Case No: A1/2019/1387/PTA

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE HONOURABLE MR JUSTICE FRASER
HQ16X01238, HQ17X02637 AND HQ17X04248

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2019

Before:

LORD JUSTICE COULSON

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Between:

Bates and Ors	**Claimant**
- and -	
Post Office Limited	**Defendant**

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- -

Helen Davies QC, Gideon Cohen and Joanne Box (instructed by Herbert Smith Freehills Llp) for the **Claimants**
Patrick Green QC, Henry Warwick, Ognjen Miletic and Reanne MacKenzie (instructed by Freeths Llp) for the **Defendant**

Hearing date: 12th November 2019

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Judgment on PTA

LORD JUSTICE COULSON:

These are my Reasons for refusing PTA following an oral hearing on 12 November 2019. Although it is convenient to put those reasons in judgment form, this is not a judgment which can be cited in other cases and therefore has no neutral citation number.

1. General

1. There are a number of reasons which militate against granting the PO permission to appeal against Judgment 3 (Common Issues). Those should be shortly stated before I go on to deal with the individual grounds of appeal. They form the background against which the test of 'realistic prospect of success' must be applied in this case.

2. The judgment followed a trial of 6 weeks in which the electronic bundle was vast. The core documents alone filled 60 lever arch files. There were 20 witnesses of fact who gave oral evidence. The judgment is 320 pages and 1122 paragraphs long. In relation to the Common Issues, in the words of Lewison LJ in ***Fage***, the trial and the subsequent judgment were manifestly 'the first and last night of the show'. No judge will ever know more about this case generally, and the Common Issues specifically, than Fraser J.

3. Furthermore, any consideration of the application for permission to appeal must bear in mind the dangers of attempting to untangle one issue for the purposes of an appeal, and the unacceptable 'island-hopping' that might result. The oral hearing of the permission application demonstrated all too clearly the impossibility of this task: inevitably, consideration of one issue opened up another, and another, until the whole first instance trial ended up being re-fought. That is manifestly not in the interests of justice.

4. This is compounded by the inescapable conclusion that many (if not most) of the PO's challenges are, when properly analysed, challenges to the findings of fact made by the judge or the inferences to be drawn from them. He heard extensive evidence about the background to these contracts, how they operated in practice, how the written terms differed from the expectations of reasonable persons, and the practical consequences of the problems with the Horizon computer system. Challenges to such findings of fact are not open to an appellant in the position of PO: see ***Fage UK Ltd*** [2014] EWCA Civ 5 and ***Henderson v Foxworth*** [2014] UKSC 41. This represents a fundamental difficulty for the PO because even the judge's conclusions of law (such as the formulation of the implied terms) are so entangled with his findings of fact that it is neither just nor practicable to endeavour to separate them out.

5. Many of the PO's difficulties now are self-inflicted. For example, as happened during the trial and on the application for permission to appeal both to the judge, and to this court, the PO has consistently put its arguments much too high. It made sweeping statements about the trial and the judgment which were demonstrably wrong. The PO ascribed various findings or conclusions to the judge which, on analysis, form no part of his judgment. As the judge himself noted when refusing permission to appeal, even when concerned with findings that he did make, the PO takes such findings "either wholly out of context, mis-stated, or otherwise not correctly summarised".

6. In my view, the judge dealt comprehensively with why he refused permission to appeal in his separate judgment of 17 June 2019 which itself runs to 91 paragraphs. The PO have made their further application to this court without taking on board any of the points made by the judge in that judgment. With one or two minor exceptions, I agree with the judge's detailed reasons for refusing this application for permission to appeal, and regard them as an answer to the renewed application to this court.

7. Another aspect of the PO's litigation strategy which works against them now is their desire to take every point, regardless of quality or consequences. That was regularly apparent during the trial, where the judge correctly labelled their approach as "attritional". The same approach was still in evidence on the application for permission to appeal.

8. The most obvious example is the PO's anxiety to state what they do not like about a particular proposal from the SPMs or the consequential finding by the judge, without providing any practical alternative. Take the issue of implied terms. The PO accepted at trial that the written contracts (the SPMC and the NTC) were inadequate as they stood and that some terms had to be implied. But the PO's proposed terms were pitched at such a high and general level that they were of no practical value. By contrast, the SPMs put forward 20 odd detailed terms for the judge's consideration. The judge asked the PO to be more helpful: the PO's pleaded response was a one-line assertion that the terms put forward by the SPMs were denied. Having refused to put forward the detail of their case on the implied terms at the appropriate time, the PO cannot seriously complain now because they do not like the detail of the implied terms found by the judge.

9. None of this engenders any confidence in the underlying merits or prospects of success of the PO's application for permission to appeal.

10. Contrary to the PO's repeated argument, there is no "other compelling reason" to grant permission to appeal, beyond a consideration of the individual grounds which they raise. The fact that the judge's findings may affect other contracts with SPMs has always been known: that is why this was designated group litigation in the first place. There is no greater or wider right to permission to appeal just because this is group litigation; indeed, from the point of view of practical justice for those waiting for the outcome of this application, and all the other sub-trials listed in front of Fraser J still to come, the opposite may well be the case. In any event, as the judge noted, the SPMC is of historical interest only, because it is no longer in use.

11. Finally, just standing back for a moment, there is an underlying point of common sense or commercial reality which, in my view, runs through every part of this application for permission to appeal. The PO describes itself as 'the nation's most trusted brand'. Yet this application is founded on the premise that the nation's most trusted brand was not obliged to treat their SPMs with good faith, and instead entitled to treat them in capricious or arbitrary ways which would not be unfamiliar to a mid-Victorian factory-owner (the PO's right to terminate contracts arbitrarily, and the SPMs alleged strict liability to the PO for errors made by the PO's own computer system, being just two of many examples). Given the unique relationship that the PO has with its SPMs, that position is a startling starting point for any consideration of these grounds of appeal.

12. None of this is a criticism of Ms Davies QC who was not involved in the trial or the application for permission to appeal to the judge in May, and who argued the points at the oral application for PTA with real skill and tenacity. But because of all that had gone before, she always had something of an uphill struggle.

2. Common Issue 1: Implied Duty of Good Faith (Grounds 2(a), (b) & (c))

Ground 2(a) Relational Contracts

13. The complaint is that the judge "erred in implying the good faith term automatically from the classification of the contracts as 'relational'". This point is repeated in paragraph 10 of the PO's skeleton argument, where the word 'automatically' is rendered in bold.

14. In my view, on any fair reading of the judgment, the judge did no such thing. He considered the circumstances of this case and found, for a variety of reasons, that the good faith duty should be implied into these contracts. Having reached that conclusion he said [711] that the contracts could "most usefully [be] termed 'relational contracts'". That was a pure point of categorisation; nothing substantive turns on it. At no point did he find that, because the contract could be described as 'relational', the good faith term somehow "automatically" had to be implied.

15. Ms Davies QC accepted that, despite its formulation in the grounds of appeal, the judge did not say this in terms. She argued that I should infer it from various paragraphs, scattered all around the judgment, such as [692], [705], [720], [738], and [1117]. But that is not what those paragraphs say, even when read in isolation, and it is plainly not what the judge found when reading his judgment as a whole.

16. The judge noted in his reasons for refusing permission to appeal, this repeated mischaracterisation of what he actually found seems to stem from "a failure by the PO to understand the concept of relational contracts". I would agree with that. He was defining relational contracts *for the purposes of this judgment only* as a contract that included the duty of good faith. He was not referring to (indeed, it appears that he was endeavouring to avoid) the academic debate about that small sub-specie of relational contracts (as defined in the authorities) that might not carry with them the good faith obligation.

17. So it is wrong to say that the judgment was contrary to the decision in ***Globe Motors.*** That case is authority for the proposition that the implication of the duty of good faith depends on the terms of the particular contract: that is precisely the extensive exercise which the judge carried out in the present case.

18. Accordingly there is no realistic prospect of success on Ground 2(a).

Ground 2(b) Implication of the Duty of Good Faith

19. The essential complaint under this head is that the judge was wrong to imply the good faith duty. In my view, this argument is not open to the PO on appeal and, even if it were, it has no realistic prospect of success.

20. It is not open to the PO because, having set out the law on what good faith is and the circumstances in which the duty might be implied into a contract, the judge then

applied those principles to his findings of fact as to the nature, scope and extent of the contracts, how they operated in practice and the gulf between the written terms and the expectations of reasonable persons in the position of the PO and the SPMs. That led to his conclusions as to how and why it was appropriate, in these circumstances, for the implied duty to be implied into these contracts.

21. These detailed conclusions were therefore based (either wholly or in large part) on the judge's findings of fact, which were themselves based on the mass of documentation and oral evidence that he heard. In the circumstances of this case, there is no basis on which those findings could or should be reopened.

22. Even if the argument were theoretically available to the PO, it has no realistic prospect of success. The judge dealt carefully with why the duty was implied in this case (see for example his analysis of the law from [705]-[727] and then his application of that to the facts at [728]-[738]). There were no arguable errors of law in that analysis.

23. Ms Davies QC said that the judge had failed to have regard to the test of necessity when implying the duty of good faith. This was in part based on a convoluted argument that, because the judge said that some of the detailed implied terms arose out of good faith as opposed to necessity, that must somehow mean that he had implied the good faith duty without having regard to the test of necessity.

24. I do not accept that submission. First, it is quite plain on any reading of the judgment that the judge paid particular regard to necessity when considering the implication of the duty of good faith: as Mr Green QC put it, "the test of necessity was baked in" to the judge's conclusions as to good faith. He took [748] as an example of where the judge used the importance of necessity to limit the scope of certain implied terms which the SPMs said arose because of the duty of good faith.

25. Secondly, I consider that the PO's argument is based on an unfair description of what the judge was trying to do. The judge made it plain that the vast majority of these implied terms (17 in total) arose because of the duty of good faith which, as I have said, he found on a proper application of the principles relating to necessity. From [743] onwards, he undertook a term-by-term analysis and concluded that some of these terms (10) were more reflective of good faith and others (7) were more reflective of necessity. He was not however saying that the 10 were somehow 'unnecessary'. The terms that he identified separately as arising through necessity alone (3) were identified in that way so as to emphasise that they needed to be implied in any event. None of that supports the conclusion that the judge must have approached the good faith test without having regard to necessity.

26. For completeness, I take three of the detailed points raised by the PO to explain why the PO has no realistic prospect of persuading this court that the duty of good faith should not have been implied.

27. First, the PO raises an issue about whether these contracts were or were not 'long term'. In my view, that was primarily a factual matter, determined by the judge on a consideration of the specific circumstances of the contracts between the PO and the SPMs. The judge having made those findings of fact, this court will not interfere with them. Similarly, in respect of the alleged difference between agreed and expected

durations, that is i) caught up with the PO's misunderstanding of the relevance or otherwise of 'relational' contracts and ii) again ignores the judge's findings of fact.

28. Ms Davies QC complained that the judge had ignored those authorities which suggested that, if a contract was terminable on short notice, it might not be regarded as a long term contract. But the obvious answer to that, and the one that the judge identified [632] is that most contracts have such termination provisions and that what matters is the underlying nature of the duties and obligations that each party owed the other. Moreover, the judge found on the facts that it was always intended that the relationship between the PO and the SPM would be long term. That was a finding of fact which the PO cannot now seek to reverse. Ms Davies QC was driven to argue that the judge did not give appropriate weight to the termination provisions, but for the reasons that I have already given, questions of weight were entirely for the trial judge.

29. Secondly, another of the PO's arguments is that the parties had already agreed certain express and implied obligations and that, between them, these filled the gap into which any good faith duty would otherwise be implied. The judge carefully considered that argument and rejected it, finding that the spirit and objectives of the PO and the SPMs were not capable of being expressed exhaustively in the written contract. As I have already noted, the PO had expressly conceded that. The judge therefore found that there was room for the implied duty of good faith: see [75] and [728]-[738]. That was a conclusion he was entitled to reach on the facts, and the contrary argument has no realistic prospect of success. If the PO has been hampered in making its case on this point because of its refusal to engage with the detail at the trial (the point made at paragraph 8 above), that was a matter for them.

30. Thirdly, on the related argument that good faith was unnecessary because of the implied terms of the sort identified in ***Stirling v Maitland***, I consider that argument to be hopeless. As the judge himself noted at [740] - [741], those terms deal with inhibition and prevention and fall far short of a duty of good faith.

31. For these reasons, I do not consider that Ground 2(b) has any realistic prospect of success.

Ground 2(c) The Nature/Scope of the Good Faith Duty

32. Here the complaint is that the judge was wrong to imply a 'broad and onerous good faith term' which went well beyond co-operation and a requirement for honesty.

33. I reject the suggestion that the judge's finding led to the implication of a "broad and onerous" term. On the contrary, at [706] the judge's finding was limited, namely a requirement that the parties "refrained from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people". The authorities stress the low hurdle that this represents: see ***Sheikh Al Nehayan v Kent***, where this test was formulated specifically so as *not* to be a demanding obligation. If the PO regard that as 'onerous', they have fundamentally misunderstood the contractual obligations necessitated by the duty of good faith.

34. During her oral submissions, Ms Davies QC said that the PO objected to the last sentence of [738] when the judge said that "transparency, co-operation, and trust and confidence are, in my judgment, implicit within the implied obligation of good faith."

She said that this went wider than the term in ***Sheikh Al Nehayan***. I disagree. The judge was simply identifying some of the concepts which he considered to be important elements of the good faith obligation in practice. It would be a surprising thing if, in the twenty first century, the PO had an obligation of good faith, but was - for example - not required to be transparent.

35. She also criticised [740] and the finding that even if the obligation of good faith were limited to cooperation (which the judge did not accept) the term of co-operation would be "wider than simply necessary cooperation". Again, the judge was simply demonstrating the lack of utility inherent in the high-level obligations put forward by the PO, and the likely range of a good faith obligation in the real world.

36. The PO's original argument, that the duty of good faith was limited to a requirement for honesty (which argument was advanced as part of this ground of appeal) is wrong in law for the reasons set out by the judge at [705] - [710]. This involved his finding that one sentence in *Chitty* (which equated good faith with honesty, without more) was wrong: see [711].

37. At the oral hearing of this application - when I asked her - Ms Davies QC properly agreed that the passage in *Chitty* was wrong. The equation which the editor seeks to make is clean contrary to the ***Yam Seng***, where Leggatt J (as he then was) found that "not all bad faith conduct can be described as dishonest". Although Ms Davies QC argued instead that the obligation of good faith was limited to 'honest co-operation', that seemed to me to be a purely semantic difference which did not address the practical reality of a duty of good faith in this context.

38. For these reasons, Ground 2 (c) is rejected as being unarguable.

39. Accordingly, Grounds 2(a)-(c) having each been rejected, it follows that the good faith duty – in the terms outlined by the judge - was implied into the SMPC and the NTC contracts. Much of the rest of the judgment, and this application for permission to appeal, is concerned with points of detail in consequence of that central – and on my analysis, unappealable - conclusion.

3. Common Issue 2: Implied Terms (Grounds 3 and 4)

Ground 3(a) Contracts Not Relational

40. The complaint is a rehash of the argument that the contracts are not relational. I have pointed out the PO's misunderstanding of this issue and rejected the substantive argument above. The judge was right to imply the duty of good faith. No additional point arises. Ground 3(a) therefore fails.

Ground 3(b) Terms Consequential Upon or Incidents of the Duty of Good Faith

41. The judge found seventeen implied terms as consequential upon or incidents of the duty of good faith. He did this as a result of a detailed analysis starting at [743] and running to [767]. On my reading of this part of the judgment, the implication arose as a result of a careful analysis, reflecting the judge's findings of fact and the wider context of the contracts. This is not an exercise which readily admits of any review by this court.

42. It is in relation to this part of the application that a number of the PO's difficulties, already averted to, coalesce. That is because:

    (a) This analysis was based (at least in part) on the judge's findings of fact, which cannot be reopened;

    (b) This analysis was based on the detailed terms put forward by the SPMs, which exercise the PO refused to engage with.

43. Many of the points now taken by Ms Davies QC related to the detail of those terms. But of course, that was the sort of response which the SPMs (and the judge) were anxious to get from the PO at the time of the trial, but which was not forthcoming. In my view, it is now much too late for those sorts of points to be taken.

44. Ms Davies QC in her oral submissions suggested that the judge had not had regard to the guidance of the Supreme Court in ***Marks & Spencer*** in connection with implied terms. That is wrong: that guidance is front and centre in [743]. She also suggested that the judge failed to have regard to the express terms. I do not accept that point either. At [702], [721], and [738], the judge expressly undertook that exercise. As the judge put it, it all depended on the context. Moreover, on this point, I think Mr Green QC was right to say that at no time have the PO ever identified any relevant express term to which they say the judge failed to have regard when addressing these implied terms.

45. The PO complains that a specific term can only be implied as an 'incident' of the duty of good faith if it follows logically from, and is necessary to give more specific content or expression to, the duty of good faith. They say these terms fall outside this rubric because the duty of good faith "should only prohibit conduct that necessarily involves a guilty mental state and/or guilty knowledge": see paragraph 40 of the PO's skeleton argument.

46. I consider that submission to have no realistic prospect of success. No authority is provided for it. The use of the word "guilty" appears to be a throwback to the erroneous argument (dealt with above) that good faith is somehow limited to the concept of honesty. The law is plain, that good faith involves broader obligations of honesty, fair dealing, cooperation, trust, confidence and transparency. It is quite possible for a party to fail to comply with one or more of these obligations without having what the PO are pleased to call "a guilty mental state".

47. Beyond that, the arguments now advanced endeavour to descend into the detail which the PO refused to grapple with at the time of the trial. There is nothing to suggest that the judge was wrong to find any of these implied terms and in my view, each of them is plausibly an "incident" of acting in good faith. That is very different to the situation in ***Mid-Essex Hospital Services NHS Trust***, because there the implied terms cut across the express terms, whilst here the judge correctly found that the implied terms did no such thing.

48. Permission to appeal on Ground 3(b) is therefore refused.

Ground 3(c) Not Incidents of Good Faith

49. This appears to be a form of procedural point; that, notwithstanding the length of the judgment already, the judge should have gone through each term, one by one, to explain why each was 'an incident' of the duty of good faith. But the point is a bad one: I consider that that is exactly what the judge did in the lengthy passages starting at [743]. I therefore conclude that Ground 3(c) is unarguable.

Ground 4 Necessity

50. Ground 4 requires a certain amount of unpacking but is largely repetitive of what has gone before. The judge found that even if he was wrong about good faith, 7 of the 17 terms were required in any event as a result of business necessity, together with a further 3 terms which would be implied by way of necessity in any event. I have already rejected the PO's submission based on the rigid distinction they seek to suggest that the judge made, as between good faith and necessity (see paragraphs 23 - 25 above).

51. Paragraphs 44 – 74 of the PO's skeleton argument disclose no substantive allegation that the judge erred in applying the test of necessity in order to imply these terms. The judge followed the test and guidance in ***Marks and Spencer*** and applied it to the facts that he found. There is therefore nothing in Ground 4, and permission to appeal is refused.

4. Common Issue 3: Discretions and Powers (Ground 5)

52. The judge found that "the implied duty of good faith applies to the exercise by the PO of all of its contractual powers and discretions under both the SPMC and MTC" (subject to some relatively minor exceptions): see [768]. This was because the contracts were subject to a general duty of good faith [756 – 757]; the contracts were either relational ([911]) or, if they were not then, as per ***British Telecommunications PLC v Telefonica O2 UK Limited***, a contractual discretion had "to be exercised consistently with its contractual purpose, and in good faith and not arbitrarily or capriciously". The judge found that on the words used, and in accordance with the commercial purpose of the contract, certain powers and discretions enjoyed by PO were subject to the duty of good faith [911].

53. On the face of it, those conclusions are unimpeachable. Again, the argument appears to be rooted in PO's dislike of the "incidents" (ie the detail) of the duty of good faith. But it remains unarguable that, given the judge's other findings, the discretions and powers available to the PO had to be exercised in accordance with the overriding duty of good faith. That is what ***Telefonica*** says and both the judge and this court are bound by ***Telefonica*** in any event.

54. One final point should be made about Ground 5, because of what I consider to be its ill-judged nature. The PO complain that the judge failed to tell them which of their powers and discretions were fettered by the implied terms. The short answer is plain: all of the discretions/powers were affected by the implied terms.

55. But in any event, this is a wholly misconceived criticism from a party who failed to provide any sort of detail of their case (even in the alternative) at trial and seems to be content to set the SPMs (and the judge) one set of exam questions and then, when they have received answers to those that they do not like, ask a series of further

questions which they had never raised before. The judge had done more than he was required to do to furnish detailed answers to the issues between the parties; he was entitled to expect the PO to take on board and act upon his detailed findings without having to provide yet further fine-slicing of the possible permutations.

56. For all these reasons, therefore, I consider that Ground 5 is hopeless.

5. Common Issue 16: Termination on Notice of the SPMC and the NTC (Grounds 6 and 7)

57. The PO's complaint is that, contrary to the judge's findings, the use of the words "not less than 3 months' notice" (Ground 6, for the SPMC) and "not less than 6 months' notice" (Ground 7, for the NTC) did not create a contractual discretion as to the notice period which had to be exercised by the PO in good faith.

58. I consider that these Grounds have to be considered in context. Later in his judgment at [911], when the judge is addressing an alternative way in which the SPMs were arguing that these notice periods were ineffective, the judge said this:

> "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 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."

59. This passage is illuminating for two reasons. First, it shows that it is impossible to separate out individual issues in the way in which the PO now seek to do. Secondly, the passage shows that, underlying the specific points of law relied on by the PO is a deeply unmeritorious position which no judge would willingly countenance. That cannot be ignored when looking at these individual Grounds.

60. There is a further point. Even if I thought Grounds 6 and 7 in isolation had a realistic prospect of success, there would be no point in granting permission unless I also felt that their grounds in respect of the alternative cases as to true agreement (Ground 9); incorporation (Grounds 14-15); and UCTA (Grounds 16-20) also had a realistic prospect of success. If not, these points are of academic interest only.

61. Returning to the Grounds themselves, as a matter of construction, the PO says that "not less than" means a minimum period, and that termination which gives more than 3- or 6-months notice must automatically be lawful. The PO argue that the judge was wrong to say that the good faith obligation was relevant to this provision, and rely on the decision in ***Ilkerler Otomotiv*** (which was not an authority on which the PO relied at the Common Issues trial). But neither this, nor any of the other authorities on which they rely, deals directly with the words 'not less than'.

62. This argument is better than all the others advanced by the PO. But there is much force in Mr Green QC's contrary suggestion that "not less than" has to be construed in the context of the contract overall, and there was striking evidence from both sides that nobody thought these termination provisions would ever be utilised.

63. Secondly, the PO says that the duty of good faith does not affect this issue, because good faith goes to performance of the contract, and there is authority (including ***Monde Petroleum***) to support the suggestion that performance would exclude termination. Mr Green QC argued in response that Leggatt J in ***MSC*** said that termination would be included in a consideration of performance. It seems to me that whether termination is properly regarded as part of performance is not something which is capable of a black and white answer: it will again depend on the contract overall. That is how the judge approached it.

64. For those reasons, I have concluded that, although these individual Grounds are stronger than the rest, in all the circumstances of the case, they cannot be said to have a realistic prospect of success. Moreover, if I was wrong about that, I am confident that nothing will turn on it since, even if I had given permission to appeal on Grounds 6 and 7, I would still have to give permission to appeal on Grounds 9, 14-15 and 16-20 for the points to go anywhere, and, for the reasons set out below, I do not do so.

6. Common Issue 15: Termination For Cause (Ground 8)

65. Here the complaint is that the judge construed the word "material" as meaning, in all the circumstances of this contract, "repudiatory". It is said that this is contrary to a number of authorities.

66. Of course, there will be other contracts (and therefore other cases) where "material" is found to mean something different, but what matters here is the particular circumstances of these contracts (with their implied duty of good faith). The judge explained in detail (see in particular [907]) why he construed the word in the way that he did.

67. Furthermore, this was not an easy provision to construe. The word 'material' only arises in some of the sub-clauses and not in others. Thus clause 16.2.16, which contains no such qualification, would, as Mr Green QC submitted, allow termination if the SPM was one penny out and/or paid it one day late. On any view that is nonsensical. The judge embarked on a detailed investigation into the scope of the contract documents, which were far from being an average commercial arrangement. He reached the conclusion that he did after a careful analysis. There is no prospect of successfully persuading this court that his analysis was wrong in law.

68. Finally, I should note that the PO have ascribed greater significance to this issue than it warrants because they may have again misunderstood the judgment: see [45] of the judge's reasons for refusing permission to appeal. I agree with his observations on this issue.

69. Accordingly, I consider that there is no realistic prospect of success on Ground 8.

7. Common Issues 17 and 18: The 'True Agreement' Principle (Grounds 9 and 10)

70. These grounds are advanced on the basis that, if the judge was wrong about the implication of good faith, he indicated in the alternative that the 'true agreement' principle (as explained by the Supreme Court in ***Autoclenz***) arose and applied to (and negated) the 3/6 months periods of notice (Ground 9) and possibly other elements of the termination provisions (Ground 10).

71. These are odd grounds of appeal. The judge dealt with this argument briefly at [909] – [926]. Moreover, when he came to answer the Common Issues at [1122], he did not answer Common Issues 17 and 18 at all, because he said they did not arise. It is therefore curious that the PO seeks permission to appeal in respect of findings that the judge did not make. That is particularly true of the tentative terms in which Ground 10 is put. There can be no basis for an appeal in respect of Ground 10 in any event since no contested findings are identified.

72. Ground 9 is different because it goes to a potentially material issue: it is plain that the judge had in mind that, even if he was wrong in all the ways identified at [911] (paragraph 58 above), the 3 months/6 months periods of termination would not arise in any event. But, since I have not given permission to appeal on those Grounds, the issue is of tangential relevance.

73. But in any event, it seems to me that the judge's analysis by reference to ***Autoclenz*** was open to him in the particular (and unusual) circumstances of this case, and he was entitled to come to the conclusions he did. Again I repeat that the judge undertook a detailed analysis of fact; the judge knew how and why these termination provisions of 3/6 months were unrealistic and outside the expectations of reasonable parties. In those circumstances, should it ever come to it, I consider that there is no realistic prospect of this court overturning the judge's application of the 'true agreement' principle, which was only another way in which he prevented arbitrary termination by the PO.

74. Accordingly, I refuse permission to appeal on Grounds 9 and 10.

8. Common Issue 14: Suspension (Grounds 11, 12 and 13)

Grounds 11 and 12 Suspension

75. The original complaint was that the judge's conclusions meant that the PO did not have the power to suspend at all. That again is wrong; another sweeping and incorrect statement based on the failure to understand the judgment, as noted at [51]-[57] of the judge's reasons for refusing permission to appeal.

76. The alternative complaint is that the judge erred in finding that a decision by the PO to suspend had to be 'necessary'; had to be in accordance with the implied duty of

good faith; and had to be the proper exercise of a contractual discretion. Ground 11 takes this point in respect of the SPMC; Ground 12 is in respect of the NTC.

77. These submissions only have to be articulated for their unrealistic nature to be revealed. It is surprising that the PO continues to argue that it could suspend the SPMs under these contracts even if that was unnecessary or if they were not acting in good faith or even if they were themselves in breach. No basis in law or fact for any of those submissions is made out in the PO's skeleton argument.

78. The judge was asked to find the circumstances/basis on which the PO was entitled to suspend. He carefully took into account the various relevant factors and said that the suspension had to be in accordance with the *legitimate* interests of the PO. The judge reached that conclusion for three reasons: because it was a proper construction of the words used; because it was in accordance with the implied term of good faith; and because it was necessary to give the contract business efficacy.

79. The judge only had to be right on one of those reasons in order for Grounds 11 and 12 to fail. In my view he was right on all three. These were common sense conclusions, based on his other findings, which seem to me to be unimpeachable. Indeed, it is difficult to see precisely how the PO suggests otherwise. Again, they do not put forward their own formulation. That is simply not a proper basis on which to seek permission to appeal.

80. To the extent that it is argued that ***Mid-Essex Services NHS Trust*** was authority for the proposition that a contractual right to suspend should be deemed non-discretionary but absolute, that submission is rejected. That is not what ***Mid-Essex*** says at all. Furthermore, it has nothing to do with the narrow point in issue here, mainly whether the interests should be qualified by the word "legitimate". Since that was the only qualification that the judge found, there is nothing in this point.

Ground 13 The PO's Own Breach

81. It is also suggested that the judge erred in concluding that the PO could not suspend when it was itself in material breach. That argument is untenable: the judge's finding follows from earlier parts of his judgment, in particular his conclusion that suspension could only be in furtherance of the PO's legitimate interest.

82. For these reasons, I consider that Grounds 11, 12 and 13 are unarguable and I refuse permission to appeal on those grounds.

9. Common Issues 5 and 6: Incorporation (Grounds 14 and 15)

83. The context for Common Issues 5 and 6 is this: if the terms are onerous and unusual, and they have not been brought to the attention of the SPMs before entering into the contract, then they are not incorporated at all (so the UCTA analysis is not even triggered).

Ground 15 Notice

84. It appears that Ground 15 is aimed at the question of whether or not it could be argued that the terms were brought to the SPM's attention merely because they were in the written contracts (see paragraph 119 of the PO's skeleton argument). That of course is

a challenge to the judge's careful detailed findings of fact as to notice and therefore not a matter on which, in all the circumstances of this case, can now be considered by this court.

Ground 14 Onerous and Unusual Terms

85. That leaves the question of whether or not the five terms identified in Ground 14 were onerous and unusual terms. The judge reached conclusions as to how and why the clauses in question were onerous and unusual. Those were mixed findings of fact and law. It is not suggested that the judge made any errors in respect of the principles to be applied. Moreover, his application of those principles is clear and, in my view, correct.

86. Dealing with each briefly:

(a) The judge concluded at [1007] – [1010] that the terms at paragraph 4.1 and 13.1 of Part 2 were onerous and unusual because, without any fault on the part of the SPM, they rendered the SPM liable for potentially sizable sums with no upper limit, for something entirely out of their control. That finding was therefore justified.

(b) For the reasons set out at [1023] – [1025], the judge found that clauses 5 and 6 of Section 19 of the SPMC and paragraphs 15.2 and 15.3 of Part 2 of the NTC were onerous and unusual because, although the Post Office would not pay the SPM during a period of suspension, the branch Post Office would have to remain open and be operating. In addition, even if the SPM was reinstated, the PO was entitled not to pay for any period of the suspension. Again, I consider that that was plainly an onerous and unusual term.

(c) For the reasons summarised at [1035] the judge concluded that assuming he was wrong on his other findings, paragraph 16.1 of Part 2 of the NTC would be onerous and unusual if the permitted termination for anything other than a repudiatory breach. That is consistent with the judge's other findings in respect of which there is no prospect of successfully arguing to the contrary. Nothing therefore remains in this complaint.

(d) For the reasons summarised at [1036] – [1040] the judge found that, if he was wrong on his other findings, and if the PO could terminate on 3 months notice without justification (the period under the SPMC), that would be onerous and unusual. He explains why. He contrasts that with the 6 months under the NTC, where the notice could not be given during the first year of appointment. He found that that was *not* onerous and unusual. Accordingly, the findings in relation to the termination on notice provisions in the SPMC were careful and consistent with the judge's other findings. There is no basis for allowing permission to appeal.

(e) For the reasons summarised in [1041] – [1045] the judge held that clause 8 of Section 1 of the SPMC and paragraph 17.11 of Part 2 of the NTC (providing that an SPM is not entitled to compensation if this contract was terminated) were onerous and unusual. The judge noted at [1044] that it could not be right that an SPM who had worked hard and built up the business would have no compensation, a fact that he expressly found to have been recognised by the PO in terms of how it behaved in

practice. This again links back to his findings of fact. There is again no basis for this ground of appeal.

87. Accordingly, I consider that there is no realistic prospect of successfully arguing any of Grounds14(a), (b), (c), (d) and (e).

88. I emphasise that Ground 14(d) went to termination on notice. Since I have concluded there is no prospect of success on this appeal, it renders immaterial whether or not I would have granted permission on Ground 6, because - in relation to the SPMC anyway - the argument would fail at this hurdle in any event.

10. Common Issue 7, 19 and 20: Substantially Different Performance /Reasonableness (Grounds 16, 17, 18, 19 and 20)

89. This is the core of the UCTA analysis, being concerned with whether or not the contracts were on the PO's standard terms of business and whether the terms allowed the PO to render a performance that was substantially different from that which was reasonably expected of it or indeed no performance at all; and then finally whether particular terms were unreasonable.

Ground 16 Standard Terms of Business

90. The argument is that the judge was wrong to find that the SPMC and the NTC were the PO's written standard terms of business. Ms Davies QC submitted that the PO's business was the supply of post office services to the public, not the employment of SPMs. That argument had already been advanced before, and roundly rejected by, the judge. It is not difficult to see why.

91. First, this was *par excellence* a finding of fact that the judge was entitled to make. But secondly the PO's argument is premised on the assumption that the PO does or is only capable of doing one type of business. That is plainly incorrect. In the present circumstances, it operates its business in two ways: it provides a service to the public but it also runs a national network of sub-post offices. That second element of the business depends entirely on the contracts between the PO and the SPMs. Accordingly, the terms of those contracts are within UCTA because they are the PO's standard terms of business.

92. Permission to appeal is therefore refused on Ground 16.

Ground 17 Substantially Different Performance

93. The complaint is that the judge was wrong to find that, in the ways analysed by the judge, the terms in question allowed the PO to render a substantially different performance to that which might reasonably have been expected.

94. I conclude that the judge was entitled to reach the conclusion that the terms allowed the PO to render a contractual performance that was "substantial and different" from that which was reasonably expected of it. The analysis at [1081]- [1084] is conventional and clear.

95. Moreover, I do not consider that any parts of paragraphs 126 – 129 of the PO's skeleton to disclose any error of law on the part of the judge. The fact-sensitivity and

case-specificity of these matters is in any event encapsulated in the passage from the judgement of Stanley Burnton LJ in ***AXA Sun Life Services***, quoted at paragraph 128 of the PO's skeleton argument.

96. A separate point was raised by the PO as to whether the judge was right to find, in the alternative, that these provisions allowed the PO to render no performance at all. I do not accept that criticism. By way of example, an alleged requirement that the SPM had to maintain access to his branch whilst he is suspended, and not entitled to be paid during the same time, is a situation where the PO would be rendering no performance at all.

97. Finally on this point, I note that in the case of ***Lalji***, this court was dealing with the application of the UCTA to these very contracts. It must therefore have been agreed that the terms of the contract entitled the PO to render a contractual performance substantially different from that which was expected and/or no performance at all: otherwise UCTA would have had no application.

Ground 18 Reasonableness

98. The judge explains how and why particular terms failed the test of reasonableness. Unsurprisingly, perhaps, these are (with one important addition) the same terms which the judge found to be onerous and unusual under Common Issues 5 and 6. Again no error of law is disclosed. Again those were findings of fact he was plainly entitled to reach, as per ***George Mitchell v Finney Lock***. I therefore reject Grounds 18(a), (b), (c), (d), and (e) (reflecting as that does my conclusions in relation to Ground 14, and paragraph 86 above in particular).

99. The addition is that the judge found that the notice provisions in *both* the SPMC *and* the NTC were unreasonable (having found that it was only the 3 months in the SPMC that was onerous and unusual). He explains at [1107(4)] why each was unreasonable and there is no realistic prospect of this court reaching a different view.

100. Again, because this includes the termination on notice provision (Ground 18(d)) it means that, even if I had been tempted to grant permission to appeal on Grounds 6 and 7, there would have been no point in doing so, because there is no prospect of the PO successfully overturning this finding of unreasonableness.

Grounds 19 and 20 Particular findings re UCTA

101. These are not separate points but a summation of what has gone before: that because the terms allow a substantially different performance and are unreasonable, UCTA applies. That of course is all in the alternative to the inclusion of the terms in their amended form (ie following the implication of the good faith duty and/or the implications for business efficacy). For the reasons I have already explained, the judge was entitled to reach the conclusions that he did. The application for permission to appeal on Grounds 19 and 20 is therefore rejected.

11. Common Issues 12 and 13: Agency (Grounds 21 – 24)

102. Two general points should be made. First, it should be noted that the PO's appeal on agency must be treated with considerable caution, because of its constantly-changing

nature, as recorded in the substantive judgment and summarised at [30] of the judge's reasons for refusing permission to appeal.

103. Secondly, all of these agency points were taken by the PO in an attempt to render the SPMs liable for any errors in the Branch Trading Statements (BTS) even if the SPM had registered an objection to the BTS or complained to the Helpline about it. This was an extreme position to adopt and one that cannot be hidden behind alleged "ordinary principles" of agency law.

104. The judge undertook a detailed analysis of precisely how the BTS worked, how they were made up, and how protests or complaints about them might be registered. That exercise was vital in informing his analysis of the so-called agency argument. Again, this court will not interfere with those findings of fact.

Ground 21 Normal Principles of Agency Law (Accounts)

105. The complaint is that the judge "somehow excluded" what are called "normal common law principles applicable to agents". Both parts of this assertion are wrong.

106. The judge carefully considered the law and principles of agency and how they related to the relationship between the PO and the SPMs: see the lengthy passages from [782] to [864] and Appendix 4. The law makes clear that the nature of any specific agency relationship has to be decided on the particular facts, taking into account the whole contract and all the surrounding circumstances, including the conduct of the parties. Labels in the contract are not determinative. That is exactly how the judge approached these issues.

107. The judge carried out a comprehensive analysis. No error of law is disclosed in his approach: he did not 'exclude' any applicable principle of law. His findings of fact are inviolable. The BTS was, as Mr Green QC submitted, about as far removed from any ordinary 'settled account' in an agency situation as it is possible to get. It was not a document over which the SPM had any control. There is therefore no realistic prospect of successfully arguing Ground 21 and it is rejected.

Ground 22 BTS

108. As already noted, the PO were taking (and maintain) the point that, if there had been no objection to any part of a BTS which had not been the subject of a notified dispute, that meant that the BTS was a settled account (as might arise in a conventional agency relationship), and could not now be challenged. In this way the SPM was stuck with the effects of the contents of a document over which he/she had no control. The judge rightly rejected that argument as a matter of law, based on his detailed assessment of the facts. There is no realistic prospect of a successful appeal on that point.

109. Ground 22 is therefore rejected.

Ground 23 Helpline

110. The judge also found [823] that an SPM could discharge the burden of showing that the BTS was incorrect by demonstrating that he or she had contacted the Helpline during the relevant period. That was a finding of fact which cannot be challenged. It

was also a pragmatic solution to the extreme case being advanced by the PO, and I consider the contrary to be unarguable.

Ground 24 False Statements

111. The judge's conclusions as to presumptions of fact was the product of a lengthy consideration of the factual background. It is consistent with, and the logical consequence of, his other findings. There is no realistic prospect that the Court of Appeal would interfere with it. Ground 24 is therefore rejected.

12. Common Issue 8: Liability Of SPMs For Losses (Grounds 25 and 26)

Ground 25 Construction of Section 12 Clause 12

112. The clause is set out at [643] and stated:

> "The sub post master is responsible for all loses caused through his own negligence, carelessness or error, and also for loses of all kinds caused by his Assistants…"

113. The judge found at [464] – [467] that this provision meant that the PO had to prove negligence, carelessness or error on the part of the SPM in order to render an SPM liable for "losses". In my view, that is the only possible interpretation of these words. I find the PO's challenge to this, set out at paragraphs 159 – 167 of the PO's skeleton argument, to be fanciful and wholly unpersuasive.

114. Moreover, I note that at trial the PO accepted that "if you allege there is a loss you need to show it". On that basis, it is unrealistic for the PO now to argue that in some way the judge was wrong to place the burden of proving any losses on them in the way in which the clause envisages.

115. It appears that the PO had (and perhaps still has) some convoluted case that Horizon-generated shortfalls might give rise to a different burden of proof. There is a hint of this in paragraph 165 of the PO's skeleton. There is no basis for any such distinction, either in the clause, or on the law, or on the facts. The judge summarised why the argument was hopeless at [34] – [37] of his reasons for refusing permission to appeal. In my view, the argument was (and remains) untenable.

Ground 26 Assistants

116. The complaint here is that the judge erred in construing the clause as imposing a need for negligence, carelessness or error on the SPM "or their assistants". The argument appears to be that in some way any loss traceable back to an assistant created a strict liability on the part of the SPM, without the need for the PO to show negligence, carelessness or error. In other words, an act or omission of a third party (the assistant) put the SPM in a worse position than if the SPM had done (or failed to do) the act himself/herself.

117. Again, like the judge, I consider that to be unarguable. The clause clearly envisages that the negligence, carelessness or error will be on the part of the SPM *or* his or her assistants. That is in accordance with ordinary principles concerned with the burden of proof in any event.

118. There is no basis in the clause, or anywhere else, for the SPM to assume strict liability for the acts or omissions of the assistants. Ground 26 of the grounds of appeal must also fail.

119. For these reasons, having carefully considered the papers and the parties' submissions at the hearing on 12 November 2019, the PO's application for PTA is rejected.