

### **Note on background to possible recusal application**

#### **Overview**

1. Most Post Office branches are run by Subpostmasters (SPMs). They are not employees, but are paid remuneration by Post Office in exchange for selling Post Office products and services. A SPM will typically run an independent business (such as a newsagent) alongside the Post Office branch, and will therefore benefit from Post Office footfall.
2. Post Office provides SPMs with an online accounting system, through which they account to Post Office. This is referred to as “*Horizon*”. This dispute centres on Horizon. The (c.570) SPM Claimants appeared, per Horizon, to have shortfalls in their accounts, which they were required to make good.
3. The Claimants’ case, insofar as relevant, is that:
  - a. This was a relational contract. That means that a term as to good faith is implied.
  - b. Other terms are construed/ implied, including terms to provide adequate training and an adequate Horizon system, to investigate apparent losses reasonably, to communicate problems with Horizon, and not to suspend or terminate contracts without reasonable cause.
  - c. Various express terms should be struck down as onerous and unusual and/or unreasonable pursuant to UCTA.
  - d. Post Office breached its obligations listed in (b) above, made fraudulent misrepresentations to the Claimants (including by misinforming them about problems with Horizon when they called the Helpline), harassed (including by sending letters demanding payment) and maliciously prosecuted them.
  - e. The Claimants have suffered losses including distress and ill-health, and damaged employment prospects.

#### **Procedural background**

4. This case is being determined in stages. It was ordered that the nature of the legal relationship should be determined first. Paragraph 1 of the Order of 25 October 2017 provides that there “*shall be a trial of common issues, to determine issues relating to*

*the legal relationship between the parties*". That Order also listed those "*common issues*". An Order of 23 March 2018 set out, for the next trial, a set of issues regarding the operation of Horizon. That trial, which is mostly focused on expert evidence, is happening at the moment. The third trial, currently scheduled for November 2019, focuses on limitation, and associated breach, issues.

5. The background to the Common Issues trial included:
  - a. A hearing discussing the Common Issues trial on 19 October 2017, at which counsel for the Claimants said, at p.12F, that while he accepted that there would be a "*theoretical risk*" of excessive evidence being introduced, "*I do regard it at the moment as a secondary if not tertiary issue because of the way we've sought to structure the approach and because there are largely purely questions of either contractual interpretation simpliciter or contractual interpretation in a context which at least is largely common ground.*"
  - b. At the same hearing, Fraser J said, at p.14F, that if evidence which is adduced goes "*to breach...it wouldn't be relevant evidence anyway.*"
  - c. The Order setting up the Common Issues trial dated 25 October 2017 (referred to above) ordered both Statements of Case (at paragraph 8) and witness statements (at paragraph 10) to be specifically "*in relation to the Common Issues*".
  - d. A further hearing on 2 February 2018, at p.5G, Fraser J said the following to counsel for the Claimants: "*When this discussion/dispute arose at the last CMC, you addressed me shortly on why there was the need for factual evidence at all on the common issues, which you effectively said it is to put the contractual relations in context. I am giving you a shorthand, but that is more or less what it is.*"
  - e. At the same hearing, Fraser J said, at p.17F, that "*in a way the common issues are refinements of what really is the main general point which is what was the nature of the relationship.*"
  - f. And at p.34C-D, he said: "*There are in this case three main rafts of dispute, there is the contractual relations, there is the operation of Horizon and there is the impact of that on the individuals... The first of those three main areas is being tackled in the autumn of this year.*"

- g. At a hearing on 22 February 2018, Fraser J said, at 9D-E: *“I thought I made this crystal clear last time but I appear not to have done so I am going to repeat myself, so far as resolving the Common Issues which are, and I have reminded myself what they are, purely points of construction... On the authorities the only factual matrix which is relevant to construe the meaning of those contracts in law is common knowledge. That is without doubt orthodox and the correct way of doing it.”*
- h. He applied the criterion for disclosure of considering whether a particular item was *“relevant to the Common Issues”*: see e.g. p.26B; p.46G.
- i. He said, at p.48A, that *“what happened or what should have happened is not relevant to construing the Common Issues.”*
- j. At a hearing on 5 June 2018, Fraser J said, at p.57E-F: *“Whatever the factual evidence upon which you seek to rely it has to be relevant to the Common Issues... If it is not relevant to the Common Issues it is not admissible.... In those circumstances it is difficult based on reading the authorities to see for example, to use Mr. Cavender's example, how evidence of breach could remotely be relevant to the Common Issues Trial.”*
- k. At p.59C-E, he said: *“So this is what I am going to do. I am going to express myself very clearly. If you serve evidence of fact which includes passages which are plainly not relevant and, hence, not admissible, Mr. Cavender is going to have a choice. He can either simply say, "I am not going to be cross-examining at all" or he is going to issue an application to have it struck out. If he does issue an application to have it struck out and that application is effective, it will involve the court going through it and simply striking out large amounts. The court will make time to do that but cringing costs consequences will follow.”*
- l. Again, at p.60A, he warned against the adducing of *“wide-ranging evidence of fact...that cannot possibly form part of the factual matrix.”* He then said to counsel for the Claimants, at p.60C: *“a very powerful shot has now been fired across your bows on two occasions and I do not mean by [counsel for Post office]. I mean by me.”*

- m. However, when Post Office subsequently applied to strike out parts of the post-contractual evidence adduced by the Claimants in their witness statements, Fraser J refused the application, and said (*Bates v Post Office* [2018] EWHC 2698 (QB), at p.52:

*“It is worth expanding on this point made by the defendant, which is relied upon in favour of allowing this application. It is that as a result of admitting this evidence (by which the defendant means failing to find it inadmissible and striking it out) the court will either find itself asked, or will make, findings on matters that are in reality to be dealt with in the Horizon Issues trial, or in the later trials that are to deal with specific breach, loss and damage alleged by the individual Lead Claimants. I do not accept that there is such a risk. The trial that is about to commence on 5 November 2018 is to deal with the Common Issues. Those Common Issues number 1 to 23. They are attached to Schedule 1 of the Directions Order of 19 November 2017. They are the agenda for that trial. There is no such risk of the court making findings on the Horizon Issues, or of the court making findings on breach. Judges are expected to be able to consider relevant matters pertaining to different issues, keeping them compartmentalised where necessary. What is relevant for one issue may not be relevant to another.”*

6. Nonetheless, at trial the judge reiterated (Day 14, p.50, lines 2-3): *“I am entirely clear that nobody wants me to go near breach”*.

#### **Post Office’s position at trial**

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

*“29. This trial is the first stage in the resolution of the issues in the group litigation. It necessarily precedes the determination of issues as to the functions and reliability of the Horizon system and the determination of matters going to breach of contract and liability in individual cases.*

*30. The Court confirmed in Judgment No. 2 that it would not be drawn into “making findings on the Horizon Issues, or...making findings on breach” at the present trial (para. 52). Post Office welcomes that ruling. Post Office*

*anticipates that Cs' case on the supposed relevance of its breach allegations to the Common Issues will become more fully articulated at trial.*

*31. In any event, it will be important for the parties not to stray into issues that fall to be determined at the Horizon trial and/or issues as to breach. The Court will recall that Post Office has not adduced any evidence at this trial to make good its case on Horizon; nor has it sought to address in evidence the various breach allegations that appear in Cs' witness evidence. Post Office has not prepared for a trial on Horizon or a trial on breach. The function of this trial is not to reach any findings on those issues, or on facts that go to those issues."*

2. This position was reiterated in oral opening submissions:

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*1 You will see what we said in our written opening  
2 about things that it would be useful -- findings to make  
3 and not to make. In your number two judgment you made  
4 it clear you are not making findings on the breach  
5 allegations or allegations about Horizon.  
6 MR JUSTICE FRASER: Everyone is agreed about that.  
7 MR CAVENDER: See paragraph 52. What I also ask that you  
8 don't do is make any findings of fact that go to -- are  
9 ancillary to those breach allegations or Horizon  
10 allegations , rather than the Common Issues. Otherwise,  
11 again , you have the difficulty of overlap and arguments  
12 about issue estoppel and all these kinds of things .  
13 MR JUSTICE FRASER: It depends what you mean by findings of  
14 fact that go to breach. I imagine, if there are any  
15 necessary findings of fact at the end of the evidence in  
16 terms of disputes of fact as to whether Mr Bates got  
17 document X, you won't want me to leave that floating in  
18 the air , will you?  
19 MR CAVENDER: My Lord, no. That goes to my first  
20 category of --  
21 MR JUSTICE FRASER: I know that and I haven't yet bottomed  
22 that out with Mr Green. Because, on one view, a finding  
23 of fact that goes to breach could involve any finding of  
24 fact in relation to the contractual relationship ,  
25 couldn't it ?*

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*1 MR CAVENDER: But what I am talking about is downstream. So  
2 the training wasn't good enough, that they didn't have  
3 sufficient report writing , that they didn't have enough  
4 help with investigations ; all those things that are*

5 downstream. Potentially breach. We haven't brought the  
6 evidence to the trial to deal with it . There hasn't  
7 been full disclosure on some of these issues . So we  
8 won't be dealing -- and this has been our persistent  
9 position -- obviously this is a trial about the contract  
10 and the relationship . Those are my submissions.  
11 Obviously the court will do what it will do.

3. Post Office once again stressed this in its written closing submissions:

*“31. This trial is the first stage in the resolution of the issues in the group litigation. It necessarily precedes the determination of issues as to the functions and reliability of the Horizon system and the determination of matters going to breach of contract and liability in individual cases.*

*32. The Court confirmed in Judgment No. 2 that it would not be drawn into “making findings on the Horizon Issues, or...making findings on breach” at the present trial (para. 52). {B7/27/19}. Post Office respectfully submits that the Court should also resist any invitation to comment on the substance of those issues and disputed facts going to them, even if those comments fall short of findings.*

*33. It remains, even after hearing the evidence and cross-examination, wholly unclear on what basis Cs will seek to persuade the Court that it can have some regard to (or should make any findings or comment upon) the evidence of post-contractual conduct and documents. Nothing that Cs argued in their opening submissions sheds any light at all on how Ms Stockdale's experience of shortfalls in 2016 is said to be something to which the Court can have regard in interpreting the relationship that she entered into with Post Office in 2014, for example. Nor is there anything to suggest that her experience is relevant to any other C's relationship with Post Office at any relevant time. The same goes for the other lead Cs.*

...

*35. Ultimately, no case as to the relevance of the post-contractual events has been pleaded or set out in the Written Opening Submissions because there is no such case to advance. The simple truth is that Cs have always intended to ignore the limitations on the scope of the Common Issues Trial in the hope of*

*securing some advantage by bringing the whole of their claims (without proper responsive evidence from Post Office and without full disclosure).*

*36. Now that the promised case as to relevance has failed to materialise, it is clear that Cs' intention must always have been to engineer a situation in which they can fight out the merits of the lead claims on an unlevel playing field. Cs must anticipate, for example, that the absence of full evidence and disclosure puts them in a stronger position to obfuscate in relation to their own post-contractual conduct (although, ultimately, one of the lead Cs felt that she had to invoke the privilege against self-incrimination as regards her accounting to Post Office). All this must be in the vain hope that the Court might be influenced by inadmissible evidence in determining the Common Issues.*

*37. It remains acutely important not to stray into issues that fall to be determined at the Horizon Trial and/or future trials on breach and liability. The Court will recall that Post Office has not adduced any evidence at this trial to make good its case on Horizon; nor has it sought to address in evidence the various breach allegations that appear in Cs' witness evidence. Post Office has not prepared for a trial on Horizon or a trial on breach. It has not, for example, led expert evidence on Horizon, and it has not provided anything like the accounting evidence that it would lead at a liability trial. The function of this trial is not to reach any findings on those issues, or on facts that go to those issues.*

*38. In this context, it was wholly unfair and unattractive for Cs to criticise Post Office's witnesses for having failed to address irrelevant material in their witness statements: see, e.g., the implied criticism of Ms Van Den Bogerd for not having addressed in her witness statement various internal Post Office documents that have been disclosed {Day8/165:12}, despite the fact that such documents are irrelevant to the Common Issues and any evidence in relation to them would be inadmissible. Ms Van Den Bogerd's witness statement was of course prepared in light of the limited permission to file and serve evidence "in relation to Common Issues": see para. 10 of the First CMC Order {B7/7/5}. She makes clear in the witness statement itself that her evidence is*

*limited to matters that she considers could have been known or anticipated by an applicant SPM at the time of contracting: see, e.g., para 64 (in relation to the operation of an agency branch) {C2/1/17}, paras 91-98 (in relation to Horizon) {C2/1/27}, paras 114-115 (in relation to further training and support) {C2/1/32} and para 116 (in relation to retail “shrinkage”) {C2/1/33}. She was careful not to trespass onto the Horizon Issues: see, e.g., Fn. 22 and 24 {C2/1/23}. It is perverse to criticise a witness for seeking to comply with a direction as to the scope of evidence and for limiting herself to admissible evidence. Ms Van Den Bogerd of course had the benefit of advice as to the proper scope of her evidence: {Day9/73:7} to line 14.*

*39. By contrast, Cs’ submissions and cross-examination of Post Office’s witnesses ignored the limits on the proper scope of the present trial and strayed well beyond anything that could be relevant and admissible for the purposes of resolving the Common Issues. This was in at least five respects.*

*40. First, Cs sought to explore technical matters that are set down for determination in the Horizon Trial and which have no relevance to the Common Issues:*

*(a) Mr Green QC invited the Court to look at transaction log print-outs from the Horizon terminal, arguing for the utility of such print-outs in tracing the transaction history of the branch: {Day1/19:7} to line 22. There is extensive evidence on this in the Horizon Trial.*

*(b) Ms Van Den Bogerd was taken to documents relating to known bugs and errors in Horizon: see, e.g. {Day8/81:16}. The Payments Mismatch bug to which the witness was referred was presented as having created shortfalls or gains (and this was reflected in the Court’s questions on it), whereas its effect was in fact to obscure (or “lose”) a shortfall or net gain that existed at the time of rolling over into the next trading period: see {G/8}. Any superficial exploration of technical issues creates a substantial risk of misunderstanding. Cs cannot invite the Court to skate over the surface of these technical issues.*

*(c) Ms Van Den Bogerd was asked to comment on various proposals for incremental improvements to technical aspects of the Horizon system: {Day 8/114:16} to {Day8/118:9} and {Day9/2:19} to line 25. The suggestion, which*



*is wrong as matter of a logic and common sense, seemed to be that because system was or might be improved, it must previously have been inadequate.*

*(d) Ms Van Den Bogerd was asked about the technical possibility of remote alteration of branch data by Fujitsu: {Day9/30:24} to {Day9/35:21}. The Court intervened to stop the line of questioning on the basis that it could not be “of the remotest assistance”: see {Day9/35:23}.*

*(e) Mr Green even sought to cross-examine Ms Van Den Bogerd on parts of her witness statement for the Horizon Trial: {Day8/60:4} to line 24. It is hard to imagine a starker example of Cs’ refusal to respect the structure of this group litigation and the scope of the Common Issues Trial.*

*(f) Mr Breeden was asked about the possibility of various technical problems with the Horizon system, including as to “client data integrity”: {Day7/113:17} to {Day7/114:4}.*

*41. All of this – the documents put to the witnesses, the questions and the witnesses’ answers – is wholly irrelevant to the determination of the Common Issues. This is obvious even from Cs’ oral opening submissions, in which it was stated that the technical detail in relation to Horizon was not known to SPMs at the time of contracting: “incoming subpostmasters, prior to contracting with Post Office, would have no knowledge of how Horizon itself worked and in particular the accounting points...”: {Day 1/27:7} to line 11. None of it can be matrix of fact or otherwise relevant to the Common Issues.”*

4. Finally, it was addressed in oral closing submissions:

*Day 14, page 27*

*18 MR JUSTICE FRASER: And you don’t take post-contractual  
19 matters into account on either footing .*

*20 MR CAVENDER: Or hindsight or views from hindsight. You  
21 have to ask the right question. The right question is  
22 not: well , is it reasonable? You don’t ask: well , what  
23 term should be implied in light of what happened in  
24 fact ? That is the mistake made in Bou Simon by the  
25 First Instance that the Court of Appeal identified . And*

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

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

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

4 shows. There is a lot of evidence here of that nature.  
5 My learned friend has put his case both in  
6 cross-examination and his closings on that basis . So  
7 you have a yawning invitation to make a mistake and it  
8 is my job to try and prevent that happening and I intend  
9 to try and do that . But in doing that , you have to be  
10 very careful what question you ask and what evidence you  
11 have regard to when you ask it .  
12 I will just divert a moment and put some skin on  
13 those bones. When you are looking at implied terms  
14 particularly , my learned friend is fascinated by doing  
15 it in the guts of the dispute and the thing going wrong.  
16 When you know a lot more detail - - and at that stage you  
17 would be able to identify certain cardinal obligations  
18 and things that have gone wrong and try and put them  
19 right . "Tempting but wrong", in the words of M&S.  
20 At the stage you're contracting you know very much  
21 less . You have a very high level view of what you  
22 expect. So the very notion of being able to imply  
23 precise terms dealing with suggested infelicities or  
24 difficulties down the line is itself wrong headed  
25 because you wouldn't be able to do that .

...

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

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1 disclosure on either side dealing with the issues they  
2 now seem to want to be dealt with. In particular , what  
3 we call the breach allegations , we only have a few  
4 documents that happen to be caught in the net of the  
5 word searches. Your Lordship should not think that we  
6 have full disclosure on all these issues . We do not.  
7 And the real temptation here is to think you have and to  
8 draw inferences from an incomplete documentary record,  
9 incomplete evidence, which would in my submission be  
10 obviously wrong.  
11 So, for instance , your Lordship should not be fooled  
12 into thinking there has been anything like proper  
13 disclosure on allegations as to training or shortfalls  
14 or investigations . Your Lordship did not order such  
15 disclosure , there has not been such disclosure , and  
16 Post Office has not led evidence on those issues . My  
17 learned friend has put questions on those areas - -  
18 MR JUSTICE FRASER: You have led evidence on training .  
19 MR CAVENDER: My Lord, only very, very high level . I think  
20 it was a couple of paragraphs --  
21 MR JUSTICE FRASER: Quite a lot of your evidence was high

22 level in some areas, and I ' m not criticising , I ' m  
23 observing, but you did lead evidence on training .  
24 MR CAVENDER: My Lord, only just high level evidence. If  
25 you wanted evidence on training , we would have evidence

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1 from trainers and the proper documentary record of the  
2 plans et cetera . All we did was have a few slides , that  
3 wasn ' t proper evidence.  
4 The other thing about training of course is it is  
5 wholly irrelevant . Why? Because my learned friend ' s  
6 case is that all the contracts were made in advance of  
7 even initial training , let alone subsequent training , so  
8 the whole question is wholly irrelevant .  
9 MR JUSTICE FRASER: The irrelevance point I understand, but  
10 it is wrong to submit you didn ' t put in any evidence on  
11 training - -  
12 MR CAVENDER: We didn ' t put any proper evidence on  
13 training - -  
14 MR JUSTICE FRASER: Mr Cavender, there is no distinction  
15 between putting in evidence and putting in proper  
16 evidence. You might have a point that it could have  
17 been more comprehensive --  
18 MR CAVENDER: There has been no disclosure on training.  
19 MR JUSTICE FRASER: There might not have been. But you did  
20 put in evidence on training because some passages of  
21 your witness statements expressly deal with training .  
22 MR CAVENDER: My Lord, yes, there is a paragraph or two in  
23 Mrs Van Den Bogerd ' s statement that on a very high level  
24 says . But not evidence of training where your Lordship  
25 can make any finding. Her evidence is about what could

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

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7 In my submission, the court should be focusing its  
8 findings on the date of contracting , we just touched on;  
9 what each lead claimant knew or could be taken to have  
10 known at the date of contracting through his or her own  
11 due diligence and through the interview process;

12 findings as to what a reasonable person in the position  
13 of the claimant would have understood about  
14 the relationship as at the date of contracting ; and  
15 points of credibility going to lead claimants where they  
16 bear on any of those earlier points .

...

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24 MR JUSTICE FRASER: I understand your submission: you are not,  
25 because of the nature of the peculiar situation in which

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1 the claimants find themselves, inviting me to make  
2 adverse findings on their credibility .  
3 MR CAVENDER: Correct.  
4 MR JUSTICE FRASER: Is that right ?  
5 MR CAVENDER: It is.  
6 MR JUSTICE FRASER: So when you put to at least some of  
7 them, I think , that they weren't telling me the truth ,  
8 do you want me to ignore their answers?  
9 MR CAVENDER: My Lord, it is really a matter for you at the  
10 end of the day, what you think is proper. What I am  
11 saying is that there has not been full disclosure on  
12 those matters, that the reason that it was put was to  
13 seek to undermine the impression they had given in their  
14 witness statements that they were telling the full  
15 story . So what we are left with, my Lord, in my  
16 submission, is , you should treat their witness evidence  
17 with caution , because you have seen that not in every  
18 respect has their account of the way things worked out  
19 been full or sometimes fair .

...

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23 MR JUSTICE FRASER: So far as the claimants' evidence is  
24 concerned, therefore , you say treat it all with caution  
25 for all the reasons you have gone through, but you are

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1 inviting me not to make any findings on their  
2 credibility .  
3 MR CAVENDER: Indeed.  
4 MR JUSTICE FRASER: Any adverse findings on their  
5 credibility , is that right ?  
6 MR CAVENDER: Yes, because to do so you would have to make  
7 findings as to the accounting system, to the TCs, what  
8 happened in fact , and you haven't had full evidence on  
9 that by any means.  
10 You can test it in this way: these are questions of  
11 breach, this is a classic question of breach. This is  
12 what they will be if there is a breach trial in October,  
13 or whenever it is going to be, that will be exactly what

14 these witnesses will be putting forward. But then with  
15 the benefit of the judgment here as to what the rules  
16 are , and with Horizon and how good or bad that is . But  
17 this will be the meat and drink of that breach trial .  
18 Now, what has happened in this court in the last  
19 four weeks is a fact . It has been recorded, it is in  
20 the transcript . Those witnesses can of course be taken  
21 back to that evidence during the breach trial and it  
22 will be surprising if they were not. So it is not  
23 wasted, it is in the can ... It is still as a matter of  
24 record it is there . But for you to make findings on it ,  
25 my Lord, we go further , for the same reason you

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1 shouldn't make findings on the accounting processes  
2 generally and all these other matters that have come in  
3 by a side wind but there has not been full disclosure  
4 on.

...

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

...

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

23 paragraph 10. That is the trial Post Office has  
24 attended and involved itself in . It has not engaged in  
25 wide-ranging evidence on breach, which the claimants

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1 have, and so not only would it be an error of law to  
2 have regard to it , it would also be procedurally unfair  
3 for that reason. Because in the absence of full  
4 disclosure on matters such as the dispute , Horizon,  
5 accounting, procedures, deficits , training and Helpline ,  
6 without full evidence and disclosure on all those  
7 points , the court should not engage in inferential  
8 findings or comments along the way. It shouldn't do so  
9 as a matter of procedural fairness but also particularly  
10 given there are two other trials that have been loaded  
11 in the system effectively on Horizon and on breach,  
12 where on those very matters there will be full  
13 disclosure , there will be full evidence and there will  
14 be determinations.

15 The other point I mentioned I think earlier was  
16 whether you should also be careful because of the nature  
17 of the way it has been set up - - we had a humorous  
18 debate about whether it was odd or not, but whether you  
19 should make comments as well about "be careful to ",  
20 because, otherwise, an independent observer might think,  
21 wrongly obviously, that the comments you make are  
22 a route along the way to reaching a particular view or  
23 a finding , which you would then have to find in judgment  
24 two or three - - sorry , in trial two or three . So again  
25 there is that sensitivity , which your Lordship no doubt

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I will obviously have in mind.

## **The Judgment**

### **Improper findings**

5. In that context, Post Office is concerned that large parts of the judgment either make findings, or strongly indicate what the judge's findings will ultimately be, on questions of breach, and (to a lesser extent) also on questions of the operation of Horizon (the subject-matter of the ongoing trial) and loss and damage. That is all in a context where there has been no proper process providing for disclosure or witness evidence on those matters (because they fell outside the scope of the Common Issues trial, which focused only on the legal relationship, viewed through the prism of six Lead Claimants).

6. The following are significant examples (identified by paragraph number).

*Training*

7. The adequacy of training will be an issue at future breach trials. As to that, the judge (in the draft judgment) made the following findings/ indications:

193: Mr Sabir's evidence on this, which I accept, matches the other evidence from other Lead Claimants about in-branch training.

297: 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".

346: 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.

352: 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.

437: 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 these laminated instructions were followed, there would be shortages in the cash accounts of branches where these occurred.

569, factual matrix 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.

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.

### *Shortfalls*

8. At the breach trials there will be important issues as to the cause of shortfalls, and how SPMs dealt with them. As to that, the judge (in the draft judgment) made the following findings/ indications:

170: Mrs Stubbs simply could not resolve these shortfalls, or explain them

172: [Mrs Stubbs] 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.

217(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.

218: Mr Sabir's account is substantiated by the audit report itself, prepared by the auditors two days after the audit.

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.

223: 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.

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.

309: 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.

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.

346: 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.

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.

### *Investigations*

9. There will be issues in future breach trials as to the quality of the investigations which Post Office conducted into shortfalls. As to that, the judge (in the draft judgment) made the following findings/ indications:

115(1): 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)...It suggests that Mr Bates’ experience [of shortfall investigation] 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.

165: “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.”

208: Mr Sabir notified the Post Office of this as soon as he discovered 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.

247: 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.

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.

### *Helpline*

10. The Claimants will say, at breach trials, that operators of the Helpline (a) provided an inadequate service, and (b) made misrepresentations to them. As to that, the judge (in the draft judgment) made the following findings/ indications:

248: 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.

303: 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.

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.

556: 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.

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.

*Post Office knowledge of problems*

11. What Post Office knew about any problems in Horizon will be important at future breach trials (including, in particular the trial focused on limitation and associated issues of breach which is currently scheduled for November 2019). As to that, the judge (in the draft judgment) made the following findings/ indications:

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.

541: 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

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.

569, factual matrix point 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.

*Reasonableness of suspensions/ terminations*

12. A large part of the Claimants' case at the breach trials will be that the process by which they were suspended/ terminated involved breaches of duty by Post Office. As to that, the judge (in the draft judgment) made the following findings/ indications:

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.

264: It is not clear if "my investigation" [in the course of an appeal against a summary termination] 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.

403: 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.

479-480: 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.

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.

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.

515(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. (emphasis in original)

(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.

723(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.

#### *Harassment/ malicious prosecution*

13. The Claimants claim that Post Office breached its obligations by improperly sending them letters demanding payment, and by threatening and maliciously bringing proceedings (civil as well as criminal) against them. As to that, the judge (in the draft judgment) made the following findings/ indications:

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.

327: 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.

462: 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.

516: 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: 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.

518: 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.

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.

Para 569, factual matrix point 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.

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.

...

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 rationale 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 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.

#### *Horizon Issues*

14. The judge also made the following findings relevant to the ongoing Horizon Issues trial:

569, factual matrix point 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.

569, factual matrix points 50-51: The introduction of Horizon limited the Claimants' ability to access, identify, obtain and reconcile transaction records.

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.

569, factual matrix points 54-57: 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.

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.

#### *Loss and damage*



15. By way of final example, the judge made findings which will be directly relevant to Mr Abdulla's claim for loss and damage (presumably to include distress and lost employment opportunities):

225: 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

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.

### Vitriol

16. A separate but overlapping category of statements from the judgment involved apparently unnecessary vitriol directed at Post Office, its witnesses, and the NFSP (the organisation which represents SPMs). None of these statements appear to be relevant to disposal of the Common Issues.

### *Suggestions that Post Office has treated SPMs badly*

17. The following are examples:

36: There seems to be a culture of secrecy and excessive confidentiality generally within the Post Office, but particularly focused on Horizon.

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.

123: 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.

191(2): Even if the SPMC was not included in the envelope (a possible scenario for any applicant, given the Post Office approach to applicants)...

523: The Post Office appears, at least at times, to conduct itself as though it is answerable only to itself.

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.

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.

1059: 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.

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.

*Suggestions that Post Office has misbehaved in this litigation*

18. The following are examples:

12: The making of a GLO at all was opposed by the Post Office<sup>1</sup>

14: Post Office in particular has resisted timely resolution of this Group Litigation whenever it can, and certainly throughout 2017 and 2018.

14: 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.<sup>2</sup>

21: Post Office seemed to want findings on that only if they were in the Post Office’s favour.<sup>3</sup>

28: The Post Office may have made these submissions because, on an objective analysis, it fears objective scrutiny of its behaviour

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<sup>1</sup> This is untrue, as has been pointed out to the Court in respect of a previous draft judgment (which the Judge refused to correct).

<sup>2</sup> Post Office actually said the opposite: that the Court should be careful to make findings which were binding across the Claimant group.

<sup>3</sup> Untrue. We made clear that he would need to make findings on receipt of documents etc – but that he could not use any adverse views arising out of their accounting/deficit evidence: as that was not properly before the Court – there had not been disclosure or full evidence on it. Therefore it would be unfair to the Claimants. Again: it seems this has been deliberately skewed.

30: 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*.

34: 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.

123: He [Mr Bates] 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.

295: 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.

341(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.

476: This passage of her [Mrs Ridge's] evidence appeared to have been written for her, but again, the point was not put so I make no findings about it.

483: Given by early 2017 this litigation was well underway it may be an example of internal suppression of material

532: 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.

544: 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.

560(1): 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.<sup>4</sup>

#### *Attacks on Post Office's witnesses*

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<sup>4</sup> Post Office was given no opportunity to comment on this. There was in fact an explanation –the redaction appeared in the original document, and was mandated by statute.

19. The following are examples.
20. At para 425 the Judge trenchantly criticises the evidence of Angela Van de Bogerd for not covering certain topics – when those topics are not within the scope of the trial, and she confirmed she had been advised as to the scope of what to include in her witness statement.
21. At para 544 the Judge trenchantly criticises the evidence of Nick Beal, as regards his evidence of his understanding that the new NTC contract, although a different contract, did not dramatically alter the relationship between PO and the SPMs. The Judge strongly implied that this was deliberately false evidence. This is curious, given that (a) this evidence accorded with the Claimants’ position on construction, and (b) at para 474, the Judge says that Post Office staff did not pay much attention to the wording of the contracts.
22. He also broadened the attack, at para 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 a frank answer would not be helpful to the Post Office’s cause.

*Attacks on NFSP*

23. The NFSP was not represented, and did not have the opportunity to comment on these criticisms:

368: 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.

577: 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.

589: 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.

596(1): 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.

**DC QC**

**GC**

**SWW**

13.3.19