistants, would be entitled to enforce, in their own right, the benefits which it is said are conferred upon those assistants by these provisions.

942. The correct starting place is the Act itself. Section 1 of the Contracts (Rights of Third Parties) Act 1999 provides as follows:

(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if —

(a) ...

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.

943. Assistants are undoubtedly identified as a member of a class. Section 1(3) does not appear to be in issue. The two elements which require consideration are, what is the benefit purportedly conferred, and on a proper construction of the contracts does it appear that the parties did not intend the term to be enforceable by an assistant?

944. The meaning of section 1(1)(b) was explained by Christopher Clarke J (as he then was) in ***Dolphin Maritime & Aviation v Sveriges Angartygs Assurans Forening*** [2014] EWHC 716 (Comm) at [74]. Dolphin was an agent, named in a contract, as the agent of another party (P) to whom payments to P were to be made. Dolphin failed in an attempt to enforce fulfilment of the payment obligation by way of payment to itself. The judge stated:

"A contract does not purport to confer a benefit on a third party simply because the position of that third party will be improved if the contract is performed. The reference in the section to the term purporting to "confer" a benefit seems to me to connote that the language used by the parties shows that one of the purposes of their bargain (rather than one of its incidental effects if performed) was to benefit the third party."

(emphasis added)

945. I agree with that construction of the section and I adopt the reasoning of Christopher Clarke J (as he then was) in that case. It cannot be said, in my judgment, that one of the "purposes" of either the SPMC or the NTC was to train assistants. The training of assistants was wholly incidental to the purpose of each of the contracts. There is no

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doubt that having properly trained assistants would be of benefit, and there is no doubt that an assistant would benefit in the ordinary sense of the word from being fully and adequately trained. However, that is insufficient, in my judgment, to bring that benefit into the language of the Act.

946. That disposes of Common Issue 22, in respect of which I accept the Post Office's case.

947. Turning therefore to Common Issue 23, training of assistants. I have already found the existence of the term at Common Issue 2(i)(a) which deals with training. This was that there was an implied term, applying the relevant test and being necessary for business efficacy, that the Post Office provide adequate training and support (particularly if and when the Post Office imposed new working practices or systems or required the provision of new services).

948. There are two points in issue, or sub-issues, between the parties in respect of the training of assistants. The first is which party – the Post Office, or the SPM – is responsible for the training of assistants. The second is to what level is that training to be provided.

949. On the first sub-issue, the Post Office submits that the SPM in each case "was ultimately responsible for providing or procuring the provision of such training as was necessary to enable the assistant to assist the SPM in discharging his obligations" to the Post Office (my emphasis). The difficult arises, in my judgment, from the use by the Post Office of the term "ultimately responsible." The Claimants maintain that the Post Office, effectively, had the primary obligation to train an SPM's assistants, but this has some difficulties, not least the express terms themselves which imposes this upon the SPM.

950. There is no doubt, in my judgment, that a SPM was responsible for training his or her assistants. However, this is subject to two qualifications, the first of which comes from the second sub-issue.

951. On the second sub-issue, the Post Office takes issue with the SPMs' argument that they cannot "have been better able to train Assistants than the training provided by the Defendant would allow or enable". The Post Office stated that this was an assertion of "a limiting principle that would have to be implied and which does not stand scrutiny". However, the Post Office's case ignores what the word "cascade" in Part 2 Paragraph 2.4 of the NTC must connote. This must mean passing down of the training or knowledge acquired during training, and that training (or acquired knowledge) was to be provided by, originate with, and come from the Post Office.

952. The Post Office's arguments on this also suffer from a complete lack of logic. There is no way that a SPM could, on Horizon, train his or her assistants to a higher level of competence than the Post Office's own training had given that SPM. In other words, any deficiency of training given to the SPM by the Post Office is not cured, in contractual terms, to the Post Office's benefit by that deficient training being passed on to an assistant by that deficiently trained SPM. I find this argument by the Post Office to fly in the face of commercial, business and indeed common sense. I construe the relevant terms in the contracts to that effect, but if it is necessary to imply a term

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(and at least so far as the non-modified SPMC it is, because it does not deal with this subject expressly at all) then I do so due to business necessity.

953. The second qualification or feature, is that a subject such as training an individual to work on a computer system is something that should be approached co-operatively. Given my finding that these contracts are relational contracts, I would expect the parties to co-operate in terms of the provision of training on Horizon. It is in both parties' interests that the assistants being used by a SPM had reached a particular standard in use of the Horizon system.

954. I have certain (non-binding) observations on the evidence that was given before me by both sides in the Common Issues trial in terms of training. A great effort was made by the Post Office to explain in detail how the training was structured and what its content included. Some evidence was given by the Lead Claimants of their experiences of the training, which the Post Office initially sought to strike out of their witness statements. That attempt failed, and once it was admitted as evidence, however, it painted a very different picture to that presented by the Post Office witnesses.

955. One feature which seemed to me to be wholly absent from the training courses run by the Post Office for the Lead Claimants was any sort of assessment or test of competence at the end of the training. Every case will of course be wholly different, but whereas one individual might, after four days, be wholly competent to use the Horizon system unsupervised, another might need longer than that. If they are all given four days of training regardless, and there is no assessment at the end of that four days, then some incoming SPMs might not be conversant with all the features of the system. This situation is in no-one's interests, and in my judgment I would go further and say it is contrary to business logic. Although there was some in-branch training, the approach to that did not appear to be uniform either. Add to this that the auditors have the dual role of in-branch training after branch transfer day, and subsequent auditing of that particular branch, it can be seen that inadequate training is not likely to be readily discernible to the Post Office. Certainly the subjective experiences of the Lead Claimants so far as training was concerned was far from ideal. I do not consider that it would be difficult for any training to include at the end of it some sort of assessment or test, and if a SPM were to fail that assessment or test, then they would not have been satisfactorily trained. They would therefore require further training.

956. I find that an SPM could not be expected, and was not contractually required, to train his or her assistants to a higher standard than that SPM themselves received from the Post Office. They were however contractually responsible for training their assistants, which logically can only mean to the level to which they themselves were trained. Their assistants should not have been trained to a lower standard than they themselves were. These findings are not dependent upon the contracts being relational ones.

O. Onerous or unusual terms

957. Common Issues 5 and 6 concern a large number of terms which the claimants allege are onerous or unusual terms, in both the SPMC and the NTC. The claimants contend that as a result, they were unenforceable unless the Post Office brought them fairly

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and reasonably to the attention of the SPMs. Accordingly, if they were terms of that character, this subject also concerns consideration of what the Post Office was required to do to draw them to the specific attention of the SPMs. Common Issue 7 concerns the Unfair Contract Terms Act 1977, and unreasonableness, in respect of the same terms.

958. I accept the submission of the Post Office that "this question arises once the Court has determined the meaning and effect of those clauses, of the effect of the Agreed Implied Terms upon them, and the effect of any of the claimants' implied terms that the Court is willing to imply", as it was put in the Post Office's written Closing Submissions. Given the wide-ranging nature of the terms said to fall into this category, I have decided that it is logical to determine these three Common Issues after deciding on all contended points of construction. Accordingly, even though these Common Issues were numbered near the beginning of the 23 different ones under consideration, I have come to this group of issues last. The starting point logically is to consider the terms themselves, and I will do so in respect of Common Issues 5 and 6 first. The terms are in seven different categories, and are as follows:

1. Rules, instructions and standards:

<u>*SPMC*</u>

- *Section 1, Clause 13: "SECTIONS 1-23 contain the general terms of a Subpostmaster's appointment. [The Defendant] issues the Subpostmaster with rules and Postal Instructions which deal with the various classes of Post Office Business to be transacted at his sub-office."*

- *Section 1, Clause 5: "...Retention of the appointment as Subpostmaster is dependent on the sub-office being well managed and the work performed properly to the satisfaction of [the Defendant]."*

- *Section 1, Clause 14: "The rules provided for the instruction and guidance of Subpostmasters must be kept up to date. They must be carefully studied and applied. No breach of rules will be excused on the grounds of ignorance."*

- *Section 1, Clause 18: "Changes in conditions of service and operational instructions, including those which are agreed with the National Federation of Sub-Postmasters, will appear from time to time in Counter News or by amendment to the Contract. Such changes and instructions are deemed to form part of the Subpostmaster's contract."*

- *Section 1, Clause 19: "All instructions received from the Regional General Manager should be carried out as promptly as possible."*

<u>*NTC*</u>

- *Part 2, paragraph 1.1 "The Operator agrees to operate the Branch on behalf of [the Defendant] in accordance with the terms of the Agreement (including for the avoidance of doubt the Manual)", and the definition of Manual at Part 5 paragraph 1.1 as follows:*

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"The following list includes the manuals, guidelines and instructions which currently come under the definition of "Manual":

- *Local Post Office Operations Manual*
- *Horizon online administration and equipment operations manual*
- *National lottery operations manual (where branch offers this product)*
- *Ordering stock and operations manual*
- *Post Office outreach services operations manual (where applicable)*
- *Post Office paystation operations manual*
- *Security operations manual*
- *Horizon system user guide (online)*
- *Horizon online help (online)*
- *Branch Focus*
- *Post Office branch standards*
- *Post Office Ltd's Accessibility Guide*
- *Branch Conformance Standards*
- *Post Office cash and secure stock remittance services manual (online)*
- *FOS project operations manual*
- *FOS project training workbook (x2)*
- *Mailwork specification (where applicable)*
- *Any other instructions to operators or updates to such instructions issued by [the Defendant] from time to time"*

- *Part 5, paragraph 1.3: "[the Defendant] may amend the list of documents set out in this Part 5 and may amend the contents of any manual or documents on that list by giving written notification (which may be by electronic means) to the Operator. In the Agreement, unless otherwise specified, a reference to the Manual is a reference to it as amended, consolidated or extended by [the Defendant] from time to time."*

- *Part 5, paragraph 1.5: "In addition to the Manual, [the Defendant] may issue to the Operator instructions which deal with various classes of Products and Services to be transacted at the Branch and the design and operational standards required to run the Branch."*

- *Part 5, paragraph 1.6: "All such instructions must be complied with immediately (unless otherwise notified by [the Defendant]) and must be kept up to date by incorporation of updates issued by [the Defendant]. They must be carefully studied by the Operator, its Manager and Assistants. No breach of instructions will be excused on the grounds of ignorance."*

- *Part 2, paragraph 3.2.1, 3.2.2: "The Operator shall…" "maintain the highest standards in all matters connected with the Branch and Branch Premises, including implementing and maintaining the standards specified in the Manual" and "comply with all instructions given to it by [the Defendant] with regard to standards and quality in the operation of the Branch".*

2. Classes of business

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SPMC

- *Section 1, Clause 6: "The Subpostmaster is informed at the time of his appointment of the classes of business he is required to provide. He must also undertake, if called upon to do so later, any other class of business not required at the time of his appointment but which [the Defendant] may subsequently and reasonably require him to do, except that [the Defendant] may not require him to undertake Mailwork where the Subpostmaster did not undertake to do so as part of the terms of his appointment."*

- *Section 1, Clause 7: "If [the Defendant] alters the services to be provided or withdraws a service the Subpostmaster has no claim to compensation for any disappointment which may result from the change."*

NTC

- *Part 2, paragraph 1.7: "[The Defendant] has the right to enter into contracts or arrangements with Clients for the handling of Products or the supply of Services by the Network (including the Branch) on such terms as [the Defendant] considers fit. [The Defendant] retains the discretion as to where within the Network particular products and services are offered"*

3. Accounts and liability for loss:

SPMC

- *Section 12, Clause 4: "The Subpostmaster must ensure that accounts of all stock and cash entrusted to him by [the Defendant] are kept in the form prescribed by [the Defendant]…"*

- *Section 12, Clause 12: "The Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants. Deficiencies due to such losses must be made good without delay."*

- *Section 12, Clause 13: "The financial responsibility of the Subpostmaster does not cease when he relinquishes his appointment and he will be required to make good any losses incurred during his term of office which may subsequently come to light."*

NTC

- *Part 2, paragraph 3.6.6: "The Operator shall: account for and remit to [the Defendant] all monies collected from Customers in connection with Transactions in accordance with the Manual. Any cash which [the Defendant] provides to the Operator or which the Operator collects as a result of Transactions does not belong to the Operator and shall be held by the Operator (at the Operator's risk) on behalf of, and in trust for, [the Defendant] and the Clients. Any such cash shall not form part of the assets of the Operator. The operator acknowledges it is expressly forbidden from*

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making use of any such amount due to [the Defendant] for any purpose other than the operation of the Branch and it must on no account apply to its own private use, for however short a period, any portion of funds belonging to [the Defendant] entrusted to it. Any breach of this clause 3.6.6 and/or any misuse of [the Defendant's] cash by the Operator or its Personnel shall be deemed to be a material breach of the Agreement which cannot be remedied and may render the offender liable to prosecution."

- *Part 2, paragraph 4.1: "The Operator shall be fully liable for any loss of or damage to, any Post Office Cash and Stock (however this occurs and whether it occurs as a result of any negligence by the Operator, its Personnel or otherwise, or as a result of any breach of the Agreement by the Operator) except for losses arising from the criminal act of a third party (other than Personnel) which the Operator could not have prevented or mitigated by following [the Defendant's] security procedures or by taking reasonable care. Any deficiencies in stocks of Products and/or any resulting shortfall in the money payable to [the Defendant] must be made good by the Operator without delay so that, in the case of any shortfall, [the Defendant] is paid the full amount when due in accordance with the Manual".*

- *Part 2, paragraph 4.2: "The Operator's responsibility for such items shall begin from the time at which the Post Office Cash and Stock are received by the Operator and shall end when the Post Office Cash and Stock are given to Customers in the proper conduct of the Branch or are returned to [the Defendant] or, in the case of cash or financial instruments are collected by a cash in transit provider or are paid into a bank. Whilst the Post Office Cash and Stock are in the Operator's possession, it shall keep them in a place of security."*

- *Part 2, paragraph 4.3: "The Operator shall retain financial responsibility (in accordance with the Agreement) following the termination of the Agreement, and it will be required to make good any losses (including losses arising from Transaction corrections and stock losses) incurred during its operation of the Branch which may subsequently come to light."*

- *Part 2, paragraph 13.1: "The Operator shall reimburse [the Defendant] in full on demand for all losses, claims, demands, proceedings, liabilities, costs and expenses (including reasonable legal costs and expenses) incurred by [the Defendant] as a result of: (13.1.1) any negligence or breach of the Agreement by the Operator or its Personnel; (13.1.2) any misuse or infringement of any Intellectual Property of any third party by the Operator or its Personnel; and/or (13.1.3) any claim brought under the EA and/or its regulations in respect of the Branch"..*

4. Assistants:

SPMC (1994 to 2006)

- *Section 15, Clause 2: "Assistants are employees of the Subpostmaster. A Subpostmaster will be held wholly responsible for any failure, on the part of his Assistants, to apply Post Office rules, or to provide*

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a proper standard of service to the public. He will also be required to make good any deficiency, of cash or stock, which may result from his assistants' actions."

SPMC (as amended in July 2006), also called the Modified SPMC

- *Section 15, Clause 2: "Assistants are employees of the Subpostmaster, and the Subpostmaster will consequently be held wholly responsible for any failure on the part of his Assistants to: (2.1) apply Post Office ® rules or instructions as required by [the Defendant]; (2.2) complete any training necessary in order to properly provide Post Office ® Services; and (2.3) comply with the obligations set out below. The Subpostmaster will also be required to make good any deficiency of cash or stock which may result from his Assistants' actions or inactions."*

5. Suspension:

SPMC

- *Section 19, Clause 4: "A Subpostmaster may be suspended from office at any time if that course is considered desirable in the interests of [the Defendant] in consequence of his: (a) being arrested, (b) having civil or criminal proceedings brought or made against him, (c) where irregularities or misconduct at the office(s) where he holds appointment(s) have been established to the satisfaction of [the Defendant], or are admitted, or are suspected and are being investigated."*

- *Section 19, Clause 5 and 6: "Where a Subpostmaster is suspended his remuneration in respect of any period of suspension will be withheld so long as such suspension continues"; "On the termination of the period of suspension whether by termination of contract or reinstatement, the Subpostmaster's remuneration in respect of the period may, after consideration of the whole of the circumstances of the case, be forfeited wholly or in part...".*

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- *Part 2, paragraph 15.1: "[The Defendant] may suspend the Operator from operating the Branch (and/or, acting reasonably, require the Operator to suspend all or any of its Assistants engaged in the Branch from working in the Branch), where [the Defendant] considers this to be necessary in the interests of [the Defendant] as a result of: (15.1.1) the Operator and/or any Assistant being arrested, charged or investigated by the police or [the Defendant] in connection with any offence or alleged offence; (15.1.2) civil proceedings being brought against the Operator and/or any Assistant; or (15.1.3) there being grounds to suspect that the Operator is insolvent, to suspect that the Operator has committed any material or persistent breach of the Agreement, or to suspect any irregularities or misconduct in the operation of the Branch, the Basic Business or any other Post Office® branches with which the Operator*

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and/or any Assistant is connected (including any financial irregularities or misconduct).”

- *Part 2, paragraph 15.2: “During the period of any suspension, whether under clause 15.1 or otherwise, [the Defendant] may: (15.2.1) suspend payment of all sums due to the Operator under the Agreement; (15.2.2) with the agreement of the Operator appoint a temporary substitute for the Operator to operate the Branch from the Branch Premises, in which case any Fees in relation to Transactions carried out at the Branch will be paid by [the Defendant] direct to such temporary substitute; and (15.2.3) to the extent such costs have been agreed with the Operator, deduct its costs incurred in appointing a temporary substitute together with other costs and expenses incurred by [the Defendant] as a result of the suspension from any payments due to the Operator under the Agreement. [The Defendant] shall initially meet the cost of appointing the temporary substitute but shall be entitled to recoup some or all of such cost from the Operator in accordance with clause 15.2.3 or otherwise. Following the end of the period suspension, [the Defendant] may, in its discretion taking into account the relevant circumstances, agree to pay the Operator all or part of such sums as have been suspended in accordance with clause 15.2.1.”*

- *Part 2, paragraph 15.3: “Following the Operator’s suspension, whether under clause 15.1 or otherwise, the Operator shall at its own cost and expense promptly take all reasonable steps to enable [the Defendant] to maintain access for Customers during the period of suspension to Products and Services.”*

6. Termination:

SPMC

- *Section 1, Clause 10: “… The Agreement may be determined by [the Defendant] at any time in case of Breach of Condition by [the Subpostmaster], or non-performance of his obligation or non-provision of Post Office Services, but otherwise may be determined by [the Defendant] on not less than three months notice.”*

NTC

- *Part 2, paragraph 16.1: “Following the Commencement Date the Agreement will continue until: (16.1.1) either Party gives to the other not less than 6 months’ written notice (unless otherwise agreed between the Parties in writing), which cannot be given so as to expire before the first anniversary of the Start Date; or (16.1.2) it is terminated at any time in accordance with its terms.”*

- *Part 2, paragraph 16.2: “In addition to any other rights of termination contained in other Parts, [the Defendant] may terminate the Agreement immediately on giving written notice to the Operator if the Operator:*

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16.2.1 commits any material breach of the provisions of the Agreement or any other contract or arrangement between the Parties and fails to remedy the breach (if capable of remedy) within 14 days of a written notice from [the Defendant] specifying the breach and requiring the same to be remedied. Any references in these Standard Conditions to a breach of a particular obligation by the Operator being deemed to be material and/or irremediable are not intended to be exhaustive and shall not prevent [the Defendant] from exercising its rights under this clause in respect of any other breach of the Agreement which is material and/or irremediable;

16.2.2 fails to provide the Products or Services to the standards required by [the Defendant] as set out in the Manual and fails to remedy the failure (if capable of remedy) within 14 days of a written notice from [the Defendant] specifying the failure and requiring the same to be remedied; ...

16.2.16 fails to pay any sum due to [the Defendant] under the Agreement by the due date".

7. No compensation for loss of office:

SPMC

- *Section 1, Clause 8: "The terms of the appointment of Subpostmaster do not entitle the holder to be paid sick or annual leave, pension or to compensation for loss of office."*

NTC

- *Part 2, paragraph 17.11: "The Operator acknowledges that he shall not be entitled to receive any compensation or other sums in the event of the termination or suspension of the Agreement."*

959. *Chitty on Contracts* states in respect of this subject at 13-015:

"**Onerous or unusual terms** Although the party receiving the document knows it contains conditions, it the particular condition relied on is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention."

960. The passage in the text book then goes on to refer to the famous dicta of Denning LJ (as he then was) in ***J Spurling Ltd v Bradshaw*** [1956] 1 WLR 461, 466, which used the statement of certain terms being required to be written in red ink with a red hand pointing to them, in order to satisfy the requirement of adequacy of notice. This was what is sometimes called a parking case, to distinguish it from what are sometimes called the ticket cases of the nineteenth century. Both types of cases feature sets of terms, either printed or on notices (in car parks) or on the reverse of railway tickets.

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Both sets purported to set out the terms upon which individuals using those services were contracting to do so.

961. The claimants rely upon the statement of Bingham LJ (as he then was) in ***Interfoto Picture Library v Stiletto*** [1989] 1 QB 433. In that case, a photographic lending library lent transparencies out as part of its business, and in the printed terms that accompanied them on the delivery note stated that their return was required within 14 days. If this time limit were not observed, the borrower would be charged £5 per day for each transparency, an amount which was very high. When someone using the lending services failed to read the terms, and failed to return the 47 transparencies within the required period, they received a claim for many thousands of pounds. Their appeal against judgment for that sum succeeded. The headnote states:

"that where clauses incorporated into a contract contained a particularly onerous or unusual condition, the party seeking to enforce that condition had to show that it had been brought fairly and reasonably to the attention of the other party; that, since the plaintiffs had done nothing to draw the defendants' attention to condition 2, the F condition (per Dillon L.J.) never became a part of the contract or (per Bingham L.J.) the defendants were relieved from liability under the clause; and that, therefore, the plaintiffs could only recover a holding fee assessed on the basis of quantum meruit"

962. Dillon LJ stated at 438G:

"At the time of the ticket cases in the last century it was notorious that people hardly ever troubled to read printed conditions on a ticket or delivery note or similar document. That remains the case now. In the intervening years the printed conditions have tended to become more and more complicated and more and more one-sided in favour of the party who is imposing them, but the other parties, if they notice that there are printed conditions at all, generally still tend to assume that such conditions are only concerned with ancillary matters of form and are not of importance. In the ticket cases the courts held that the common law required that reasonable steps be taken to draw the other parties' attention to the printed conditions or they would not be part of the contract. It is, in my judgment, a logical development of the common law into modern conditions that it should be held, as it was in Thornton v. Shoe Lane Parking Ltd. [1971] 2 Q.B. 163, that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party."

963. Bingham LJ stated, at 439H, in passage dealing with what he called the "well known cases on sufficiency of notice":

"At one level they are concerned with a question of pure contractual analysis, whether one party has done enough to give the other notice of the incorporation of a term in the contract. At another level they are concerned with a somewhat different question, whether it would in all the circumstances be fair (or reasonable) to hold a party bound by any conditions or by a particular condition of an unusual and stringent nature."

(emphasis added)

964. The claimants submit that for these Common Issues the court is concerned with "a principled answer" to that latter question posed in the underlined passage.

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965. The Post Office maintain that the trend has been to find that particular clauses are not unusual or onerous. Reliance is placed on a number of cases.

966. Hale LJ (as she then was) considered this in ***O'Brien v MGN*** [2001] EWCA Civ 1279. That case concerned what she described as a "cruel disappointment", when a reader of the Daily Mirror thought he had won £50,000 in the daily scratch card game played in a daily newspaper, although the proprietors of the newspaper thought otherwise. She described the issue in the following terms: "It would make an excellent question in an undergraduate contract law seminar or examination. Like all good questions, it is easy to ask and difficult to answer." Due to a printing error, too many cards had been printed and there was some confusion over which cards issued with a particular Sunday sister title, The People, were the right ones for the purposes of playing the game. The central issue in the case was whether the Mirror Group's rules had been incorporated into the competition. In particular, the newspaper sought to rely upon Rule 5 which stated "Should more prizes be claimed than are available in any prize category for any reason, a simple draw will take place for the prize."

967. The particular point is considered at [23]:

> "[23] …..the words 'onerous or unusual' are not terms of art. They are simply one way of putting the general proposition that reasonable steps must be taken to draw the particular term in question to the notice of those who are to be bound by it and that more is required in relation to certain terms than to others depending on their effect. In the particular context of this particular game, I consider that the defendants did just enough to bring the Rules to the claimant's attention. There was a clear reference to rules on the face of the card he used. There was a clear reference to rules in the paper containing the offer of a telephone prize. There was evidence that those rules could be discovered either from the newspaper offices or from back issues of the paper. The claimant had been able to discover them when the problem arose.
>
> [24] The judge had 'great sympathy for Mr O'Brien who struck me as a thoroughly decent young man who must have suffered a cruel disappointment when his hopes were raised only to be dashed.' There can be little sympathy for a newspaper which introduces such a game to attract publicity and readers, and then devotes space which could have been devoted to printing the Rules to hyperbole about the prizes to be won and the people who have won them. But the fact of the matter is that there was nothing at all outlandish about the rules of this game and indeed it would have been surprising if there had been no protection on the lines of Rule 5."
>
> (emphasis added)

968. The general principle is that more is required, depending upon the effect of the term. In that case, there was "nothing outlandish" about the term. It was not a particularly onerous term. It did have an onerous effect, in terms of the young person's ability to win £50,000, but given 1,472 other people had also "won" (as set out in [4]) because "someone had blundered", had it been otherwise the total prize money required to be paid out could have been as high as £73.6 million.

969. In ***Woodeson v Credit Suisse (UK) Ltd*** [2018] EWCA Civ 1103, the Court of Appeal considered the same issue. The claimants owned Cabbage Hall Farm in Oxfordshire and had a re-mortgage with the bank. Sterling interest rates were high in late 2007,

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and so they considered re-mortgaging in a foreign currency with lower interest rates. They therefore borrowed a sum in Swiss Francs approximately £480,000 more than the £300,000 owing on their existing mortgage; paid that mortgage off; put the surplus into sterling deposits, and attempted to profit from the differential in interest on the two currencies, performing something called a "carry trade". This did not work well for them, and indeed proved to be disastrous when the Bank of England base rate fell dramatically. The bank eventually appointed receivers over their property.

970. Mr and Mrs Woodeson blamed the bank for mis-selling the Swiss Franc facility. The bank sought summary judgment but HHJ Havelock-Allan QC in the Bristol Mercantile Court refused this, and the bank appealed. The bank failed in its appeal, although it succeeded on two of the three grounds relied upon by the Woodesons to resist summary judgment. In the course of the judgment, the Court of Appeal (Longmore and Leggatt LJJ) considered what was called "the ***Interfoto*** point".

971. Longmore LJ stated the following:

"[39] Mr Adams' argument began with the undoubted principle that, if a party is to contract out of the common law position, that must be done by clear words (see ***Modern Engineering Ltd v Gilbert Ash (Northern) Ltd*** [1974] A.C. 689 at 717H per Lord Diplock) and proceeded to the proposition that the bank in the current case could only show that the common law position had been departed from, if it had specifically brought the attention of the claimants to the presence of the anti-set off clauses in the contract. That they had not done. Mr Adams relied on ***Interfoto*** both for the existence of the principle and as an example of it.

[40] The judge did not accept this submission and neither can I. ***Interfoto*** was a very different case because the clause was considered by the court to be an unreasonable clause on its face and was contained in a document which had not been signed by the person the claimant sought to hold liable. It was therefore necessary to examine the well-known ticket cases at the end of the 19th century when a ticket was handed to the defendant with a reference to conditions. The courts held (in broad terms) that in those circumstances the defendant had to have proper notice of the conditions before he was bound.

[41] In ***Interfoto*** itself the claimants delivered 47 photographic transparencies to the defendants together with a delivery note containing nine printed conditions one of which stated that if the transparencies were not returned within 14 days of delivery, the defendant would be charged a fee of £5 per day plus VAT for each transparency retained. The ratio of the decision in favour of the defendant was that if a clause said to be incorporated was "particularly onerous or unusual", as the Interfoto clause was, the claimant had to show it had been brought fairly and reasonably to the other party's attention; since that had not happened, the defendant was not bound.

[42]. In the present case there was evidence that the anti-set off clauses were by no means unusual in mortgage transactions, even if not universal. <u>They may operate harshly on a consumer or indeed a business who has a genuine cross-claim but it is impossible to say that such a clause is onerous in the Interfoto sense of almost being a penalty. In any event questions of reasonableness are now determined by a consideration of the relevant statute or regulations, which the judge has permitted to go ahead.</u> The first step that has to be taken is to consider each term which is said to

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be onerous or unusual, and decide if it is correctly so characterised. Only if any of them do, does one need to move to the second step of the process, and consider adequacy of notice."

(emphasis added)

972. The Post Office relies in particular upon the passage where Longmore LJ characterised this point in [42] as requiring "a clause [which] is onerous in the ***Interfoto*** sense of almost being a penalty". The use of the word "penalty" has the capacity to confuse the situation. The Supreme Court itself in ***Cavendish Square Holding BV v Makdessi*** [2015] UKSC 67 considered the penalty rule required detailed consideration to the issue of "what makes a contractual provision penal?" The best place to find the modern definition is in that judgment of Lords Neuberger and Sumption, with whom Lord Carnwath agreed:

"31. In our opinion, the law relating to penalties has become the prisoner of artificial categorisation, itself the result of unsatisfactory distinctions: between a penalty and genuine pre-estimate of loss, and between a genuine pre-estimate of loss and a deterrent. These distinctions originate in an over-literal reading of Lord Dunedin's four tests and a tendency to treat them as almost immutable rules of general application which exhaust the field. In ***Legione v Hateley*** (1983) 152 CLR 406, 445, Mason and Deane JJ defined a penalty as follows:

"A penalty, as its name suggests, is in the nature of a punishment for non-observance of a contractual stipulation; it consists of the imposition of an additional or different liability upon breach of the contractual stipulation ..."

All definition is treacherous as applied to such a protean concept. This one can fairly be said to be too wide in the sense that it appears to be apt to cover many provisions which would not be penalties (for example most, if not all, forfeiture clauses). However, in so far as it refers to "punishment" and "an additional or different liability" as opposed to "*in terrorem*" and "genuine pre-estimate of loss", this definition seems to us to get closer to the concept of a penalty than any other definition we have seen. The real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a pre-estimate of loss. These are not natural opposites or mutually exclusive categories."

(emphasis added)

973. I take the expression, used by Longmore LJ, to mean that by its nature the clause must have the potential to act very severely to the detriment of the party in question, almost to the point of being a punishment or imposing a different or additional liability. It must also be unusual.

974. The Post Office heavily relies upon the fact that these are commercial contracts, and two other cases also bear close consideration in this respect. One is ***Sumukan v Commonwealth Secretariat*** [2007] EWCA Civ 1148, when the Court of Appeal was considering whether it would be an unusual and onerous term in a contract that an arbitration be conducted by a panel wholly appointed by one side and under statutes capable of being changed at any time by that one side. This argument was dismissed at [9] by Waller LJ in the following terms:

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"This was a commercial contract. True, Sumukan had no choice as to the terms of the contract so far as arbitration was concerned but that is a common feature of and the reality of many commercial contracts. Sumukan are not a consumer with the protection of consumer legislation and are bound by the terms of the contract they made."

975. The second such case has already been considered in the context of relational contracts, and is ***Carewatch Care Services Ltd v Focus Caring Services Ltd*** [2014] EWHC 2313 (Ch) where Henderson J had this to say about an argument that certain clauses were not brought to the attention of the opposing party. In the circumstances of that case, the point did not have particularly favourable prospects.

"[84] I will deal with the contention briefly, because it is in my judgment a hopeless one both on the facts and on the law, quite apart from the failure to plead it properly. The relevant principle of law is that it may in certain circumstances be unfair or unreasonable to hold a person bound by a written contractual term of an unusual and stringent, or particularly onerous, nature, unless it has fairly been brought to that person's attention: see ***Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*** [1989] 1 QB 433 (CA) at 438F-439A per Dillon LJ and 439H-445C per Bingham LJ. Questions of this nature typically arise in a consumer context, where the offending provision is hidden in the small print and the consumer has no option but to contract on the proffered terms. The issue may, however, arise in other types of contract, although it is always necessary to have full regard to the context and the respective bargaining positions of the parties.

[85] I will need to examine the step-in provisions in more detail later in this judgment, but viewed as a whole I do not think they can possibly be characterised as particularly stringent or onerous. They are intended to deal with the position on the ground after the agreement has been terminated, at a time when the franchisee will be prevented by the restrictive covenants in clause 22.2 from carrying on the former business himself. It is clearly essential in such circumstances that there should be continuity in the provision of care, and the general purpose of the clauses is to enable Carewatch to take over the franchisee's business in return for payment of the consideration specified in clause 22.8. The clauses come where one would expect to find them, towards the end of the agreement, under the heading "Conditions following Termination". They are in the same format and typeface as the rest of the agreement, and clause 22 is included in the index at the beginning.

[86] Furthermore, the Norwich agreement, like its predecessors, was signed by each of the Graces and was the product of a voluntary decision by them to expand their profitable franchise business. <u>They were educated people, with significant business experience. They had entered into agreements containing materially similar terms dating back to 1999, and they had consistently decided to ignore recommendations that they should seek legal advice from a solicitor experienced in franchising before signing any of them.</u>"

(emphasis added)

976. I also believe guidance is contained in ***Goodlife Foods Ltd v Hall Fire Protection Ltd*** [2018] EWCA Civ 1371, even though there the court was concerned with an exclusion clause. At [5], Coulson LJ made it clear that there were two distinct steps.

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The first (which he subdivided into issue 1(a) and issue 1(b)) was whether the clause in question was onerous and unusual, and whether (if it was) it was brought fairly to the attention of the other contracting party. This step is necessary in order to decide whether the clause in question is incorporated into the contract at all. The second he identified as if the clause "was incorporated into the contract, was it unreasonable (and therefore ineffective) as a result of the operation of UCTA?". This second step only arises if the first step is answered in such a way that the clause is incorporated at all. If it fails at the first hurdle – and that hurdle could be described as the ***Interfoto*** incorporation test – one need not consider the position under the Unfair Contract Terms Act at all.

977. There is also a correlation between the degree of onerousness of a clause, and the amount of notice. At [32] in ***Goodlife*** Coulson LJ stated the following:

"[32] ….. Also in ***Interfoto***, Bingham LJ observed that:

"The more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given."

Speaking for myself, I find that a helpful distillation of the necessary relationship between, on the one hand, the degree of onerousness in the clause and, on the other, the degree of notice required."

978. Plainly, the more onerous and unusual a clause, the greater notice must be given to the other party. This was described as "a sliding scale" by Gross LJ in ***Goodlife*** at [101].

979. I do not believe that these cases demonstrate "a trend", as the Post Office submits. I consider that the cases make it clear that the principle is that it may in certain circumstances lead to a clause not being incorporated into a contract, if the written contractual term is of an unusual and stringent, or particularly onerous, nature, unless it has fairly been brought to that person's attention. The degree of notice depends upon the nature of the clause; the more severe its effect, the greater the notice required. Such a clause must have the potential to act very severely to the detriment of the party in question. It is a principle available to contracting parties who are not consumers, but context and the respective bargaining positions of the parties are relevant. So too is a recommendation that legal advice be sought before the contract is entered into. I also consider that it is a high hurdle that must be passed for a term to be held to be onerous and unusual. The phrase used by the Post Office at one point in its Closing Submissions is that the Claimants must show the terms "are literally extraordinary in their harshness". That phrase uses different words to the way I have expressed it in [973] above, but whether there is any appreciable difference between the different ways of expressing it, I doubt. At [33] in ***Goodlife*** Coulson LJ said:

"[33] The authorities do not always agree as to what amounts to an 'onerous' clause. In ***Interfoto*** Bingham LJ called the clause in question "unreasonable and extortionate". Dillon LJ referred to "particularly onerous" clauses. In a case decided at about the same time, ***Circle Freight International Limited (T/A Mogul Air) v Medeast Gulf Exports Limited (T/A Gulf Exports)*** [1988] 2 Lloyd's Rep 427, the clause in question, which limited the carrier's liability to a very small sum, were found to be neither unusual nor "Draconian"."

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980. This judgment is unlikely to be improved by a linguistic analysis of whether there is a difference between harsh and onerous; or unusual and extraordinary (or outlandish). I prefer onerous and unusual, but the test may amount to the same whether one uses the phrase extortionate, extraordinarily harsh, or any permutation. A clause imposing a literally Draconian punishment would undoubtedly qualify under any of these words, but I doubt a clause has to be as severe as that in any event.

981. I also consider that it is plain that the first step is to decide whether any of the terms the subject of these Common Issues – and there are a great many that the Claimants maintain fall into this category – are indeed onerous and unusual, with the potential effect to which I have referred, before coming to the question of adequacy of notice. If that were not the correct way of approaching it, the case in the very recent appellate authority of ***Goodlife*** would not have contained the two issues, 1(a) and 1(b), that it did.

982. It is also, as stated by Henderson J (as he then was) in ***Carewatch*** at [84], "always necessary to have full regard to the context and the respective bargaining positions of the parties". Here, the Post Office was in an extremely strong bargaining position and the incoming SPM could not bargain at all. Amendments to terms were not permitted. Other important points of context were that outgoing SPMs would have their branches (and also their businesses) advertised by the Post Office on the outgoing SPMs' behalf, which suggests a degree of oversight and approval of the transaction whereby an incoming SPM would purchase that business, and also the Post Office's requirement for, and assessment of, an applicant's business plan.

983. The different categories of terms, in both the SPMC and the NTC, are as follows, retaining the numbering in Common Issue 5. I shall deal with each group separately. Having done so, I will deal with what I consider to be an obvious difference between the two contracts, namely the advice to seek legal advice, at the end of that exercise. The different categories are:

1. Rules, instructions and standards;

2. Classes of business;

3. Accounts and liability for loss;

4. Assistants;

5. Suspension;

6. Termination;

7. No compensation for loss of office.

The Terms themselves

1. Rules, instructions and standards

984. I do not consider that the terms in the SPMC at Section 1, Clauses 13, 5, 14 or 19 are onerous or unusual. They deal with the way in which the business is to be transacted, keeping rules up to date, and following the rules and instructions. Similar comments

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apply to the terms identified in the NTC at Part 5 Paragraphs 1.5, 1.6, and Part 2 Paragraphs 3.2.1 and 3.2.2. In my judgment they can readily be seen as not being onerous or unusual. However, three contract terms I consider require more detailed consideration in terms of being onerous and unusual.

985. They are as follows.

1. In the SPMC, Section 1, Clause 18 which provides: "Changes in conditions of service and operational instructions, including those which are agreed with the National Federation of Sub-Postmasters, will appear from time to time in Counter News or by amendment to the Contract. Such changes and instructions are deemed to form part of the Subpostmaster's contract."

2. In the NTC, Part 2, Paragraph 1.1 which states: "The Operator agrees to operate the Branch on behalf of [the Defendant] in accordance with the terms of the Agreement (including for the avoidance of doubt the Manual)", and the definition of Manual at Part 5 paragraph 1.1 as follows [there then follow a list of 17 publications with an 18th, namely "Any other instructions to operators or updates to such instructions issued by [the Defendant] from time to time"].

3. Also in the NTC, Part 5, Paragraph 1.3: "[the Defendant] may amend the list of documents set out in this Part 5 and may amend the contents of any manual or documents on that list by giving written notification (which may be by electronic means) to the Operator. In the Agreement, unless otherwise specified, a reference to the Manual is a reference to it as amended, consolidated or extended by [the Defendant] from time to time."

986. I consider the effect of this clause of the SPMC, and those in the NTC as distinguished by me going to changes in conditions of service of a SPM, have the potential to be onerous and unusual, depending upon the terms introduced by the Post Office in this way. This is because they give the Post Office the unilateral power to vary the terms of the SPM's appointment, without their agreement in any way. I consider this potential only arises so far as changing the terms of appointment are concerned; changing operation instructions by including them in "Counter News" (a regular publication to SPMs by the Post Office) does not have the potential to introduce onerous and unusual new terms.

987. The ability to introduce new terms of appointment in this way is, in my judgment, unusual, and also has the potential to create a very detrimental and severe effect upon a SPM. The following features are relevant.

988. The Post Office, throughout the Common Issues trial, regularly categorised these contracts as being "business to business." I do not consider that to be a wholly correct or accurate categorisation. SPMs are not employees, but the relationship has some of the qualities of employment; they are not consumers; but they are not fully autonomous in terms of the terms upon which they can become SPMs, either. The evidence was clearly that no changes to terms and conditions would be entertained by the Post Office; the Post Office wished to have all their SPMs contracting on the same terms (putting to one side their inability to do so competently in the early days, and also the three different forms, SPMC, Modified SPMC and NTC).

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989. The reason I have distinguished operational instructions in the way I have above is that they do not affect the terms of appointment. They relate to the way that the SPM would run the branch Post Office, in terms of how they present different products, how they operate Horizon, and how the day-to-day business is transacted. For these aspects of the relationship, it is entirely normal for the Post Office to be entitled to change these in Counter News, the publication that it sends to the SPMs. However, it is not normal, for one commercial party to be able unilaterally to change the conditions upon which the other party contracts with it. An SPM contracts with the Post Office on the terms that he or she does as at the date of that contract.

990. I not accept that there is any protection for, or assent by, SPMs due to the involvement (if there were any) of the NFSP in the process of their "agreeing" changes in conditions of service with the Post Office.

991. There are some contracts in which one party is required to act in a particular way, without specifically agreeing to each change. A simple example is any of the detailed standard forms of contract for construction or engineering works. They include within them a sophisticated mechanism for the instruction of variations to the works themselves, due to the subject matter of the contract. However, the contract terms that permit this are extraordinarily detailed, and are contained in industry-wide standard forms, the terms of which are negotiated by trade bodies such as for JCT contract forms, the Joint Contracts Tribunal, and for the NEC contracts, the Institution of Civil Engineers.

992. However, the SPM contracts drafted by the Post Office gives the Post Office the contractual right to change whichever of the terms it chooses, whenever and in what terms it chooses, and simply to have that change imposed upon the other contracting party. The authority upon which the Post Office relies to justify this approach, or as support, is ***Stretford v Football Association Ltd and another*** [2006] EWHC 479 (Ch), a decision of the Chancellor of the High Court, which was approved on appeal at [2007] Bus.LR 1052.

993. That case concerns the licensing of players' agents by the Football Association ("the FA"), and also the world body that governs association football, the (or le) Fédération Internationale de Football Associations, known as FIFA. Mr Stretford, a players' agent, had become a players' agent in 1995. This meant (at that time) being approved by FIFA, his application having first been passed by the FA as suitable and forwarded to FIFA for that purpose. In 2000 the rules governing the regulation of such agents were changed by FIFA, the FA became the regulatory body for agents. The FA rules included a mandatory arbitration provision.

994. The FA instituted proceedings against Mr Stretford in relation to the circumstances whereby he became the agent of Mr Wayne Rooney, an association football player of some renown, who was also for a time captain of the England football team. Mr Stretford sought declarations in the High Court under CPR Part 8, and the FA sought to stay these to arbitration. The Chancellor imposed a stay under section 9 of the Arbitration Act 1996.

995. The Post Office relies upon the dicta at [16] and [17] which deal with incorporation of Rule K, the FA's arbitration provision. However, those passages are, in my judgment, more correctly considered in context by considering [14] to [25]:

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"[14] Mr Stretford claims, in addition, that the terms of Rule K are unusual or onerous so that in accordance with well known principles the FA cannot rely on it unless it can establish that it brought the terms of Rule K to the specific notice of Mr Stretford before the contract was concluded between them. The respects in which it is contended that Rule K is onerous are that the arbitration proceedings will be heard in private, the award of the arbitrators will not be published unless all parties agree and recourse to the courts is excluded.

[15] I should record at this stage that in his witness statement made on 11th November 2005 Mr Diaz-Rainey, Mr Stretford's solicitor, stated in paragraph 31:

"I am informed by Mr Stretford that he was not aware of and had not read Rule K prior to the commencement of the disciplinary proceedings. I am informed by Mr Stretford that he did not know that he could not apply to a court for a review of the FA Rules."

In both the evidence in reply and in a letter dated 22nd December 2005 Mr Stretford was challenged to confirm that statement in a further witness statement to be made by him and to submit to cross-examination. He failed to do either and this notwithstanding that Mr Diaz-Rainey made a further witness statement in reply on 11th January 2006, in part, at least, on the basis of information supplied to him by his client. There has been no cross-examination of Mr Diaz-Rainey either.

[16] The statements attributed to Mr Stretford are surprising. As a players' agent it was his duty to keep himself informed of the Rules. Rule K applies as much to disputes between a player and his club as between a players' agent and the FA. Moreover there was nothing secret about Rule K. It was published as one of the Rules in the annual FA Handbook, in particular that for the Season 2001-2002, where it featured in the index under the heading of 'arbitration procedures'. Plainly Mr Stretford would need to have a copy of the annual handbook as part of the tools of his trade and he himself exhibited parts of the edition for the 2004-2005 season, including Rule K, as part of exhibit 'PS 1' to his witness statement made on 16th September 2005 in which he described it as an annual publication.

[17] Nevertheless there has been no cross-examination of either Mr Stretford or Mr Diaz-Rainey. Thus it is not open to me to find affirmatively that Mr Stretford at all relevant times knew of the existence and terms of Rule K. Nevertheless I am entitled to conclude, and do, that at all material times Mr Stretford was in possession of documentary material which included Rule K (or its earlier versions) and that, if he did not know of its terms, he could and should have done.

[18] At this stage I should also consider whether the terms of Rule K are 'particularly onerous or unusual', see Chitty on Contract 29th Ed. 12-015. These words are not terms of art but describe the sort of term which, because of its nature or content, requires the party who relies on it, the FA, to demonstrate that it was brought fairly and reasonably to the attention of Mr Stretford if that term is to be binding on him. Moreover the question must be considered at the time the contract into which it is said to have been incorporated was made, namely at the time the players' agents licence was issued by the FA to Mr Stretford in 2002.

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[19] It is unnecessary to set out the terms of Rule K. It is a conventional arbitration agreement applicable between the persons or bodies described in the definition of 'Participant', namely:

"an affiliated association, competition, club, club official, player, official, match official and all such persons who are from time to time participating in any activity sanctioned either directly or indirectly by the [FA]"

For the purposes of Rule K the term 'Participant' includes the FA.

[20] The respects in which it is claimed to be onerous or unusual are those to which I have referred in paragraph 14 above. A private hearing and a confidential award are far from being either onerous or unusual in the context of an arbitration agreement. Indeed it is the element of privacy which makes the arbitral system so attractive to so many. Rule K5(b) provides that

"The parties shall be deemed to have waived irrevocably any right to appeal, review or recourse to a court of law."

S.69 Arbitration Act 1996 allows the parties to waive their rights of appeal on a question of law but s.68 preserves their rights, notwithstanding any agreement to the contrary, in respect of any serious irregularity.

[21] Rule K is equally applicable to all parties. Thus it is unlike an exemption clause in favour of one party. It is effective, pro tanto, to waive rights under Article 6 ECHR. Such a waiver has long been regarded as acceptable for the purposes of the ECHR in the case of a voluntary arbitration, cf ***Deweer v Belgium*** (1980) 2 EHRR 439, 460, para 49 and ***Bramelid v Sweden*** (1982) 29 DR 64. Further the terms of the Arbitration Act 1996 sis. 9, 68 and 69 clearly demonstrate the intention of parliament that such clauses should be given effect.

[22] With those considerations in mind I turn to consider the course of dealing between Mr Stretford, FIFA and the FA in relation to the issue of a players' agents licence to Mr Stretford. It is not disputed that the licence granted to Mr Stretford in 1995 was granted by FIFA and that it was FIFA, not the FA, which was the other party to the contract with Mr Stretford. Nor is it disputed that the article 13(a) of FIFA' players' agents regulations then in force required Mr Stretford to observe all the regulations of the FA. Thus from 1995 until the FIFA licence ceased to have effect in 2002 there is no doubt that Mr Stretford was bound, at least to FIFA, by the Rules of the FA, including, from 1999, Rule K.

[23] The new players' agents regulations approved by FIFA in December 2000 and notified to all concerned by FIFA in March 2001 imposed (article 14(a)) on all players' agents the obligation:

"to adhere without fail to the statutes and regulations of the national associations, confederations and FIFA"

Article 23.1 enabled a players' agent licensed by FIFA to exchange his licence with one issued by his national authority without the need to take a written examination.

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[24] Mr Stretford was well aware of the new FIFA requirements because he commented on the new regulations extensively in a letter to an official of the FA dated 9th March 2001. He applied for the FA licence in a letter to the FA dated 30th August 2001. It was sent to him on 9th April 2002. The licence stated on its face under the name and a photograph of Mr Stretford that the holder agreed to abide by the rules and regulations of, amongst others, the FA. On 23rd April 2002 Mr Stretford acknowledged receipt of the new licence. He continued his business as a players' agent without interruption.

[25] In my judgment the obligation to observe the Rules, as a whole, became a term of the contract between Mr Stretford and the FA by any one or more of three distinct processes. First, the obligation to observe the Rules was a continuing obligation. It first arose in 1995 under Article 13 of the original players' agents regulations. It was continued by Article 14(a) of the revised version. The exchange, pursuant to Article 23, of the FIFA licence for the FA licence in 2002 altered the identity of the other party to the contract from FIFA to the FA but had no other effect on the obligations by which Mr Stretford was bound. This case is unlike those in which a contract is made for the first time without any prior course of dealing. Thus in the well known case of ***Olley v Marlborough Court Ltd*** [1949] 1 KB 532 the terms were not incorporated into the contract because the relevant party had had no notice of them before the time at which the contract was made. Second, if it is necessary to find some conventional offer and acceptance then the supply of the licence on 9th April 2002 bearing the statement to which I have referred followed by the acknowledgement of its receipt by Mr Stretford on 23rd April 2002 would suffice. Thirdly, the transaction of business as a licensed players' agent on the terms of Article 14(a) of the revised players' agents' regulations and the terms expressed on the face of the licence constitute the acceptance of those terms by conduct."

996. I consider this case to be wholly distinguishable for the following reasons. Firstly, the FA – and FIFA before it – were regulatory bodies approving licences. This is different to the Post Office contracting with SPMs to provide branch Post Offices for reward. Secondly, the term in question was an arbitration provision, which governed the dispute resolution forum, and not Mr Stretford's substantive rights. Thirdly, the issue in the case was not *ex post facto* incorporation, but Mr Stretford's knowledge of Rule K. The Chancellor found that as "a players' agent it was his duty to keep himself informed of the Rules. Rule K applies as much to disputes between a player and his club as between a players' agent and the FA. Moreover there was nothing secret about Rule K. It was published as one of the Rules in the annual FA Handbook" which Mr Stretford had. Fourthly, as [1] makes clear, "the terms of the licence required the agent to observe the regulations of FIFA and the national associations at all times". It therefore followed that if the regulations changed, then the terms of the licence required Mr Stretford to comply with the new changed rules. Fourthly, as [4] makes clear, after the change was made from FIFA to the FA providing the licence "on 30th August 2001 Mr Stretford duly applied to the FA and, having received temporary authority on 11th January 2002, [Mr Stretford] was issued with a new licence by the FA on 9th April 2002". The arbitration rule was already in place by then, and as [16] makes clear "It was published as one of the Rules in the annual FA Handbook, in particular that for the Season 2001-2002, where it featured in the index under the heading of 'arbitration procedures'. Plainly Mr Stretford would need to have a copy of the annual handbook as part of the tools of his trade……"

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997. This case does not therefore assist the Post Office.

998. I have however found that these are relational contracts, with implied duties of good faith. In those circumstances, the introduction of other terms by the Post Office could only be done in the exercise of that duty. The terms of appointment are also in the context of what was intended to be, by both parties at the time of contracting, a long term relationship, which may (and for Mrs Stubbs did) run over into a third decade or even longer. It would be important for the Post Office to have the ability to change or introduce further terms. It would also not be possible, at the beginning of such a long term relationship, to anticipate all the relevant terms that might be required in the future.

999. If my finding on relational contracts is correct, these terms are not onerous or unusual. This is because the ability of the Post Office to introduce new terms could not be exercised in an arbitrary fashion, or in a way that would be considered commercially unacceptable by reasonable and honest people.

1000. However, if my finding on relational contracts is not correct, then the introduction of such terms would not be governed by such a duty. After very careful consideration, I have concluded that the terms are not onerous and unusual in this alternative scenario. Although the introduction of new terms would themselves have to be properly incorporated, with (using the sliding scale to which I have referred) required specific and reasonable notice to the SPMs, the degree of such notice depending upon the content of the new terms which the Post Office seeks to introduce. I do not consider that Counter News would be the appropriate way of giving notice for terms that affected liability for losses, for example. Also (depending upon the conclusion I reach in the next section, reasonableness under the Unfair Contract Terms Act) if these contracts are governed by that Act, then the contents of new terms would have to satisfy the test of reasonableness too.

1001. I consider these provisions, on their face entitling the Post Office to change, post-contractually, the substantive terms upon which a SPM contracted with it (as opposed to the operational instructions) have the *potential* to be onerous and unusual, even bearing in mind the high test that I have found applies to finding such terms. However, whether the contractual effect is onerous and unusual depends upon the content of the new terms sought to be introduced.

2. Classes of business

1002. I do not consider that any of the clauses in this category are onerous and unusual. The Post Office has a very wide range of business products. Particularly in the context of my finding that this was intended by both sides to be a long term arrangement, it is inevitable in such an arrangement that the range of services may change, and may also be unpredictable. I doubt a SPM from (say) the early 2000s would have been able to predict that financial services would now form such a part of the Post Office's business, or that vehicle road fund licence (what are colloquially called "car tax discs") would disappear from existence entirely.

1003. In my judgment, neither of the clauses complained of in the SPMC, and the single one in the NTC, are onerous nor unusual. Mr Green sought to persuade me that a SPM may, in their business plan, estimate a sizeable income stream (the example he used

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was the National Lottery) yet this might disappear. I agree that this might happen. It is effectively a normal business risk. However, that does not make the terms onerous or unusual.

3. Accounts and liability for loss

1004. I do not consider that any of the three clauses in the SPMC of which complaint is made by the claimants can be characterised as onerous or unusual. Indeed, for Mr Bates and Mrs Stubbs (and any other SPMs who fall into their category) I have found that, in the absence of a contract on the full SPMC terms in their cases, a like term to Section 12 Clause 12 would be implied into their appointment in any event, for reasons of business efficacy. In those circumstances, there is no question of that being characterised as onerous and unusual. Indeed, it would be wholly illogical.

1005. The other two clauses of the SPMC, namely Section 12 Clause 4, and Clause 13, deal with the way in which stock and cash must be kept, and ongoing responsibility for losses after the appointment comes to an end. I find nothing onerous and unusual in either of them.

1006. Turning to the NTC, however, the same conclusion is not reached. The clauses at Part 2 Paragraph 3.6.6; Part 2, Paragraph 4.2; and Part 2, Paragraph 4.3, are not onerous and unusual. They deal with methods of accounting, responsibility for cash and stock, the legal status of cash collected on behalf of the Post Office, and the fact that the SPM cannot use the Post Office's money. They also deal with the demarcation line for responsibility for cash and stock, and the need to keep these in a place of security.

1007. However, two of the clauses I consider to be onerous and unusual. They are:

1. Part 2, Paragraph 4.1: "The Operator shall be fully liable for any loss of or damage to, any Post Office Cash and Stock (however this occurs and whether it occurs as a result of any negligence by the Operator, its Personnel or otherwise, or as a result of any breach of the Agreement by the Operator) except for losses arising from the criminal act of a third party (other than Personnel) which the Operator could not have prevented or mitigated by following [the Defendant's] security procedures or by taking reasonable care. Any deficiencies in stocks of Products and/or any resulting shortfall in the money payable to [the Defendant] must be made good by the Operator without delay so that, in the case of any shortfall, [the Defendant] is paid the full amount when due in accordance with the Manual".

2. Part 2, Paragraph 13.1: "The Operator shall reimburse [the Defendant] in full on demand for all losses, claims, demands, proceedings, liabilities, costs and expenses (including reasonable legal costs and expenses) incurred by [the Defendant] as a result of: (13.1.1) any negligence or breach of the Agreement by the Operator or its Personnel; (13.1.2) any misuse or infringement of any Intellectual Property of any third party by the Operator or its Personnel; and/or (13.1.3) any claim brought under the EA and/or its regulations in respect of the Branch"..

1008. The reasons that I have come to this conclusion are as follows.

1009. As I have construed the first of these clauses at Part 2 Paragraph 4.1, in the section of this judgment "The Terms of the NTC dealing with Losses" at [677] and following

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above, this clause means, on the natural meaning of the words, that as a matter of construction, the NTC imposes full liability upon a SPM for any losses to cash and stock, whether by as a result of negligence or otherwise, with the sole exception being losses arising from criminal acts which could not have been prevented. In that section of the judgment, I accepted the submission of the Post Office that there is no general fault requirement for liability, and the starting point is that the SPM is liable for all shortfalls, whatever the cause of the underlying loss, as long as the Post Office has demonstrated that there is an actual loss.

1010. That is, in my judgment, an onerous and unusual term. It has a very wide ambit, with potentially very serious financial implications for any SPM. Its effect is, absent any fault on the part of that SPM, that they may become liable for very sizeable sums with no upper limit, for something entirely out of their control. The term may also be unreasonable, although that point is considered separately under Common Issue 7.

1011. Turning to the second term, this is a clause that imposes an obligation upon a SPM to reimburse the Post Office on demand for all losses, claims, demands, proceedings, liabilities, costs and expenses incurred by the Post Office as a result of any negligence or breach of the agreement by the SPM. Given I have found that the correct construction of Part 2 Paragraph 4.1 effectively imposes strict liability upon a SPM (once loss is established), then a failure to pay for sums claimed by the Post Office for something out of the SPM's control, but which were due under that clause, would constitute a breach. If the Post Office were to demand those sums, and incur costs as a result, then these would be recoverable from the SPM too. The words of this clause are, again, very wide, impose a potentially very wide liability upon SPMs, and in the context of the NTC, I consider them to be onerous and unusual.

4. Assistants

1012. The liability of an SPM for losses caused by his or her assistants under the SPMC has already been considered above in Section M at [938] above. However, that deals with Section 15 Clause 7.1 of the SPMC, and not these two clauses, Section 15 Clause 2 in each of the SPMC and Modified SPMC. One tries, particularly in a lengthy judgment such as this one, not to re-quote issues again and again (or at all). However, here it is necessary due to what might be described as an issue anomaly.

1013. Section 15, Clause 2 of the SPMC that was in force between 1994 and 2006 states: "Assistants are employees of the Subpostmaster. A Subpostmaster will be held wholly responsible for any failure, on the part of his Assistants, to apply Post Office rules, or to provide a proper standard of service to the public. He will also be required to make good any deficiency, of cash or stock, which may result from his assistants' actions."

1014. The wording of the Common Issue agreed by the parties (and included in a document entitled the Consolidated Common Issues, which I ordered the parties to prepare, to avoid the need for endless cross-referencing back to different pleadings) contains at Common Issue 5(d)(ii) of what is called the Modified SPMC, Section 15, Clause 2 as amended which reads: "Assistants are employees of the Subpostmaster, and the Subpostmaster will consequently be held wholly responsible for any failure on the part of his Assistants to: (2.1) apply Post Office ® rules or instructions as required by [the Defendant]; (2.2) complete any training necessary in order to properly provide

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Post Office ® Services; and (2.3) comply with the obligations set out below. The Subpostmaster will also be required to make good any deficiency of cash or stock which may result from his Assistants' actions or inactions."

1015. However, that modification was included in a document entitled "Contract variation (Subpostmaster, Community and Modified) – Assistants." This varied Section 15 of the SPMC, Section 11 of the Community SPMC and Section 10(M) of the Modified SPMC. There is a different document in the trial bundle also called the Modified Subpostmasters Contract which does include a clause dealing with assistants, but in Section 10 Clause 2, and in slightly different wording to that at [1014]. I drew this difference in wording to the attention of the parties. Neither of them sought to persuade me to answer this part of Common Issue on a different wording of Section 15 Clause 2 than the one in the preceding paragraph. I refer to this for completeness.

1016. The two clauses challenged by the claimants in this section, one in the SPMC and the second in the Modified SPMC, impose vicarious liability upon a SPMC if their assistant (who it is stated is employed by the SPM) does not follow the rules or provide a proper standard of service to the public.

1017. The clause in the SPMC is not onerous and unusual. Ensuring an assistant follows the rules and serves the public correctly, with liability otherwise, is neither, in my judgment. Allocating the risk of this to the entity best placed to observe the behaviour of an assistant is not onerous or unusual. This is similar to the approach adopted by Andrew Popplewell QC (as he then was) sitting as a Deputy High Court Judge in ***Do-Buy 925 v National Westminster Bank*** [2010] EWHC 2862 at [93], when the risk of identity fraud was allocated contractually to the merchant.

1018. The clause in the Modified SPMC goes rather wider. However, although it is wider in terms of its effect and scope, I do not consider that allocating the risk in the way done by this clause makes the subject matter of this onerous and unusual.

5. Suspension

1019. These clauses can be considered in the following way, as having two limbs, both for those in the SPMC (namely Section 19 Clause 4; and Section 19 Clauses 5 and 6) and also the NTC (namely Part 2 Paragraph 15.1; and Part 2 Paragraph 15.2 and 15.3). The first limb is the power the Post Office has to suspend an SPM; the second limb is the way in which the clauses permit the Post Office to act in terms of remuneration and costs.

1020. So far as the power to suspend is concerned, I do not consider that either Section 19 Clause 4 of the SPMC, or Part 2 Paragraph 15.1 of the NTC, are onerous and unusual. The matters that would entitle the Post Office to suspend are:

1. Under the SPMC these matters are arrest; civil or criminal proceedings; irregularities or misconduct having been established, admitted or suspected, or being investigated.

2. Under the NTC these matters are arrest, charge or police investigation; civil proceedings; grounds to suspect insolvency; suspicion of material or persistent breaches; irregularities or misconduct.

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1021. It must be remembered that SPMs are in custody of Post Office cash and stock, and although the Post Office is not quite a bank, it has some features of a bank in terms of depositing cash by customers, payments out by the branch to customers, and sales of Post Office products. As a modern example, these include such services as checking passport applications; other services are changing foreign currency. Older services included the public purchasing premium bonds, which are an investment product issued by National Savings and Investment, although that can no longer be done at the Post Office.

1022. It makes eminent commercial and common sense for the Post Office to have the power, in the circumstances I have summarised at [1020], to suspend SPMs given the activities undertaken at a branch Post Office. These terms are not therefore onerous or unusual. They are entirely to be expected.

1023. However, it is the second limb which I consider gives significant concerns in terms of the clauses being onerous and unusual. The Post Office in its Closing Submissions maintained that the power to withhold remuneration if a SPM is suspended "follows naturally". I disagree. These are the following clauses in each of the SPMC and the NTC:

1. In the SPMC, Section 19, Clauses 5 and 6: "Where a Subpostmaster is suspended his remuneration in respect of any period of suspension will be withheld so long as such suspension continues"; and "On the termination of the period of suspension whether by termination of contract or reinstatement, the Subpostmaster's remuneration in respect of the period may, after consideration of the whole of the circumstances of the case, be forfeited wholly or in part...".

2. In the NTC, Part 2, Paragraph 15.2: "During the period of any suspension, whether under clause 15.1 or otherwise, [the Defendant] may: (15.2.1) suspend payment of all sums due to the Operator under the Agreement; (15.2.2) with the agreement of the Operator appoint a temporary substitute for the Operator to operate the Branch from the Branch Premises, in which case any Fees in relation to Transactions carried out at the Branch will be paid by [the Defendant] direct to such temporary substitute; and (15.2.3) to the extent such costs have been agreed with the Operator, deduct its costs incurred in appointing a temporary substitute together with other costs and expenses incurred by [the Defendant] as a result of the suspension from any payments due to the Operator under the Agreement. [The Defendant] shall initially meet the cost of appointing the temporary substitute but shall be entitled to recoup some or all of such cost from the Operator in accordance with clause 15.2.3 or otherwise. Following the end of the period suspension, [the Defendant] may, in its discretion taking into account the relevant circumstances, agree to pay the Operator all or part of such sums as have been suspended in accordance with clause 15.2.1."

3. Also in the NTC, Part 2, Paragraph 15.3: "Following the Operator's suspension, whether under clause 15.1 or otherwise, the Operator shall at its own cost and expense promptly take all reasonable steps to enable [the Defendant] to maintain access for Customers during the period of suspension to Products and Services."

1024. The effect of these provisions in each contract is broadly the same in terms of the remuneration of the SPM. This is, firstly, that the Post Office is not required to pay the SPM during a period of suspension, even though the branch Post Office would

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remain open and being operated. Secondly, they also mean that the Post Office may, even upon reinstatement, decide not to pay the SPM at all for the period he or she had been suspended. I consider both of those provisions to be onerous and unusual.

1025. Further, in the NTC, the Post Office can actually oblige the suspended SPM to bear the cost and expense of keeping the branch open – which is what "maintain access for Customers" in fact means – even whilst suspended. Yet further, there is no time limit upon the period of suspension. I consider these provisions too to be onerous and unusual.

1026. In coming to these conclusions, I apply the test as I consider it to be. So far as these payment provisions, however, I would go further. I accept that there is a high hurdle to be overcome to establish that provisions are onerous and unusual. These provisions, in my judgment, easily clear that hurdle by a significant margin.

1027. The remuneration paid to SPMs is not a salary, as they are not employees. However, running a branch Post Office is a full time occupation and this, in conjunction with the associated small business, is a SPM's livelihood. The vast majority of SPMs are individuals. The Post Office regularly would argue that the NTC Local contract is used for it to contract with limited companies to run branch Post Offices. That is, in my judgment, an isolated point which does not dilute the effect of these clauses. Firstly, there is a wholly different contract form used by the Post Office to contract with large companies such as WH Smith to run large Post Offices, and this is called the NTC Main Contract. The NTC Main Contract is not a contract upon which any of the Claimants in this litigation have contracted with the Post Office. Secondly, there is no evidence that any companies have contracted with the Post Office on the SPMC contract form in any event. Thirdly, it is the Post Office that chooses the contract form it uses to contract with SPMs who are individuals. Fourthly, even for SPMs who have more than one branch, if they are suspended on valid grounds from running one branch, they are highly likely also to be suspended from their second branch too. Therefore, these provisions on remuneration affect their income and livelihoods, regardless of how many Post Offices they operate.

1028. I therefore conclude that the provisions in respect of remuneration whilst suspended, and upon reinstatement, are onerous and unusual. Indeed, in my judgment, they are on their terms capable of putting a SPM in a simply impossible position, under either contract form. Even after reinstatement, which may have eventually occurred after a very lengthy period of suspension (for which the suspended SPM has been paying the costs of keeping open the branch) the Post Office may decide not to pay any remuneration that would otherwise have been due. The consequences are potentially financially ruinous for any SPM.

6. Termination

1029. I have construed the relevant provisions in both the SPMC and the NTC concerning termination in Section M of this judgment above, from [888] onwards.

1030. The Post Office particularly relies upon ***Lalji v Post Office*** [2003] EWCA Civ 1873 in this respect when, in a case brought by a SPM, it is said the Court of Appeal "referred without adverse comment" to the Post Office's right to terminate on 3 months' notice under the SPMC.

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1031. In that case Mr Lalji brought a claim against the Post Office for remuneration withheld from him during a period when he was suspended, together with a claim for damages arising from the closure of his business when his appointment was terminated. His appointment was on the SPMC. He also claimed that the Post Office had "dismissed him in a harsh and humiliating way which imputed dishonesty on his part and made it all but impossible for him to find another position", as set out at [4] in the judgment of Brooke LJ. The case did not concern Horizon. Parts of Mr Lalji's claim were struck out at first instance and his appeal against this was substantially allowed, although his claim for damages for his depressive illness was not allowed to proceed.

1032. I am not sure the degree to which, if any, the Post Office finds any support in that judgment for any proposition challenging the termination provisions. Sedley LJ said the following, in the context of Mr Lalji failing to attend his interview:

> "[24] So far as concerns the taking of a decision in Mr Lalji's absence, no legitimate ground of complaint can arise. Mr Lalji was twice offered the opportunity to attend and twice failed to do so. It is too late for counsel to tell us now that he was too depressed to attend. The least that could be expected of someone who was not wholly incapacitated is that he would have told the Post Office that this was so. At worst he should have made use of his right of appeal.
>
> [25] But it does not follow that his silence left the Post Office free either to terminate the contract summarily rather than on the due 3 months' notice, nor arbitrarily to forfeit the remuneration which it had meanwhile withheld.
>
> [26] As to the first of these, I see nothing at present in the evidence which justifies the Post Office's resort to the drastic remedy of summary termination. As to the second, it seems to me cogently arguable that clause 19.6 of the contract, which purports to give an unfettered power to forfeit remuneration withheld during a period of suspension, falls foul of s.3(2)(b) of the Unfair Contract Terms Act 1977.
>
> [27] The Post Office's concession that the power must not be exercised capriciously (I assume in its favour that it will at least be able to pass this test) will not be enough to meet the requirements of the 1977 Act if s.3 applies. How the section operates - whether by avoidance of the offending provision or by reading down - does not have be determined at this stage. It may well have to be decided, however, at trial."

1033. The most that the Post Office can take from this is that the criticism from the Court of Appeal of the Post Office that there was nothing in the evidence before that court that justified "the drastic remedy of summary termination" being taken by the Post Office, or that the power to withhold remuneration during a period of remuneration was potentially contrary to the terms of the Unfair Contract Terms Act 1977 (as to which more later), was not matched with other criticism to the effect that a period giving only 3 months' notice to Mr Lalji was potentially onerous and unusual. The point was simply not mentioned either way. If that is the fullest extent to which the Post Office can rely upon this case – and I find that it is -- it does not take them very far.

1034. I have construed the relevant clauses in Section M above. In brief summary, I have found that as a matter of construction, the question of termination without notice only applies in circumstances where there is a repudiatory breach. If that is the correct

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construction, then I do not find that the provisions in the SPMC and NTC permitting immediate termination without notice to be onerous or unusual. A party in repudiatory breach is not, on my analysis, entitled to notice that what is conventionally called "the innocent party" wishes to accept that breach.

1035. However, if I am wrong, and the termination without notice provisions are not construed as being related to repudiatory breaches, then the provisions would be onerous and unusual. This is because *if* these provisions are construed as entitling the Post Office to terminate without notice for *any* breach, no matter how minor, they would be onerous and unusual.

1036. Turning to termination with notice, again I have construed these provisions above. Particularly given my finding that these are relational contracts, and that the words properly construed give the Post Office discretion in terms of considering the period of notice that should be given, I do not consider these to be onerous and unusual.

1037. However, in case I am wrong about that, and if the wording of the termination provisions in either, or both, of the SPMC and the NTC are found to entitle the Post Office in all circumstances to give precisely 3 months' and 6 months' notice respectively regardless, then further consideration is required.

1038. The SPMC and the NTC must be considered separately. Under the SPMC, the three months could be given practically immediately upon branch transfer. There is no limit upon the exercise of the notice provision. I find that term would be, on that alternative construction, onerous and unusual.

1039. This is because of the serious impact that these clauses could have, were that construction to be the correct one. It would mean, that after a lengthy application and approval process, including approval of a business plan, a SPM could purchase premises for many tens of thousands of pounds, with the joint objective intention with the Post Office that this appointment would run for many years, yet have notice served upon them the very day after the branch was transferred. I consider that to be an onerous and unusual term.

1040. However, under the NTC, notice cannot be given "*so as to expire before the first anniversary of the Start Date"*, which means that the minimum period of appointment would be one year. This means that the feature in the SPMC which I have found leads to the conclusion that the similar term in the SPMC is onerous and unusual is lacking in this provision in the NTC. Accordingly, it is not onerous and unusual.

7. No compensation for loss of office

1041. There is an interesting feature to this aspect of the case. When the Network Transformation Programme was initiated, the Post Office did pay compensation to certain SPMs for loss of office. Though SPMs are not employees, there seems to me, on a superficial examination at least, to have been similarities between that approach, and a voluntary redundancy programme.

1042. Regardless of that, these clauses fall to be considered on their terms. In the SPMC, the provision is at Section 1, Clause 8 which states:

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"The terms of the appointment of Subpostmaster do not entitle the holder to be paid sick or annual leave, pension or to compensation for loss of office."

1043. In the NTC, the provision is at Part 2, Paragraph 17.11 which states:

"The Operator acknowledges that he shall not be entitled to receive any compensation or other sums in the event of the termination or suspension of the Agreement."

1044. I consider both of these to be onerous and unusual. The provision in the SPMC that deals with sick or annual leave, and lack of pension, do not seem to me to be onerous or unusual. However, the contractual right on the part of the Post Office to terminate the appointment of a SPM, who may have worked very hard over many years in building up the business, and pay nothing by way of compensation, does seem to me to have the effect required for these clauses to be correctly categorised as onerous and unusual.

1045. I consider this to have been implicitly recognised in any event by the Post Office in terms of how it behaved in practice in the Network Transformation Programme, although I have not taken that into account when considering the clause.

1046. Having performed that exercise, on each of the seven categories, the conclusion I have reached is that the following are onerous and unusual:

3. Accounts and liability for loss: in the NTC, Part 2 Paragraph 4.1 and Part 2 Paragraph 13.1.

5. Suspension: in the SPMC Section 19, clauses 5 and 6, and in the NTC Part 2, Paragraphs 15.2 and 15.3.

6. Termination: given how I have construed the clauses in Section M concerning termination without notice as being concerned with repudiatory breaches alone, this does not arise. In the alternative, if that is wrong, then in the SPMC Section 1 Clause 10.

7. No compensation for loss of office: in the SPMC Section 1 clause 8, and in the NTC Part 2, Paragraph 17.11.

1047. I turn therefore to consider adequacy of notice.

Adequacy of notice

1048. There is a different approach from the parties to the way this issue should be approached in this trial. The claimants in their Opening Submissions at [253] states that "the experiences of the individual Lead Claimants is not directed to any finding that insufficient notice was given in their particular cases (whether that is in fact established on the evidence or not). The Post Office seeks to rely upon two different matters. Evidence of the Post Office general procedures, as well as the signatures of SPMs to demonstrate acceptance and sufficiency of notice.

1049. On that latter point, in ***Woodeson,*** in the paragraphs of the judgment of Longmore LJ following on from the passages quoted at [971] above, the following is stated:

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"[42] …. In any event questions of reasonableness are now determined by a consideration of the relevant statute or regulations, which the judge has permitted to go ahead.

[43] Mr Adams submitted that a no set-off clause operated as a clog on the equity of redemption and should be regarded as either void, or at least onerous, by analogy with ***Kreglinger v New Patagonia Meat and Cold Storage Co. Ltd*** [1914] AC 25. But the concept of a "clog on the equity" is that it prevents the redemption of the mortgage. A no-set off clause does not prevent redemption; it merely requires the mortgagor to bring his own proceedings rather than to hold up enforcement of the security. If he brings his own proceedings in time and the claim is a good one, he will be fully compensated.

[44] It is, moreover, clear in the present case that Mr Woodeson signed the relevant documentation containing both the Mortgage Offer accepting the accompanying General Terms and Conditions including clause 8.1:

"All payments to be made hereunder … shall be made

8.1.1 on the due date in cleared funds and without set-off;"

and the "Private Banking Terms and Conditions" which by clause 4 provided for payment without set off as set out in para 45 of the judgment.

[45] He was also told of the need to take independent advice and indeed had solicitors at the time whom he no doubt consulted.

[46] In any event, when the contractual documentation is signed, the ***Interfoto*** principle has no, or extremely limited, application, see ***Peekay v Australia and New Zealand Bank*** [2006] EWCA Civ 386, [43] per Moore-Bick LJ.

[47] For all these reasons the ***Interfoto*** case can have no relevance to the facts of the present case."

1050. The judgment of Moore-Bick LJ to which Longmore LJ refers makes the following statement in respect of a term in a signed document states as follows:

"[43] One of the factors that distinguishes the present case from those to which I have referred so far is that the true position appeared clearly from the terms of the very contract which the claimant says it was induced to enter into by the misrepresentation. Moreover, it was not buried in a mass of small print but appeared on the face of the documents as part of the description of the investment product to which the contract related. It was accepted that a person who signs a document knowing that it is intended to have legal effect is generally bound by its terms, whether he has actually read them or not. The classic example of this is to be found in ***L'Estrange v Graucob*** [1934] 2 K.B. 394. It is an important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions far beyond the business community. Nonetheless, it is a rule which is concerned with the content of the agreement rather than its validity. Accordingly, as both Scrutton L.J. and Maugham L.J. recognised in that case, the contract may be rescinded if one party has been induced to enter into it by fraud or misrepresentation."

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(emphasis added)

1051. However, although of course I fully accept and follow that binding authority, the Post Office rather conveniently overlooks, in its reliance upon it, that so far as the SPMC is concerned, that document was *not* signed by SPMs. What was signed was an appointment document – and I have provided specific findings for each applicable Lead Claimant above – with the confusing references to non-existent documents such as the Book of Rules. The NTC was, however, entirely different. It was designed to be signed as I explain below; the necessary document was signed; and an entirely different approach to contractual documentation, and the formation of contractual relations, was adopted from the time of its introduction.

1052. It is important to address a significant difference between the NTC and the SPMC contractual formation procedure. This is best done by means of illustration with one of the Lead Claimants. I am making an assumption that the statement to which I turn was given to each of the Lead Claimants who contracted on the NTC form.

1053. Mrs Dar was sent the appointment pack. The actual contents of these documents may not have been standard in respect of all NTC claimants, as hers involved relocation of the branch. However, the same principles can be considered on their terms generally, as the same instructions were given to Mrs Stockdale in identical terms. The covering document stated:

"Please read all of the documents carefully and follow the instructions.

Instructions

1. If you would like to be appointed to operate a Local branch at your premises, you should sign all of the documents highlighted in red in the list above (we call these "relevant documents") and return them to us by 26 June 2014. This must be done in the way described in the section headed 'How to Sign Relevant Documents' below.

2. We strongly suggest you take independent legal advice before signing the relevant documents and returning them to us. We would also suggest that you keep a copy of the relevant documents that you have signed and dated.

3. By signing and returning the relevant documents to us you will be making us a legal offer to enter into the Local Post Office Agreement, which is made up of the documents listed at 1-5 above (we call this the "Agreement").

4. Once you have sent the signed relevant documents to us, you cannot withdraw your offer to enter into the Agreement.

5. If we accept your offer to enter into the Agreement we will also sign the relevant documents and return one copy to you within two weeks from when we receive all the relevant signed documents from you. Only once we have done this will there be a legally enforceable, conditional contract between us. You should keep all signed documents in a safe place."

1054. Although the NTC form itself is not one of the documents identified in red, hence requiring signature and return, it is numbered item 2, and is identified in numbered paragraph 3 of the Instructions as forming part of "the Agreement". Numbered

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paragraph 2 clearly states "we strongly suggest you take independent legal advice before signing the relevant documents and returning them to us." That was a clear warning in respect of legal advice, which has to be taken into account when considering the ***Interfoto*** test.

1055. In my judgment, the following can be drawn from this.

1. Questions of reasonableness are governed by statute, in this case the Unfair Contract Terms Act 1977. That approach may have wider application now than the ***Interfoto*** approach, but the question of incorporation must still first be considered. This is because if the term in question falls at this hurdle, the term is never incorporated at all, and one would not therefore need come to consider reasonableness at all. The term would fail as a matter of incorporation.

2. So far as notice is concerned, I consider that there is binding authority that a signature upon the contract terms is wholly conclusive so far as notice to a SPM of onerous and unusual terms is concerned, which means incorporation. The dicta of Moore-Bick LJ states that a signature means one is "generally bound" by the terms. Although he also states that the term in that case was not "buried in a mass of small print" I consider that in this case, the signature – particularly together with the recommendation to seek legal advice – means the terms complained of in the NTC are incorporated.

3. The degree of notice required depends upon the nature of the term, and its degree of onerousness. I consider that the clauses in the NTC concerning account and liability for losses (namely Part 2 Paragraph 4.1 and Part 2 Paragraph 13.1) are particularly onerous and unusual in their effect. However, I find that although specific and separate notice was not given in respect of these two clauses, the signature means that this provision for terms in the NTC was sufficient. This disposes (or should, assuming the contract formation procedures were observed in all cases) of the NTC cases in the Post Office's favour so far as the ***Interfoto*** test is concerned. That means the terms would be incorporated. I will however go on to consider those two clauses in any event, in case I am wrong about the signature disposing of the point in the Post Office's favour.

4. So far as the SPMC is concerned, if any SPMs signed that document, then that would be sufficient to deal with the complaints of inadequacy of notice against the Post Office, also in the Post Office's favour. On the Post Office's procedures as I understand them to be during the SPMC years, that is unlikely. There is no evidence before that the SPMC was routinely (or at all) presented for signature in any case, or even intended to be signed.

5. For those SPMs who were appointed by the Post Office prior to the NTC coming into force, in other words under the previous SPMC regime, it will be a question of fact in each case whether the terms I have identified as onerous and unusual were brought to the attention of the SPM in each case. This is because the SPMC was not signed, and certainly the evidence of the Lead Claimants makes clear that the SPMC was not even routinely provided by the Post Office to the SPMs at all. There also does not seem to have been a uniform procedure adopted by the Post Office in terms of documentation sent to SPMs prior to appointment, nor even uniform documentation. The documents sent to Mr Sabir, for example, included within Appendix 1

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identification of certain requirements in terms of remuneration and painting the branch. However, no actual notice was given at all of the terms in the SPMC which I have found to be onerous and unusual.

6. Further, specific notice of the terms I have found to be onerous and unusual is required. It is not enough, to use the phrase of Moore-Bick LJ in ***Peekay v Australia and New Zealand Bank*** for them to be "buried in the small print". A similar expression was used by Coulson LJ in ***Goodlife Foods Ltd v Hall Fire Protection Ltd*** [2018] EWCA Civ 1371, who said "buried away in the middle of a raft of small print". That case also concerned the reasonableness of an exclusion clause, but the phraseology is useful.

7. Finally, for completeness, claimants such as Mr Bates and Mrs Stubbs did not contract (on my analysis for each of them) on the full SPMC terms at all. I have found in respect of Mr Bates that the contract was formed on 31 March 1998 on the terms of what was enclosed with the Letter of Appointment. This did not include even the extract of terms contained in the document SERV 135. Mrs Stubbs was appointed on the day after her husband's death, on very little documentation other than her simply signing the direct debit form with her bank account details so she could be paid. If, for example, the SERV 135 document evolved over time and included reference to other specific terms provided prior to or upon the formation of the contract, then separate identification of those terms, given the terms of that letter, probably would be sufficient but *only* for any terms specifically identified in that letter. The document referred to "certain very important Post Office regulations. As a means of protecting the investment made by yourself and Post Office Counters Ltd in the business I would like to draw your attention to the following extracts, from your Contract." However, there is no evidence before me that the SERV 135 document did evolve in that way.

1056. The SERV 135 document was instituted by Mr Williams because he, as a matter of common sense rather than legal analysis, realised separately (and audit terms had reported to him) that many SPMs simply did not know of some important terms. However, his realisation to this effect did not lead to the Post Office changing its procedures, and the terms identified in that letter (I assume) were those that Mr Williams personally considered important, not those that I have found to be onerous and unusual.

1057. The only terms identified in the SERV 135 document provided to Mr Bates are Section 12 clauses 3, 4, 5, 12; Section 19 clauses 1 and 4; and Section 4 clause 1. None of those are in the list that I have found onerous and unusual. If the terms of the SERV 135 document remained in that form, then that would not assist the Post Office in respect of giving adequate notice, and no adequate notice would have been given in respect of the SPMC terms I have identified as onerous and unusual. That would mean that they are not incorporated. A similar approach in Mr Sabir's case shows that none of the terms I have found to be onerous and unusual were brought to his attention either. They were, at best, buried within a document he was told to read. That is not, in my judgment, sufficient notice, and it is not sufficient to incorporate them.

1058. However, it is now necessary to analyse (as an alternative) and specifically consider the NTC clauses I have identified as particularly onerous and unusual, in case I am wrong about signature, and these need to be dealt with differently. These are Part 2

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Paragraph 4.1 and Part 2 Paragraph 13.1. The reason that I deal with these (in the alternative) differently is as follows. These clauses are extraordinarily onerous. I have construed Part 2 Paragraph 4.1 on the meaning of the actual words, imposing full liability upon a SPM for *any* loss or damage to cash and/or stock regardless of however this occurred, and whether the SPM is at fault or otherwise, except for a criminal act by a third party. This is a very wide-ranging clause with potentially draconian financial impact upon a SPM.

1059. I put to one side entirely that the Post Office's case on this shifted during the trial – at one point it seemed to be argued in opening that the Post Office's case was that the extent of liability was as Mr Beal (in evidence I have rejected) explained he understood, namely that it sought to replicate the extent of liability of a SPM under the SPMC. I also put to one side entirely that the genesis of this clause emerged about a decade *after* SPMs, on their case, started to experience significant discrepancies and shortfalls due to Horizon; and which on any case, they expressly blamed upon the Horizon system. It would be, perhaps, too cynical for even the most hardened Post Office watcher to suggest that the problems with Horizon led to changes to, and extension of, the contractual liability of SPMs for losses that were adopted in the NTC. However, that option cannot be entirely discounted.

1060. I have come to the conclusion that this clause is unduly onerous, and most unusual, solely on the effect of the clause itself as I have construed it. I find that in its context, Part 2 Paragraph 4.1 of the NTC has such a severe and onerous nature, and is so unusual in the context of a SPM running a branch, that clear and conspicuous notice should have been given to incoming SPMs. In fact, there was no notice at all. I would therefore, were I wrong about the signature on the NTC being conclusive so far as notice is concerned, find that this clause was not incorporated.

1061. The same comments apply to the second clause, Part 2 Paragraph 13.1.

1062. However, I will consider the UCTA reasonableness issue of both of these clauses as even if incorporated due to the signature, they must still pass the test if that statute applies. So too must the clauses in the SPMC pass the test of reasonableness in an alternative scenario too, if they are incorporated.

P. Unfair Contract Terms

1063. I turn therefore to consider this issue. The same list of terms that are challenged as being onerous and unusual under Common Issues 5 and 6 are also challenged by the claimants in Common Issue 7 as not being reasonable under the Unfair Contract Terms Act 1977 ("UCTA").

1064. Section 3 of UCTA states as follows:

"(1) This section applies as between contracting parties where one of them deals....on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term—

… (b) claim to be entitled—

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(i) to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness."

1065. The application of the Act is challenged by the Post Office on two grounds. Firstly, it is denied by the Post Office that the SPMC and/or the NTC are written standard terms of business. Secondly, it is said by the Post Office that none of the terms are relied upon to render a contractual performance substantially different from that expected, or no performance at all.

1066. There is no definition within UCTA itself of standard terms of business, or standard form of contract. Law Commission Report No. 69 that led to the passing of the Act stated explained at [157] that "…. the courts are well able to recognise standard terms used by persons in the course of their business."

1067. In ***British Fermentation Products Ltd v Compair Reavell Ltd*** [1992] 2 All ER (Comm) 398 the Institution of Mechanical Engineers Model Form of General Conditions of Contract Form C (1975 edition) was held not to be standard terms of business for the purposes of UCTA. The passage in the Law Commission Report was cited. However, in that case the terms were those of an outside body – the Institution of Mechanical Engineers – whose standard form had been chosen by the parties as their contract. The decision that this was not one party's written standard terms of business is not therefore that surprising.

1068. The matter has been considered in other first instance cases. The one I have found of most assistance is the dicta of Edwards-Stuart J in ***Yuanda (UK) Co Ltd v WW Gear Construction Ltd*** [201] EWHC 720 (TCC), a case that considered UCTA in the context of a JCT Trade Contract with substantial amendments thereto made by the employer. He stated at [20] and following:

"[20] In ***Hadley Design Associates v Westminster*** [2003] EWHC 1617 (TCC), HH Judge Richard Seymour QC said, at [78]:

"The concept underlying the provisions of [UCTA] section 3, in my judgment, is that there should exist a stock of written, no doubt usually, at any rate, printed, contract conditions which was simply drawn from as a matter of routine and intended to be adopted or imposed without consideration or negotiation specific to the individual case in which they were to be used. That seems to me to be the force of the words "written" and "standard" in the expression "written standard terms of business". In other words, it is not enough to bring a case within [UCTA] section 3 that a party has established terms of business which it prefers to adopt, as, for example, a form of draft contract maintained on a computer, or established requirements as to what contracts into which it entered should contain, as, for example, provision for arbitration in the event of disputes. Something more is needed, and on principle that something more, in my judgment, is that the relevant terms should exist in written form prior to the possibility of the making of the relevant agreement arising, thus being "written", and they should be intended to be adopted more or less automatically

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in all transactions of a particular type without any significant opportunity for negotiation, thus being "standard"."

[21] With these observations I agree. The conditions have to be standard in that they are terms which the company in question uses for all, or nearly all, of its contracts of a particular type without alteration (apart from blanks which have to be completed showing the price, name of the other contracting party and so on). One encounters such terms on a regular basis - whether when buying goods over the internet or by mail order or when buying a ticket for travel by air or rail.

[22] In my view, it is the essence of such terms that they are not varied from transaction to transaction. If they were, they would no longer be "standard".”

(emphasis added)

1069. At appellate level, in ***African Export-Import Bank v Shebah Exploration and Production Co Ltd*** [2017] EWCA Civ 845, and as clearly identified in the judgment of Longmore LJ at [2] “the main question in this appeal is the meaning to be attributed to "deals … on the other's written standard terms of business” in section 3(1) of UCTA. At first instance, Philipps J had granted the claimant summary judgment on sums claimed under a syndicated loan facility. He had dismissed the different defendants' contention that they had an arguable case that the Facility Agreement constituted the claimants' written standard terms of business within the meaning of section 3 of UCTA. The result of that would have been that the claimants could not rely on the relevant clauses, except in so far as the claimants could show that the terms satisfied the requirement of reasonableness under section 11 of UCTA.

1070. Longmore LJ reviewed the first instance authorities in the course of dismissing the appeal. They were the ones I have identified above, together with a Scottish case, referred to in ***British Fermentation***, and ***St Albans City and District Council v International Computers*** [1006] 4 All ER 481. That case concerned where there had been negotiation between the parties the result of which being that some, but not all, of the standard terms were applicable to the transaction.

1071. At [25] Longmore LJ, with whom Henderson LJ agreed, stated:

“I would also approve these first instance decisions and hold that it is relevant to inquire whether there have been more than insubstantial variations to the terms which may otherwise have been habitually used by the other party to the transaction. If there have been substantial variations, it is unlikely to be the case that the party relying on the Act will have discharged the burden on him to show that the contract has been made "on the other's written standard terms of business".”

Here, there have been no variations at all to the terms.

1072. The Post Office relies upon ***Commerzbank AG v Keen*** [2006] EWCA Civ 1536, in which the Court of Appeal considered a clause in a banker’s employment contract that dealt with a discretionary annual bonus. This was not payable if on a particular date the banker was not employed by the bank. One of the challenges brought by Mr Keen against the non-payment of his bonus after the bank closed down the desk (he was a proprietary trader) in June relied upon UCTA. This failed. The Post Office relies upon

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the statement by Mummery LJ at [104], however that needs to be read in context as follows:

"[101] I do not see how it can be argued with any real prospect of success that under such a term for remuneration Mr Keen 'deals as consumer' with the Bank. As a matter of principle and of construction of section 3 I have been assisted in reaching this conclusion by the analysis of Professor Mark Freedland in the 2nd edition of his work The Personal Contract of Employment at pp. 190–191. I agree with his general conclusion that:

'This body of regulation is of marginal application to personal work or employment contracts, both as to its scope and its substance.'

[102] As he says, the regulation of fairness of contract terms by section 3 of the 1977 Act is not primarily directed at personal work or employment contracts and is not particularly appropriate to them. After citing ***Brigden*** and referring to the article of Loraine Watson, he rightly comments that such contracts do not really fit naturally into the categories of consumer contracts or standard form contracts, as it involves treating workers as users or recipients of goods or services when in truth they are providers of their services. It is artificial and unconvincing to read section 3 as extending to payment provisions in respect of personal services rendered by the employee to the employer. I do not think that there is a real prospect of a trial judge coming to a contrary conclusion after hearing all the arguments.

[103] For similar reasons I have reached the same conclusion on the issue whether Mr Keen contracted on the Bank's 'written standard terms of business' in relation to the provision in the discretionary bonus scheme requiring him to be in the employment of the Bank at the date of payment of the bonus.

[104] As Morland J pointed out in ***Brigden*** the relevant business in that case, as in this case, is the business of banking. The terms as to the payment of discretionary bonuses were not the standard terms of the business of banking. They were the terms of the remuneration of certain employees of the Bank, such as Mr Keen, who were employed in part of the Bank's business."

1073. Moses LJ at [115] in the same case "lent emphasis to Mummery LJ's reasons for rejecting the application of the 1977 Act to Mr Keen's contract of employment." He said "a bank's business is not entering into contracts of employment with its employees." I would add that the case of ***Brigden v American Express Bank*** also concerned a bank employee's contract of employment.

1074. I do not consider this case (or either of these cases, if one includes ***Brigden***) assists the Post Office. SPMs are not employees. The Post Office's business includes the running of a large number of PO Branches, which are operated on the Post Office's behalf by SPMs. The running of such branches is directly *within* the business of the Post Office. The terms are undoubtedly standard and were used in all cases to appoint SPMs (putting to one side the irrelevant point that contractual formation did not occur as intended for some of the Lead Claimants). During the years prior to 2011, the SPMC was used. It was a standard document which was not permitted to be amended. After that, the NTC was used.

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1075. In my judgment, ***Commerzbank*** is wholly distinguishable. The ***African Export-Import Bank*** case expressly approves ***Yuanda***, including the passage I have quoted at [1068]. The evidence is compelling that both the SPMC and the NTC were the Post Office's standard terms of business, and were used by the Post Office in the course of its business. I conclude therefore that the SPMs were contracting on the Post Office's written standard terms of business. I find that both the SPMC and NTC are written standard terms of business for the purposes of UCTA.

1076. The Post Office also challenges the applicability of UCTA by reason of section 3(2)(b), and asserts that none of the clauses under scrutiny in Common Issue 5 are relied upon by the Post Office either to render a contractual performance substantially different from that reasonably expected; or to render no performance at all in respect of the whole or any part of the contractual obligation.

1077. In ***AXA Sun Life Services plc v Campbell Martin Ltd*** [2011] EWCA Civ 133, the Court of Appeal considered an exemption clause in AXA's standard terms of business. The case concerned appeals in a number of cases brought in respect of findings on preliminary issues by HHJ Graham Jones sitting as a Deputy High Court Judge in the Mercantile List at Bristol. They all concerned UCTA.

1078. At [48] and following Stanley Burnton LJ stated:

> "[48] It is common ground that the Agreements were on AXA's standard terms of business, so that section 3 of UCTA applies to them. The Respondents contend that both that section and section 3 of the Misrepresentation Act 1967 apply to them. The Appellants submitted that neither provision does, since the effect of clause 24 is to exclude any effective misrepresentation or collateral warranty.
>
> [49] An entire agreement such as clause 24 is not an exemption clause of the kind with which UCTA was and is principally concerned. Since it prevents any collateral contract or warranty from coming into existence, it is not the subject of section 3(2)(a), since there is no collateral contract of which AXA could be in breach. Nor does section 13 materially assist the Respondents, for the same reason.
>
> [50] However, different considerations apply to section 3(2)(b)(i). Quite how that 'paragraph' should operate is not entirely clear, as is demonstrated by the somewhat tentative discussion in *Chitty on Contracts*, 30th edition, at paragraph 14-073. I have no doubt that it is principally aimed at the small print that entitles a party to a contract to provide something other than that defined by the principal terms of the contract, as where a holiday company reserves the right to substitute a hotel or resort for that specified in the main part of the contract. In most cases, as *Chitty* suggests, the performance reasonably expected of a party is that which is defined by the written contract between the parties. But this 'paragraph' of section 3 refers not to the performance specified in the contract but to the performance "which was reasonably expected" of that party. It seems to me that in appropriate circumstances a pre-contractual representation or promise may affect the performance that is reasonably expected of a party. It follows that clause 24 may be subject to the reasonableness test in UCTA in relation to both collateral warranties and representations. However, section 3(2)(b)(i) will only come into play in the present cases if it is possible to identify both the performance by AXA that was reasonably expected and that defined by the contract. The effect of clause 24, if any, on a representation such as "We are

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the largest insurance company in England" will not be within the scope of section 3(2)(b)(i).”

(emphasis added)

1079. Also, in ***Paragon Finance v Nash plc*** [2001] EWCA Civ 1466, Dyson LJ (as he then was) considered the same section in the context of loan agreements and variable interest clauses. I will quote, again, from a number of passages to put the paragraphs relied upon by the Post Office in their correct context.

1080. At [72] and following section 3(2)(b) is considered:

“[72] It is submitted on behalf of the appellants that they were reasonably entitled to expect that, in performing their side of the bargain, the Claimant would not apply rates which were substantially out of line with rates applied by comparable lenders to borrowers in comparable situations to the appellants. It is contended that the setting of interest rates is "contractual performance" within the meaning of section 3(2)(b) of the 1977 Act, and that the Claimant set interest rates that defeated that expectation.

[73] The first question is whether the fixing of rates of interest under a discretion given by the contract was "contractual performance" within the meaning of section 3(2)(b). Mr Broatch [for the appellants] submits that it is. He relies on two authorities. The first is ***Timeload Ltd v British Telecommunications PLC*** [1995] EMLR 459. In that case, the plaintiff set up a free telephone inquiry service, and entered into a contract with BT whereby BT provided the plaintiff with the use of a certain telephone number. There was a clause in the contract which authorised BT to terminate apparently without reason. BT gave one month's notice of termination, and the plaintiff sought an injunction to restrain BT from terminating. It was held by the court of appeal that it was at least arguable that a clause purporting to authorise BT to terminate without reason purported to permit partial or different performance from that which the plaintiff was entitled to expect, and that section 3(2) of the 1977 Act applied. But the licence agreement imposed clear performance obligations on BT. Thus, clause 1.1 obliged BT to provide the various services there set out. In these circumstances, it is not difficult to see why the court thought that it was at least arguable that a clause authorising termination of the obligation to provide those services for no good reason purported to permit a contractual performance different from that which the customer might reasonably expect.

[74] The second authority is ***The Zockoll Group Ltd v Mercury Communications Ltd*** [1999] EMLR 385. This was another telecommunications case. The plaintiff planned to set up a network of franchisees to provide goods and services to the public in response to telephone inquiries. It entered into a contract with Mercury under which it obtained a number of telephone numbers. Mercury wished to withdraw one number from the plaintiff and asserted that it was entitled to do so at its sole discretion. The plaintiff brought proceedings and relied on section 3(2)(b)(i) of the 1977 Act. The court held that the withdrawal of the disputed number did not render the contractual performance substantially different from what was expected. Mr Broatch points out that it is implicit in the decision of the court that it was accepted that the withdrawal of the disputed number was *capable of being* contractual performance substantially different from that which it was reasonable to expect.

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[75] In my judgment, neither of these authorities assists Mr Broatch's submission. In both cases, the defendant telecommunications provider was contractually bound to provide a service. The question was whether the withdrawal of the service in the particular circumstances of the case was such as to render the contract performance (ie the provision of that service) substantially different from that which it was reasonable for the other contracting party to expect. The present cases are quite different. Here, there is no relevant obligation on the Claimant, and therefore nothing that can qualify as "contractual performance" for the purposes of section 3(2)(b)(i). Even if that is wrong, by fixing the rate of interest at a particular level the Claimant is not altering the performance of any obligation assumed by it under the contract. Rather, it is altering the performance required of the appellants.

[76] There appears to be no authority in which the application of section 3(2)(b)(i) to a situation similar to that which exists in this case has been considered. The editors of *Chitty on Contracts (28th edition)* offer this view at paragraph 14-071:

"Nevertheless it seems unlikely that a contract term entitling one party to terminate the contract in the event of a material breach by the other (e.g. failure to pay by the due date) would fall within paragraph (b), or, if it did so, would be adjudged not to satisfy the requirement of reasonableness. Nor, it is submitted, would that provision extend to a contract term which entitled one party, not to alter the performance expected of himself, but to alter the performance required of the other party (e.g. a term by which a seller of goods is entitled to increase the price payable by the buyer to the price ruling at the date of delivery, or a term by which a person advancing a loan is entitled to vary the interest payable by the borrower on the loan)."

[77] In my judgment, this passage accurately states the law. The contract term must be one which has an effect (indeed a substantial effect) on the contractual performance reasonably expected of the party who relies on the term. The key word is "performance".”

A good example of what would come within the scope of the statute is given at paragraph 14-070 of *Chitty.* The editors postulate a person dealing as a consumer with a holiday tour operator who agrees to provide a holiday at a certain hotel at a certain resort, but who claims to be entitled, by reference to a term of the contract to that effect, to be able to accommodate the consumer at a different hotel, or to change the resort, or to cancel the holiday in whole or in part. In that example, the operator has an obligation to provide a holiday. The provision of the holiday is the "contractual performance". But that does not apply here.”

1081. This therefore means that one has to analyse “the contractual performance” reasonably expected of the Post Office, in respect of which the contractual term in question “must have an effect (indeed a substantial effect).”

1082. The “contractual performance”, in my judgment, must be that of the Post Office. That contractual performance can be expressed in different ways, but they all boil down to the same thing, in essence. It can be expressed as the Post Office remunerating the SPM for running the PO Branch; the Post Office permitting or enabling the SPM to run the PO Branch; and/or the Post Office requiring the SPM to provide Post Office services to the public through the PO Branch.

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1083. However, not all the terms challenged by the claimants under UCTA (a summary which is not designed to change the correct burden upon the party that must demonstrate reasonableness) in Common Issue 7 (which challenges all or any of the terms in Common Issue 5) relate to the contractual performance by the Post Office.

1084. Those that do are identified substantially already at [1046] above, namely those related to the following separate categories, retaining the numbering of categories in Common Issue 5. The two lists are not however identical.

1. Rules, instructions and standards: in the SPMC, Section 1 Clause 18, and in the NTC, Part 2 Paragraph 1.1 and Part 5 Paragraph 1.3.

These relate to the way in which the Post Office sought to be entitled to change the character or nature of its own performance by means of unilateral variation of the terms upon which a SPM was appointed.

3. Accounts and liability for loss: in the SPMC Section 12 Clause 12, and in the NTC, Part 2 Paragraph 4.1 and Part 2 Paragraph 13.1.

These relate to the way in which the Post Office would be entitled to claim payment from, or reduce remuneration otherwise due to, the SPM for running the branch.

5. Suspension: in the SPMC Section 19, Clauses 5 and 6, and in the NTC Part 2, Paragraphs 15.2 and 15.3.

These relate to the way in which the Post Office could prevent the SPM from running the PO Branch, and also no longer observe the contractual requirements to remunerate the SPM for running the branch.

6. Termination: in the SPMC Section 1 Clause 10, and in the NTC Part 2 Paragraph 16.1.

These relate to the way in which the Post Office could bring the appointment of the SPM to an end, such that the operation of the PO Branch by the SPM who had been contracted for that purpose would come to an end.

7. No compensation for loss of office: in the SPMC Section 1 Clause 8, and in the NTC Part 2, Paragraph 17.11.

These relate to the consequential effects of the appointment of the SPM coming to an end (whereby the operation of the PO Branch by the SPM who had been contracted for that purpose would end).

1085. I therefore turn to reasonableness. This is a different consideration to whether those terms are onerous and unusual. Gross LJ stated at [106] in ***Goodlife*** in respect of the approach adopted in that case:

"I agree entirely and specifically with the observations of Coulson LJ (at [35]) that the issues of incorporation (at common law) and reasonableness (under UCTA) are separate and the questions to be decided in respect of each are distinct, though there may be some overlap."

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1086. It is therefore a separate exercise to consider reasonableness.

1087. The test for reasonableness is set out in section 11(1) of UCTA.

> "11. The "reasonableness" test.
>
> (1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967 is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.
>
> (2) In determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract
>
> (3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.
>
> (4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above in the case of contract terms) to—
>
> (a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and
>
> (b) how far it was open to him to cover himself by insurance.
>
> (5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does."

1088. The analysis of reasonableness is highly fact specific. There have been many cases in which this issue has been considered by the courts. I have read and considered all of those relied upon by both the parties. However, I do not consider individual recitation of them will assist, either the parties or anyone else, in this judgment.

1089. Schedule 2 of UCTA contains a list of matters relevant to the consideration of reasonableness under section 11(2). Although that is a different section to the one under consideration here, I am entitled to have regard to it. In ***Stewart Gill Ltd v Horatio Myer & Co Ltd*** [1992] QB 600, 608, Stuart-Smith LJ stated:

> "Section 11(2) of the Act requires the court which is determining the question of reasonableness for the purpose of sections 6 and 7 to have regard in particular to the matters specified in Schedule 2. Although Schedule 2 does not apply in the present case, the considerations there set out are usually regarded as being of general

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application to the question of reasonableness. Two paragraphs of these guidelines would in my judgment be unworkable unless the whole term is being considered".

1090. In ***Overseas Medical Supplies Limited v Orient Transport Services Limited*** [1999] 2 Lloyd's Rep 273, at [10] Potter LJ set out eight observations from the authorities dealing with the UCTA test of reasonableness. Amongst other things, he noted that Schedule 2 was relevant to Section 3 of UCTA, whilst bearing in mind that the court was dealing with a commercial and not a consumer transaction; and that the question of reasonableness must be assessed having regard to the relevant clause viewed as a whole, and not taken in isolation.

1091. Schedule 2 contains a list of guidelines. They are, in summary, the strength of parties' bargaining positions; whether an inducement was provided to agree to the term (here that would be an inducement to the SPMs); whether the SPM knew or ought to have known of the existence and extent of the term (my emphasis); whether it excluded or restricted any relevant liability; and whether goods were manufactured to a special order.

1092. Here, the two factors that are relevant from the list in Schedule 2 are the strength of parties' bargaining positions; and whether the SPM knew or ought to have known of the existence and extent of the term. Although the lack of negotiation of the terms is a very notable factor, it is not necessary to take separate account of it, as it is effectively subsumed within the parties' bargaining position. In other words, the lack of negotiation (and the fact that amendments were not permitted) means SPMs were in a wholly weak bargaining position.

1093. The eight factors in ***Overseas Medical Supplies*** are (again, in summary):

(1) The way in which the relevant conditions came into being and are used generally is relevant.

(2) Although not specifically applicable to cases falling within Section 3 of the 1977 Act, the five guidelines as to reasonableness set out in Schedule 2 are nonetheless relevant to the question of reasonableness, while bearing in mind that the court is dealing with a commercial and not a consumer transaction. They ought therefore to be taken into account.

(3) In relation to the question of equality of bargaining position, the court will have regard not only to the question of whether the customer was obliged to use the services of the supplier but also to the question of how far it would have been practicable and convenient to go elsewhere.

(4) The question of reasonableness must be assessed having regard to the relevant clause viewed as a whole: it is not right to take any particular part of the clause in isolation.

(5) The reality of the consent of the customer to the supplier's clause will be a significant consideration.

(6) In cases of limitation rather than exclusion of liability, the size of the limit compared with other limits in widely used standard terms may also be relevant.

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(7) While the availability of insurance to the supplier is relevant, it is by no means a decisive factor.

(8) The presence of a term allowing for an option to contract without the limitation clause but with a price increase in lieu is important.

1094. None of (6), (7) or (8) apply here.

1095. There is a general lack of judicial enthusiasm, which I share, to permit UCTA to intrude into contracts between commercial parties of more or less equal bargaining power. This is best expressed – although it appears in a number of cases, in ***Granville Oil & Chemicals Limited v Davis Turner & Co Limited*** [2003] 2 Lloyd's Rep 356 at 362, where Tuckey LJ said:

"The 1977 Act obviously plays a very important role in protecting vulnerable consumers from the effects of draconian contract terms. But I am less enthusiastic about its intrusion into contracts between commercial parties of equal bargaining strength, who should generally be considered capable of being able to make contracts of their choosing and expect to be bound by their terms."

(emphasis added)

1096. Earlier in his judgment in ***Goodlife***, Gross LJ stated at [103] and following:

"[103] However, even where UCTA is applicable, at least in the case of commercial contracts between parties of broadly equal bargaining power, considerations of party autonomy and freedom of contract remain potent. Thus, in ***Watford Electronics v Sanderson*** [2001] EWCA Civ 317; [2001] 1 All ER (Comm) 696, Chadwick LJ said this:

"55. Where experienced businessmen representing substantial companies of equal bargaining power negotiate an agreement, they may be taken to have had regard to the matters known to them. They should, in my view, be taken to be the best judge of the commercial fairness of the agreement which they have made; including the fairness of each of the terms in that agreement. They should be taken to be the best judge on the question whether the terms of the agreement are reasonable. The court should not assume that either is likely to commit his company to an agreement which he thinks is unfair, or which he thinks includes unreasonable terms. Unless satisfied that one party has, in effect, taken unfair advantage of the other – or that a term is so unreasonable that it cannot properly have been understood or considered – the court should not interfere."

[104] The observations of Tuckey LJ in ***Granville Oil v Davis Turner*** [2003] EWCA Civ 570; [2003] 2 Lloyd's Rep. 356, at [31], were to the same effect:

"The 1977 Act [i.e., UCTA] obviously plays a very important role in protecting vulnerable consumers from the effects of draconian contract terms. But I am less enthusiastic about its intrusion into contracts between commercial parties of equal bargaining strength, who should generally be considered capable of being able to make contracts of their choosing and expect to be bound by their terms."

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1097. However, I do not consider that it is correct or accurate to describe an SPM, and the Post Office, as being commercial parties of equal bargaining strength. Indeed, in my judgment, they are a substantial and significant distance from being such parties.

1098. I find it highly material that the Post Office on the one hand, and the SPMs on the other, were not of equal bargaining power, or indeed anything like it. I consider that the Post Office occupied a potentially unique position in terms of strength of position. Mr Green QC would often describe this as asymmetry; he did this almost as often as Mr Cavender described the relationship as "business to business". It is indeed asymmetrical, but in my judgment it is a very significant asymmetry. If one wished to become a SPM, then it was the Post Office's terms that were available, and those terms alone. There was no negotiation permitted whatsoever. The Post Office is also a sizeable and significant institution. A SPM is a small business person, although some may have more than one branch. The two parties are not remotely equal. In fact, they are almost uniquely unequal.

1099. Further, and I consider this highly significant too, the NTC was introduced after many years – almost a decade – of Horizon having been used as the accounting system for SPMs and the Post Office. Reasonableness of the terms of the SPMC has to be viewed as at the time of contracting; the same exercise has again to be performed for SPMs who contracted on the NTC. The answer will not necessarily be the same for each of the terms, or for each of the contract forms. I will deal with liability for losses first, as the parties concentrated on these terms extensively in the trial. I find that the provision in the SPMC at Section 12 clause 12 (as I have construed it concerning the extent of responsibility for assistants) is reasonable. It requires fault in order for a SPM to be liable, and that is entirely reasonable. Section 12 Clause 4 and Section 12 Clause 13 are also reasonable.

1100. There is no evidence whatsoever from the Post Office about what governed or influenced the change from what I have found is fault-based liability in the SPMC for losses, to the far wider blanket liability in the NTC. Indeed, the only evidence, from Mr Beal, which I have rejected, is that the NTC was supposed to reflect the same extent of liability of the SPM as contained in the SPMC. Nor, in my judgment, does it matter what the driving motivation within the Post Office was for the imposition of the wider, no fault liability in the NTC.

1101. It is also for the Post Office to demonstrate that the particular clause satisfies the test of reasonableness, and this is clear from the terms of UCTA itself.

1102. I find that Part 2, Paragraph 4.1 of the NTC fails the test of reasonableness, and fails it by a significant margin. Although in my analysis I have concluded, on the ***Interfoto*** test, it is incorporated, I have gone on to consider incorporation in case if I am wrong about notice and the signature required. On the basis that I am correct on incorporation and notice, the term in question falls to be considered under UCTA, and I find that it is to be struck down on the grounds of reasonableness. If I were to be wrong on signature and notice, then the term would not be incorporated at all and consideration of reasonableness on that alternative scenario would not arise. However, on either approach, the particular clause in the NTC does not form part of the contract between the Post Office and the SPM.

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1103. This therefore leaves the NTC without a clause dealing with the scope of an SPM's liability in respect of losses. It would therefore require a term to be implied for reasons of business efficacy. For the same reasons that I concluded that, for Mr Bates and Mrs Stubbs, a term of like effect to Section 12 Clause 12 would have to be implied into their contracts given my findings on contract formation in their individual cases, a similar term would have to be implied into the NTC. This is that the SPM is "responsible for all losses caused through his or her own negligence, carelessness or error." The clause which is unreasonable, namely Part 2 Paragraph 4.1 of the NTC, does not deal with responsibility for assistants and so, in terms of business necessity, implication of a term for losses into the NTC does not need to include the second part of Section 12 Clause 12, which deals with assistants.

1104. Part 2, Paragraph 3.6.6, Paragraph 4.2 and Paragraph 4.3 are all reasonable.

1105. Part 2, Paragraph 13.1, if incorporated (which I have found it is, due to the signature on the NTC) does not satisfy the test of reasonableness either. This is because it requires reimbursement in full on demand of all losses claims, demands, proceedings, liabilities, costs and expenses, including reasonable legal costs and expenses incurred by the Post Office as a result of any breach, or any claim brought under the Equality Act in respect of the branch. That is extraordinarily wide, has a potentially unlimited effect in financial terms, and there is no evidence at all that there is or would be any insurance available to a SPM to insure against such losses. In the same way as Part 2 Paragraph 4.1 fails the reasonableness test. If I am right about signature and notice, and it is incorporated, it is not part of the contract as it fails the reasonableness test in UCTA. If I am wrong about signature and notice, it would never be incorporated at all.

1106. Turning to the other categories of clauses, there is a degree of overlap in my judgment between consideration of what leads to clauses that are onerous and unusual, and those that fail the reasonableness test under UCTA. However, they are distinct and separate tests, and I have applied them separately.

1107. I consider category 2, classes of business, and category 4, dealing with assistants, all pass the test of reasonableness. Applying the correct test, and bearing in mind that it is the Post Office who have to demonstrate that the clause is reasonable, to the other categories (and also bearing in mind that I provide this analysis in respect of all the elements of Common Issue 5, regardless of my separate findings on incorporation in case I am wrong).

1. Rules, instructions and standards: in the SPMC, Section 1 Clause 18, and in the NTC, Part 2 Paragraph 1.1 and Part 5 Paragraph 1.3.

These relate to the way in which the Post Office sought to be entitled to change the character or nature of its own performance by means of unilateral variation of the terms upon which a SPM was appointed. I consider these to be reasonable. However, new terms sought to be introduced by the Post Office by way of this contractual mechanism must themselves satisfy the test of reasonableness.

3. Accounts and liability for loss: in the SPMC Section 12 Clause 12, and in the NTC, Part 2 Paragraph 4.1 and Part 2 Paragraph 13.1.

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I have already dealt with this. Part 2 Clause 4.1 and Part 2 Clause 13.1 of the NTC both fail the test of reasonableness.

5. Suspension: in the SPMC Section 19, Clauses 5 and 6, and in the NTC Part 2, Paragraphs 15.2 and 15.3 fail the test of reasonableness. The other clauses that deal with the power to suspend are reasonable. The clauses that fail the test of reasonableness, relate to the way that the Post Office could, whilst preventing the SPM from running the PO Branch, ensure that Branch is kept open yet also no longer observe the contractual requirements to remunerate the SPM for running the branch during that period, and/or fail to pay even a reinstated SPM. In ***Lalji v Post Office*** [2003] EWCA Civ 1873 at [17] Brooke LJ stated:

"On the appeal Mr Davies called in aid section 3(2)(b) of the [Unfair Contracts Term] Act. He said that this was a contract on the Post Office's written standard terms of business by which the Post Office was claiming to be entitled to render no performance at all in relation to its obligation to remunerate Mr Lalji during each month of his suspension. In these circumstances it would be for the Post Office to show at trial that the contractual term on which it relied passed the "reasonableness" test in section 11 of the Act, and this would be essentially a matter for the trial judge to determine. I agree."

The effect of this provision is accurately summarised. The Post Office under these terms would be entitled to keep the PO Branch open, having suspended a SPM, and render no performance at all in relation to its obligation to pay the SPM, regardless of how long the suspension were to last, and even not pay such a SPM if they were later reinstated. I find that fails the test of reasonableness.

6. Termination: in the SPMC Section 1 Clause 10, and in the NTC Part 2 Paragraph 16.1.

These give the Post Office to bring an end to the operation of the PO Branch by the SPM, who had been specifically contracted for that purpose. I consider, on the basis of how I have construed the clauses, requiring termination on notice to be interpreted as relating to repudiatory breach, the no notice provisions to be reasonable. On the way I have construed the clauses, in particular the phrase "not less than three months' notice" in the SPMC and "not less than 6 months' notice" in the NTC, the termination on notice clauses are reasonable. However, on the Post Office's contended for construction, I consider both clauses fail the test of reasonableness. I have rejected that construction but deal with this in the alternative, in case I am wrong. The reason they would fail on that alternative construction is because a SPM who had invested very significant sums would be liable to termination for no legitimate business reason and on only a few months' notice (under either contract form) without any consideration of their length of service.

7. No compensation for loss of office: in the SPMC Section 1 Clause 8, and in the NTC Part 2, Paragraph 17.11.

I have dealt above with the rationale in terms of no compensation during suspension, which is part of the effect of Part 2 Paragraph 17.11 of the NTC. The two clauses that state, in each of the SPMC and the NTC, that the SPM is not entitled to compensation for loss of office each fail the test of reasonableness. Office could be lost – which is

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another way of saying the Post Office could terminate an SPM's appointment – for (on the Post Office's case) no legitimate reason at all. It was still, as at the end of the Common Issues trial, in issue between the Post Office and the Claimants whether the Post Office could act arbitrarily, irrationally and/or capriciously. I put entirely to one side, and ignore, why the Post Office might wish to claim a contractual right to act in any of these three ways with its SPMs. However, in my judgment, a blanket lack of entitlement to any compensation for loss of office cannot be reasonable in all the circumstances of this case. These terms therefore fail the test of reasonableness too.

1108. Therefore and in summary, these are standard terms of business of the Post Office, and the categories of terms I have identified above seek to have a substantial effect on the contractual performance of the Post Office. They are therefore subject to the requirement of reasonableness imposed by UCTA, and it is for the Post Office to demonstrate that they are reasonable. The Post Office has failed to satisfy this test in respect of the NTC terms concerning liability for losses; remuneration for SPMs in terms of suspension and also reinstatement following suspension in both the SPMC and NTC; termination (on the Post Office's construction of those terms, which I have rejected in any event) in both the SPMC and the NTC; and no compensation for loss of office in both the SPMC and the NTC.

1109. Further, new terms which the Post Office may seek to introduce that govern the appointment of SPMs, by means of the mechanism contained in both the SPMC and the NTC, are themselves subject to the same reasonableness test in the Act.

1110. My findings in respect of these clauses, which fail the test of reasonableness, is that the Post Office is not entitled to rely upon them. Accordingly, other Common Issues, such as Common Issues 19 and 20 which effectively seek the proper construction of the same clauses, and consideration of loss of profit and consequential losses, are to be answered taking into account that the relevant clauses do not form part of the contracts between the Post Office and the SPMs.

Q. Conclusions and Summary

1111. The Post Office describes itself on its own website as "the nation's most trusted brand" (at http://corporate.postoffice.co.uk/our-heritage). So far as these claimants, and the subject matter of this Group Litigation, are concerned, this might be thought to be wholly wishful thinking. Trust is an element of an obligation of good faith, a concept which I find is to be implied into the contracts between the Post Office and the SPMs because they are relational contracts. The Post Office asserts that its brand is trusted by the nation, but the SPMs who are claimants do not trust it very far, based on their individual and collective experience of Horizon.

1112. This judgment does not contain any findings as to breach, causation or loss, and therefore it remains to be decided in future judgments whether the Post Office has behaved in the way in which claimants allege, in the very first claim form, when there were far fewer of them than the many hundreds there are now. Much hinges on the outcome of this litigation as a whole, both in terms of the individual claimants and the effects upon them of the events over a number of years, as well as the potential effect upon the Post Office, both financial and reputational.

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1113. I have found that the contracts formed between the Post Office and SPMs are relational contracts, which means that there is an implied duty of good faith in the agreement. This means that the Post Office is not entitled to act in a way that would be considered commercially unacceptable by reasonable and honest people.

1114. The clause in the earlier version of the contract used by the Post Office, the SPMC, from about 1994 onwards until 2011 imposed liability for losses upon SPMs based on their negligence or fault. Even if such a term were not express, for those SPMs for whom the contractual formation procedures were inadequate, such liability for losses would be implied.

1115. Horizon was introduced in 2000, and from then onwards unexplained discrepancies and losses began to be reported by SPMs. Internal documents obtained in this litigation show that some personnel within the Post Office believed at the time that at least some of these were caused by Horizon. Some of these are identified at [542] above. The first document in that paragraph of this judgment dates from November 2000. At [41] I deal with part of an internal Post Office report from as recently as June 2014 – other parts have been redacted – that make it clear that steps had to be taken within the Post Office to "ensure consistency of accounts and enable a higher chance of detecting errors in accounts due to problems with Horizon". The Post Office's position in this litigation remains that there were no problems with accounts caused by Horizon. Further consideration of this will occur in subsequent judgments and after the Horizon Issues trial.

1116. Under Horizon, the way in which a SPM was required to compile Branch Trading Statements each trading period (usually every four weeks) meant that they had no choice but to accept into that statement even amounts with which they expressly disagreed, and Transaction Corrections that they either did not understand or disputed. The Post Office treated disputed amounts as debts which they were entitled to claim under debt recovery procedures from SPMs. There was no mechanism adopted by the Post Office to resolve such disputes. The Post Office accepted during the trial that amounts that were "settled centrally" were treated by it as being legally due and owing to the Post Office, even if they were disputed by SPMs. I find that the Post Office is not therefore entitled to rely upon the Branch Trading Statements, for any period in respect of which a SPM notified a dispute to the Helpline, as a settled account between agent and principal. Nor do SPMs bear the burden of demonstrating that the Branch Trading Statement is wrong for such a period.

1117. Suspended SPMs were not paid for their period of suspension but in order to keep their branches open had to pay Temporary SPMs to run them. Even if reinstated, they had no right to be paid their remuneration for their period of suspension. If re-instated and given time to pay sums claimed by the Post Office (even if disputed by them) these "debts" were held against them if further shortfalls and discrepancies led to other losses showing in their branches which they did not accept, and/or were not able to pay to the Post Office. In the case of all six of the Lead Claimants, all of them had their appointments terminated. I find that the claimants are correct and the Post Office was required to act in accordance with the implied duty of good faith in these contracts (as a result of their being relational ones) in exercising its power to terminate the contracts.

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1118. Software "fixes" were introduced by the Post Office to the Horizon system over time, and one, "the ping fix" regarding Camelot and the Lottery, which was introduced in 2012, resulted in a sizeable shortfall of transaction corrections being issued. These had been in to the value of in 2007 approximately (to 1 decimal point) £22.8 million; in 2008 approximately £12.5 million; in 2009 approximately £12.0 million; in 2010 approximately £11.3 million; and in 2011 approximately £4.5 million. In 2012, the year the "ping fix" was introduced, these fell below £1 million for that year.

1119. In 2011, and after Horizon had been used for over ten years, a different form of contract for SPMs was introduced by the Post Office, called the NTC. In that contract the extent of contractual liability of a SPM was sought to be increased very substantially, and to entitle the Post Office to recover losses from SPMs regardless of any fault on their part. I find that this clause fails the test of reasonableness in the Unfair Contract Terms Act 1977, which governs these contracts, and the Post Office is not entitled to rely upon it. Other clauses dealing with how the Post Office seeks to remunerate (or more accurately, seeks to avoid remunerating) suspended SPMs, even when reinstated, and avoid compensation for loss of office, also fail the reasonableness test.

1120. The National Federation of Sub Postmasters is not independent of the Post Office. It is not only funded by the Post Office, but would only agree changes in favour of SPMs' compensation if it, itself, obtained a guarantee from the Post Office on its future commercial funding in an amount initially claimed of £30 million over a 15 year period. It expressly sought to make agreement on these payments conditional upon agreeing changes in SPMs' favour. The Post Office also has a highly detailed funding agreement with the NFSP that would entitle the Post Office to "claw back" funds already paid to the NFSP if it does anything that would damage the Post Office's reputation, including supporting the SPMs in this litigation.

1121. The Horizon Issues trial, to take place in March and April 2019, will determine the Horizon Issues concerning the operation of the Horizon system. Each side will be calling an expert witness to give opinion evidence in IT matters, and resolution of those issues will help narrow the areas of dispute between the parties in this litigation. Further issues are to be tried in the autumn of 2019.

R. Answers to the Common Issues

1122. I find that the answers to the Common Issues themselves are as follows. The following is a summary of the answers to the Common Issues, but the detailed sections of the judgment should be consulted for a full analysis of the different permutations and alternative views in case I am wrong on some central issues (such as the categorisation of the contracts as relational ones).

1. Yes, the contractual relationship between the Post Office and the SPMs was a relational contract.

2. The implied terms at Common Issue 2(i)(a) to (m) are implied as set out in Section I of this judgment, the first two for reasons of business efficacy and the remainder as incidents of my finding that the terms are relational ones. The two terms at Common Issue 2(i)(n) and (o) are implied, but are narrower in scope than pleaded by the Claimants, and those at Common Issue 2(i)(p) to (s) are also implied. The term at

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Common Issue 2(t) is implied but without reference to the business, health and reputation of the SPMs. The term at Common Issue 2(ii)(a) is not implied.

3. The functions at Common Issue 3(a), (b) and (c) are governed by the implied duty of good faith, and the incidents of that in the terms identified at Common Issues 2(i)(q), (r), (s) and (t). The one at Common Issue 3(d) is however similarly restricted without reference to the business, health and reputation of the SPMs.

4. The Post Office supply of the Horizon system, the Helpline and/or the training and/or training materials are not subject to the statutorily implied term pursuant to s.13 of the Supply of Goods and Services Act 1982. However, implied terms do govern the s

5. and 6

Certain of the terms in the SPMC identified in this Common Issue were onerous and unusual, and are not incorporated due to lack of notice. These are included in Section O of this judgment. However, due to the signature upon the NTC and the statement recommending legal advice, all of the clauses in the NTC are incorporated, even those that are onerous and unusual, due to the law on incorporation.

7. The following terms fail the requirement of reasonableness in the Unfair Contract Terms Act 1977, which governs these contracts. These are those dealing with liability for losses in the NTC (Part 2 Clause 4.1 and Part 2 Paragraph 13.1); remuneration of suspended/reinstated SPMs (in the SPMC Section 19 Clauses 5 and 6; and in the NTC Part 2 Paragraphs 15.2 and 15.3); and no compensation for loss of office (in the SPMC Section 1 Clause 8; and in the NTC Part 2 Paragraph 17.11).

8. and 9

These are answered in Section H. In summary terms, the SPMC imposes fault- based liability for losses, and the NTC imposes a very wide liability which requires no fault on the part of the SPM. The latter however fails the test of reasonableness in UCTA as a result.

10. The Post Office was not the agent of SPMs as alleged.

11. This does not arise as framed, due to the answer on Common Issue 10.

12. SPMs were under an express contractual duty to account to the Post Office in the manner required or prescribed by the Post Office. This was by using the Horizon system. This required a Branch Trading Statement, which is not subject to the same common law principles that would apply as though it were an agreed or settled account. The Branch Trading Statement required a SPM to "accept now" in respect of items that were disputed or not agreed. The common law principles at Common Issue 12(b) and (c) do not apply to the Branch Trading Statement.

13. No, SPMs bear no such burden.

14. The circumstances are those identified in the implied term dealing with suspension in Common Issue 2(i)(n). It must be done in accordance with the implied duty of good faith.

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15. The Post Office was entitled to terminate a SPM's appointment summarily in circumstances where the breach or breaches on the SPM's part was repudiatory in nature.

16. Termination on notice must be done in accordance with the implied duty of good faith.

17. and 18

These do not arise.

19. Yes. This is because the clauses purported to exclude this fail the test of reasonableness in UCTA.

20. The clauses relied upon by the Post Office in respect of removing or excluding any rights to recover compensation for loss of office fail the test of reasonableness in UCTA, regardless of whether such clauses were in each case as a matter of fact drawn to the specific attention of the incoming SPM. The heads of loss identified in this Common Issue are not therefore limited as the Post Office contends.

21. There is no restriction upon the Post Office in terms of how this discretion can be exercised, other than the discretion available to the Post Office would have to be exercised for a proper purpose and in accordance with the implied duty of good faith.

22. Assistants do not have benefits conferred on them for the purposes of section 1 of the Contracts (Rights of Third Parties) Act.

23. SPMs had a responsibility to train their assistants, but they could not be expected, nor were they contractually required, to train them to a level above that which they had themselves received and achieved.