

Defendant's Recusal Application -

Alan Bates & Others v Post Office Limited

Day 1A

April 3, 2019

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Housekeeping 3 having considered the fair-minded and informed observer, having considered the facts, would conclude that there LORD GRABINER: My Lord, on this application I appear for the Post Office, and I think your Lordship will be 5 So it is an objective test.  The second case is the case of Otkritie v Urumov, and that is in bundle 9.5, tab 25, [89.5/25/1] and it is learned friends Mr Gavender and Mr Cohen, and my 7 and that is in bundle 9.5, tab 25, [89.5/25/1] and it is learned friends Mr Green, Ms Donnelly, Mr Warwick, 8 learned friends Mr Green, Ms Donnelly, Mr Warwick, 9 to the effect that bias includes conveying the 10 MR JUSTICE FRASER: Yes. 10 impression of having prejudged any issue which remains 11 LORD GRABINER: Your Lordship will have seen our skeleton 11 to be decided. And Lord Justice Longmore's observation 12 argument and a draft of the order that we seek. We 12 is this, and I quote: 13 invite your Lordship to recuse your Lordship as managing 13 "The concept of bias extends further to any real 14 judge of this litigation and in association with that 14 possibility that a judge would approach a case with 15 application we also seek an order that the Horizon trial 15 a closed mind or indeed with anything other than an 16 currently being heard by your Lordship should be stayed 16 objective view; a real possibility, in other words, that 17 or adjourned, as the case may be. And for the avoidance 17 he might in some way have prejudged the case."  The third case I want to show your Lordship, becaus 19 succeeds, the Common Issues trial will have to be 19 you may not be familiar with it, and there are passages 19 in it that I want to draw to the court's attention, and 19 that is the case of Mengiste. It is in your Lordship's 10 the 10 that 10 that is the case of Mengiste. It is in your Lordship's 10 the 10 that 1
4 LORD GRABINER: My Lord, on this application I appear for 5 the Post Office, and I think your Lordship will be 6 familiar with all the characters in the story. I am 7 with my learned friends Mr Cavender and Mr Cohen, and my 8 learned friends Mr Green, Ms Donnelly, Mr Warwick, 9 Mr Miletic and Ms MacKenzie appear for the claimants. 9 to the effect that bias includes conveying the 10 MR JUSTICE FRASER: Yes. 11 LORD GRABINER: Your Lordship will have seen our skeleton 12 argument and a draft of the order that we seek. We 13 invite your Lordship to recuse your Lordship as managing 14 judge of this litigation and in association with that 15 application we also seek an order that the Horizon trial 16 currently being heard by your Lordship should be stayed 17 or adjourned, as the case may be. And for the avoidance 18 of doubt, we do not say that if this application 19 succeeds, the Common Issues trial will have to be 10 the second case is the case of Otkritie v Urumov, 10 and that is in bundle 9.5, tab 25, {B9.5/25/1} and it is 11 to be decided. And Lord Justice Longmore of having prejudged any issue which remains to be decided. And Lord Justice Longmore's observation is this, and I quote: 10 invite your Lordship to recuse your Lordship as managing 11 The concept of bias extends further to any real possibility that a judge would approach a case with a possibility that a judge would approach a case with a closed mind or indeed with anything other than an objective view; a real possibility, in other words, that he might in some way have prejudged the case." 18 of doubt, we do not say that if this application 19 succeeds, the Common Issues trial will have to be 19 you may not be familiar with it, and there are passages in it that I want to draw to the court's attention, and
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21 MR JUSTICE FRASER: The Common Issues trial? 21 that is the case of Mengiste. It is in your Lordship's
22 LORD GRABINER: Precisely. So if we are successful, we do 22 bundle {B9.5/23/1}.
not say that that trial will be have to be re-run, which 23 MR JUSTICE FRASER: I think it is tab 24, isn't it?
I think is one of the concerns expressed by the other 24 LORD GRABINER: It is certainly tab 24 for me.
side. We do propose to appeal against your Lordship's 25 MR JUSTICE FRASER: It is tab 24 for me as well.
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judgment, and the view we take is that the matters we 1 LORD GRABINER: Very good. I wasn't sure if the electronics
2 complain about can be rectified on appeal without the 2 had caught up.
need for a retrial. 3 MR JUSTICE FRASER: Tab 24 for me is the costs law report
4 Can I turn, then, to apparent bias. 4 version, is that the one that you have?
5 MR JUSTICE FRASER: Yes, just before you do, Lord Grabiner, 5 LORD GRABINER: Yes. That case, we say, is instructive.
6 in terms of logistics , we usually have a break sometime 6 I can just tell your Lordship something about it first ,
7 round about a quarter to 12 for five or ten minutes just 7 it will save going through the headnote. There
for the shorthand writers, which I know you will know is 8 Mr Justice Peter Smith had criticised the evidence of an
9 entirely conventional. 9 Ethiopian law expert witness. He is improbably called
10 LORD GRABINER: Indeed. 10 Mr Jones in the case, but that was to protect him
11 MR JUSTICE FRASER: Although the application is set down for 11 against possible repercussions in Ethiopia, so Mr Jones
the whole day, if you could aim to finish your 12 is just a nom de plume.
submissions some time between 12.30 and 1 o'clock, or 13 In his judgment, he went on to criticise the
1.30 at the latest . 1.4 solicitors for the party who had relied on Mr Jones on
Application by LORD GRABINER 15 the basis that the solicitors had failed to educate the
16 LORD GRABINER: Yes, my Lord. 16 expert as to his proper functions and duties.
I can deal first of all with the law very shortly by 17 Encouraged by what the judge had said, the other side
reference to four cases. And I am not going to trouble 18 applied for a wasted costs order against the solicitors.
your Lordship to turn them all up, but give you 19 The judge granted permission for that application to
a reference because there are short quotes I can deal 20 proceed, that was stage 1, but he refused to recuse
with. 21 himself from the substantive hearing, stage 2. The
The first is the well-known legal test stated by 22 Court of Appeal held that the judge should have recused
23 Lord Hope in Porter v Magill, and the reference for the 23 himself because of his concluded views as to the
transcript is $\{B9.5/8/1\}$ and it is just in $24$ behaviour of the solicitors, as expressed in his
paragraph 105, where Lord Hope says the test is , and 25 judgment.
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1	If your Lordship would be kind enough to go	1	down.
2	paragraph 59 of the judgment of Lady Justice Arden.	2	MR JUSTICE FRASER: I see, yes.
3	MR JUSTICE FRASER: Give me one second, my chair seems to be	3	LORD GRABINER: "A judge who is doing no more than his
4	broken, so I'm just swapping it for this one. (Pause)	4	discharge his judicial function does not create an
5	LORD GRABINER: Paragraph 59, my Lord, the Lady Justice says	5	impression of bias, which is well-established. What
6	that she has reached the clear conclusion that this was	6	occurs in that situation is adjudication, not unsought
7	an exceptional case and that there was apparent bias	7	findings."
8	stemming from the facts of the case which meant that the	8	And I emphasise those words, "unsought findings".
9	judge should have recused himself.	9	And then about four or five lines below that:
10	MR JUSTICE FRASER: Yes.	10	"Where there is an issue of apparent bias, the test
11	LORD GRABINER: Then under various headings, the	11	in Porter v Magill must be fearlessly applied by this
12	cross-heading is "No necessity to make the findings"	12	court and the fourth and fifth principles overlook the
13	and, and I want to emphasise the words:	13	possibility that mere criticism expressed in absolute
14	"The judge's criticisms were not, in my judgment,	14	terms may of itself be extreme and unbalanced because
15	necessary to enable the judge to evaluate Mr Jones'	15	the impression to even the fair-minded observer that the
16	evidence."	16	door has not been left open for whatever explanation the
17	And a few lines below that:	17	party or non-party, who has not yet had the chance of
18	"The question why his reports contained inadmissible	18	providing that explanation, may have to say."
19	material or he performed poorly as a witness, which	19	And I shall be submitting that your Lordship does
20	I accept were likely to increase costs, were primarily	20	express himself in the judgment in very firm terms.
21	relevant when it came to costs. As it seems to me, the	21	The fourth case, and it is probably helpful to
22	judge in making criticisms against the solicitors over	22	I have got a hard copy, old school bundle with me, but
23	their explanation to Mr Jones about his duties was	23	the fourth case perhaps we can also just briefly look
24	concerned to warn off an application for a wasted costs	24	at, and this is the final case, is Stubbs v The Queen
25	order against Mr Jones."	25	{B9.5/29/1}.
	5		7
1	And that was to anticipate an application that had	1	MR JUSTICE FRASER: Yes, it is . I too am using an old
2	not yet been made, and your Lordship might want to	2	school bundle.
3	glance at the balance of that paragraph, but I am not	3	LORD GRABINER: Very wise. But again, I don't know if
4	going to read it out. And then the next cross-heading	4	your Lordship is familiar with this case, it is an
5	is "Criticisms expressed in absolute terms," and	5	appeal to the Privy Council in a murder trial from the
6	your Lordship might like to read that paragraph through.	6	Caribbean, and you can see in the sort of second line of
7	Then the other cross-heading is "Repetition, further	7	the headnote:
8	criticism and concern to meet criticisms of the judge's	8	"In 2007 a second trial took place before
9	conduct."	9	a different judge and jury, in the course of which the
10	And the learned Lord Justice says:	10	judge made certain rulings relating to the admissibility
11	"While I might not have reached the same conclusion	11	of evidence and dock identification and ruled against
12	if a criticism had been made in absolute terms on	12	the submission of no case to answer. Then that trial
13	a single occasion, here the judge accepted that there	13	was aborted."

stay judgment." And I wasn't going read the balance of that, but if your Lordship would be kind enough to go to paragraph 63, about seven or eight lines down:

were six criticisms of the appellant's solicitors in the

"The second principle is that a judge who is doing no more than discharge his judicial function does not create an impression of bias, which is well-established."

22 23 MR JUSTICE FRASER: I'm sorry, I have reached 63, but ...

LORD GRABINER: 63, you will see it is split into the first principle and then the second principle, about six lines

defendant's objection --"

This is just above F:

on hearing that appeal:

"-- that the participation of the same judge in the second trial and in the appeal would not give rise to a reasonable apprehension of bias, since the aborted trial  $% \left( x\right) =\left( x\right)$ had taken place some seven years earlier, the judge

When there was in due course, I think, a third trial

and the defendants were convicted, the Court of Appeal,

"It transpired that the judge who had sat in the

second trial was a member of the Court of Appeal in the

third trial and the Court of Appeal rejected the

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wouldn't be sitting alone, but in a panel of two other judges."

So they seemed to think it didn't matter if one of

So they seemed to think it didn't matter if one of the three infected the other two, but the Privy Council took a different view. Just from the top of the headnote in the holding:

"Whether fair-minded and informed observer having consider the facts would conclude that there was a real possibility that the Tribunal was biased, that the appearance of bias as a result of pre-determination or pre-judgment was a recognised ground for other recusal."

 $\label{thm:condition} If your Lordship would be kind enough to just flick \\ to paragraph 16 in the judgment of Lord Lloyd-Jones in \\ F, between F and G, a couple of lines below F:$ 

"The issue will only arise in all the circumstances where prior involvement is such as might suggest to a fair-minded and informed observer that the judge's mind is closed in some respect relevant to the decision which must now be made."

Then after some citation of Locabail, which I will come back to later on, the learned judge says:

"However, relevant factors are likely to include the nature of the previous and current issues, their proximity to each other and the terms in which the previous determinations were pronounced."

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And in paragraph 17:

"It is not acceptable for a judge to form or to give the impression of having formed a concluded view on an issue prior to hearing full argument by all parties on the point."

So that is all I wanted to show your Lordship for the moment, but judging from my learned friend's skeleton argument, the impression I have is that what I have just been showing your Lordship is not controversial.

Then it is also necessary, we suggest, to bear mind the big picture. The incomplete disclosure and evidence itself relates only to a tiny proportion of the claimant group. There were six lead claimants in the Common Issues trial out of, I gather, about 550-odd claimants, and the 550-odd are themselves a small proportion of the many thousands of Subpostmasters currently serving, so there must also be some historic examples as well of people who are no longer acting as Subpostmasters, and we don't have any disclosure or evidence from any of that wider group.

MR JUSTICE FRASER: But there would never be disclosure of
 Subpostmasters who weren't claimants, would there?
 LORD GRABINER: Well, in principle, that is quite correct,

but there would be disclosure from those who were.

1 MR JUSTICE FRASER: Yes.

2 LORD GRABINER: And I suppose in theory, it might be

possible for disclosure to be widened, notwithstanding

4 the fact that the others are not parties as claimants.

5 I don't know.

6 MR JUSTICE FRASER: In terms of third party disclosure?

7 LORD GRABINER: Yes, exactly.

8 MR JUSTICE FRASER: Yes.

9 LORD GRABINER: But it is a theoretical possibility,

10 I readily accept.

11 MR JUSTICE FRASER: But you are entirely right, there were

12 six lead claimants out of 557 claimants in the

13 litigation .

14 LORD GRABINER: I am grateful. Two points follow from that.

First of all, the danger of reaching premature

conclusions is magnified because the incomplete

evidential picture for the lead claimants is itself part

of a larger unexplored evidential canvass, in my

submission.

And secondly, the consequence of making that mistake would be great, given -- or could be great, given that this litigation extends far beyond the lead claimants' claims.

Turning to this litigation . Obviously your Lordship is very familiar with it and the various disputes

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between the parties, and I am not going to even attempt to rehearse the details. The starting point of my submissions is the proper scope of what is called the Common Issues trial. The Common Issues are set out in your Lordship's paragraph 45 of the judgment, very helpfully.

And then paragraph 1 of the order of the 27 October 2017, just for the transcript, that is {B9.3/2/1}, gave an accurate and convenient precis of the Common Issues, and paragraph 1 simply says:

"Issues relating to the legal relationship between the parties."  $\label{eq:second_eq}$ 

So it couldn't be clearer or more concise than that. For convenience, we have summarised the Common Issues under four headings in paragraph 18 of our skeleton argument.

We have comprehended every item there, and paragraph 18 summarises each of those items.

19 Your Lordship might want to glance at that.

20 MR JUSTICE FRASER: Just give me a second. I had been 21 working off the schedule to the order, but I am sure

they are correctly identified. Paragraph 18 of your skeleton?

LORD GRABINER: Paragraph 18 of our skeleton on page 7. It
 identifies all the issues, but puts them under

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1 particular sort of generic headings. 2 In our submission, there was little scope for 3 factual evidence at the Common Issues trial, looking at 4 those items. 5 Then pre-trial at the 22 February 2018 hearing, 6 your Lordship said that you had, and I quote "reminded 7 yourself that the Common Issues were" and I quote 8 "purely points of construction". And the reference for 9 that, but we don't need to go to it, is the 10 22 February 2018 hearing at page 9D and that is 11 {B9.3/2/85}. That is probably a transcript page 12 reference. 13 Now, that was, in my submission, an important and 14 accurate statement. Your Lordship repeated a version of 15 the same point several times at a number of 16 interlocutory hearings thereafter. The parties were 17 entitled to rely on those clear and correct indications 18 as to the scope of the Common Issues trial. 19 As your Lordship rightly said on various occasions, 20 evidence was only admissible if it went to the 21 Common Issues. You said that at the 5 June 2018 hearing 22 at page 57E {B9.3/2/271} and your Lordship also said 23 that the only relevant evidence for contractual 24 construction is knowledge common to the parties, when 25 the relevant contract was made and with which, if I may

Post Office on a number of occasions drew attention to its developing concern that the evidence and arguments adduced by the claimants might lead your Lordship, when giving judgment, to trespass on matters outside the Common Issues which were yet to be tried, for example Horizon or breach issues.

The relevant passages are scheduled to our skeleton argument, which I think your Lordship will have seen. Just in summary, they include transcripts of pre-trial hearings, extracts from our trial skeleton, passages from Mr Cavender's oral opening and closing at the trial, as well as extracts from the Post Office's written closing at trial. But in the event, I am I afraid, those concerns, in my submission, turned out to be well-founded.

In addition to our criticisms of the way the judgment deals with issues outside of the Common Issues, we also complain about prejudicial and irrelevant observations made in the judgment about Post Office and its witnesses.

Both categories of complaint, taken separately or together, would lead the fair-minded observer to conclude that there is at least a real possibility that your Lordship will not be able to judge the remainder of these proceedings impartially. I regret making that

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say so, I respectfully agree, 22 February 2018 hearing at page 9E, {B9.3/2/85}, and the other point for that trial was a much narrower one, namely whether the lead claimants had been properly notified of the contractual terms, which obviously was an issue in the case in Common Issues 1.

MR JUSTICE FRASER: I think it went to a number of

9 LORD GRABINER: Indeed, under the Unfair Contract Terms Act. 10 MR JUSTICE FRASER: Onerous and usual terms in terms of 11 incorporation and then if incorporated, whether they 12 were reasonable under the Unfair Contract Terms Act. 13 LORD GRABINER: Exactly, and your Lordship is familiar with 14

Common Issues, due to onerous and unusual terms.

the successive trial structure that was set up under the litigation management arrangement. Under that scheme, in respect of each trial, there needs to be disclosure and witness statements geared to the issues in the particular trial.

The Common Issues trial was never intended to decide issues which fall to be investigated and determined in some later trial, and still less to provide a platform for wide-ranging evidence, for example on the Horizon Issues or alleged breaches of duty. That is an important point.

Prior to and during the Common Issues trial, the

submission, but I do make the submission firmly.

Now, in these submissions, I propose to focus on the paragraphs in your Lordship's judgment we rely on and which we have given notice of. In the interests of time, I was not proposing to take your Lordship through Mr Parsons' 14th and 15th witness statements, which were prepared and served specifically for this hearing, and I am sure your Lordship has looked at those.

MR JUSTICE FRASER: They identify effectively pre-trial transcript passages and then in the 15th, the actual specific judgment passages.

12 LORD GRABINER: My Lord, yes. And similarly, I would prefer 13 to take our skeleton argument as read. I should make it 14 clear that we rely on everything in those witness 15 statements and in our skeleton argument in support of 16 this application.

> Now, as to the first category, I want to go to the paragraphs in the judgment which show that your Lordship made many findings and numerous observations both about the facts and the witnesses, which, in the first place, were not necessary for the purpose of deciding the matters which were the subject of the Common Issues trial, and that this was done without disclosure and witness evidence, and secondly, because your Lordship adopted that approach, the judgment prejudges many

1	matters, including technical characteristics of the	1	LORD GRABINER: Absolutely, I respectfully agree.
2	Horizon system and supposed breaches of contract and	2	MR JUSTICE FRASER: All right.
3	duties on the part of Post Office, which are still to be	3	LORD GRABINER: If your Lordship would look at paragraph 12,
4	dealt with in the Horizon trial and the other future	4	my learned friend says:
5	trials .	5	"In any event, these matters were not irrelevant.
6	Now, it would be helpful if your Lordship would be	6	In many cases, they were relevant because of
7	kind enough to take up my learned friend's skeleton	7	Post Office's expressly pleaded case as to how the
8	argument. I just want to make a brief reference to	8	relevant contract should be construed or in the
9	a couple of the paragraphs because my learned friend's	9	resolution of issues directly arising from challenges
10	skeleton helpfully narrows the dispute. If,	10	mounted before the court by Post Office's own
11	your Lordship, you have got that skeleton handy, if	11	cross-examination of lead claimants."
12	your Lordship would be kind enough to go to paragraph 8.	12	You see how the point has now been elided away from
13	MR JUSTICE FRASER: This is Mr Green's skeleton?	13	the contract terms into the cross-examination debate.
14	LORD GRABINER: My Lord, yes.	14	Then in 13:
15	MR JUSTICE FRASER: Yes.	15	"It does not lie in the Post Office mouth to
16	LORD GRABINER: What he says in paragraph 8 is:	16	complain that the judge resolved matters that the
17	"In the judgment, the judge correctly resolved	17	Post Office itself elected to put in issue and contested
18	matters that were put in issue before him. He did so in	18	before him or on which it expressly invited him to make
19	the light of the evidence adduced, how it was challenged	19	findings, still less as a basis upon which to seek to
20	and the case advanced by the parties before him.	20	derail the entire group litigation by alleged apparent
21	A party can't be surprised when a judge makes findings	21	bias ."
22	on a point when the same party has elected to adduce	22	Then in paragraph 17:
23	evidence on that point or to cross-examine on it."	23	"The court cannot be fairly criticised for making
24	In paragraph 9:	24	a judicial assessment of both parties' cases, evidence
25	"The judge rightly made his assessment of the above	25	and witnesses in the usual way, particularly on the
	177		10
	17		19
1	matters and resolved the Common Issues."	1	basis of the parties' respective pleaded cases and the
2	And I really emphasise those words:	2	way their cases were actually advanced at the
3	"In the light of the parties' pleaded cases, in	3	Common Issues trial."
4	particular Post Office's expressly pleaded case on	4	So there is a clear departure away from the contract
5	issues of construction and its procedural election not	5	terms, as your Lordship put it to me a few moments ago,
6	to amend that case, this approach was a proper and	6	and into matters such as what was pleaded and what was
7	necessary part of his judicial assessment of the	7	cross-examined and so on.
8	proceedings before him."	8	MR JUSTICE FRASER: But just pausing there just for
9	And I emphasise those words as well. Then in	9	a moment, because your expression "the cross-examination
10	paragraph	10	debate" I think as useful shorthand term for it . But if
11	MR JUSTICE FRASER: There is no dispute that $\ I \ had$ to	11	the Post Office was challenging a particular lead
12	consider and resolve the Common Issues, I think.	12	claimant's veracity and cross-examined on particular
13	LORD GRABINER: Indeed, that is common ground.	13	material to demonstrate that that witness should not be
14	MR JUSTICE FRASER: And I had to do that in respect of the	14	believed, and there is an issue of fact as to whether
15	six lead claimants as well.	15	that witness' contractual relations with the Post Office
16	LORD GRABINER: Indeed, absolutely.	16	were formed on X, Y, or Z, does that mean that the
17	MR JUSTICE FRASER: And insofar as there were issues of	17	material in respect of which cross-examination has been
18	fact, because there were issues of contract formation	18	performed remains irrelevant or does it become relevant?
19	LORD GRABINER: Indeed.	19	LORD GRABINER: If the cross-examination was concerned to
20	MR JUSTICE FRASER: that went to each of the six.	20	deal with the Common Issues, entirely appropriate to
21	LORD GRABINER: Indeed.	21	deal with to make findings in relation to that
22	MR JUSTICE FRASER: So I assume your position on that $$ is	22	cross-examination, yes.
23	that insofar as fact had to be resolved to identify the	23	MR JUSTICE FRASER: What if it was done to deal with the
24	contractual relations of each of those $\operatorname{six}$ , that was	24	credit of the witness, which is itself in issue in
25	a necessary part of the Common Issues trial.	25	respect of their contract formation?
	18		20

LORD GRABINER: Well, as I say, if it is concerned with contract formation, fair dos, but insofar as there might have been cross-examination which went to wider issues at the trial, which I understand is the case, that is driven essentially by the background about whether or not the material that was incorporated into the claimants' witness statements was admissible and relevant material.

One of the concerns on this side was not to leave unchallenged matters which shouldn't have been in evidence at all, because they were not relevant to the Common Issues as defined. That, I think, is the area for disagreement, and I will develop it a little bit further, because when we look at various paragraphs in the judgment, you will see how that distinction can be demonstrated from the paragraphs in the judgment that we rely upon.

But that was a grumbling issue all the way through, because at the outset it was anticipated that that would not be a problem, and indeed your Lordship at one stage had actually invited the possibility that there would be a strike-out application in respect of the witness statements on the grounds that my side were saying that the witness statements contained matters of fact which were wholly irrelevant to the Common Issues.

In the event, when that application was made, I think your Lordship said that would either be dealt with by way of a strike out or by way of no cross-examination. In the event, the strike-out application was made, but was rejected by your Lordship. But, of course, my side were then left in a quandary, not knowing whether or not your Lordship would take account of irrelevant material, irrelevant for the purposes of the trial of the Common Issues. That, I think, is the area for difference. MR IUSTICE FRASER: The strike-out application  $% \left( \mathbf{r}\right) =\mathbf{r}^{2}$  was first , or concerns about scope of evidence were first mentioned before the witness statements had been served, so there was a lot of debate about the scope of evidence that might be served in the absence of seeing what that evidence was.

17 LORD GRABINER: Yes.

18 MR JUSTICE FRASER: But I understand your submission. Your
19 submission is as a result of the judgment on the
20 strike-out application, you, the Post Office, was in
21 a quandary about what it could or should do in respect
22 of the evidence that had not been struck out, is that
23 correct?
24 LORD CRADINER. Precisely. What would be your your.

LORD GRABINER: Precisely. What would be very, very
 unattractive, in the face of the events that had

happened, that if, by the time you got to the trial, my learned friend Mr Cavender spent a lot of his time during my learned friend's Mr Green's cross-examination of witnesses jumping up and down saying, "You can't put that because it doesn't arise in the Common Issues trial", nothing could be more irritating either to Mr Green in his cross-examination, still less to the learned judge, because that is just not the way to proceed.

So that said, the only way in which you can cover yourself, you either say nothing at all, which is a high risk strategy because you don't know what the judge's thinking is or what relevance the judge may apply to the matters that have been the subject of the questioning, or you actually indulge yourself in some cross-examination.

But it doesn't following that because you have done that, by some kind of process of osmosis, the definition of the Common Issues are suddenly being dramatically expanded or increased. It doesn't change the definition of the Common Issues in the slightest. It means there has been some cross-examination on some irrelevant material, which is perfectly reasonable.

But I take your Lordship's point that if the cross-examination goes to credit and was in respect of

a matter such as what were the contract terms, or some other issue under the Common Issues' rubric, then that would be fair dos, and if your Lordship came to a conclusion about that, that would be reasonable.

But on the other hand, your Lordship came to

But on the other hand, your Lordship came to a conclusion about the credibility of some witness, but in the context of a debate about breach of contract, in my submission, that would be wholly irrelevant and should not have entered upon the debate.

Similarly, if it was an issue about the working of Horizon, the idea or the notion, as we shall see, I am afraid, when we get to the paragraphs, that your Lordship expresses a view about the witnesses' position in relation to a Horizon Issue for example, in my submission, that was an irrelevant consideration and should not have figured in the judgment on the Common Issues. I hope your Lordship understands where I am coming from.

MR JUSTICE FRASER: No, I do. That is very clear. But just to take a worked example, for example, in respect of credit, there were issues of fact concerning

22 Mr Abdulla's contract formation.

23 LORD GRABINER: Indeed

24 MR JUSTICE FRASER: And the claimant called, as is

conventional, its evidence of fact first and Mr Cavender

that that cross-examination of Mr Abdulla was irrelevant because it went to the circumstances in which he was because it went to the circumstances in which he was before you.  MR JUSTICE FRASER: You say it was irrelevant.  MR JUSTICE FRASER: When the Post Office made submissions in closing that Mr Abdulla had been lying, how can those before you.  MR JUSTICE FRASER: When the Post Office made submissions in submissions properly be considered without taking closing that Mr Abdulla had been lying, how can those submissions properly be considered without taking closing that Mr Abdulla had been lying, how can those submissions properly be considered without taking data account of the fact that the Post Office had put to mr Abdulla had he was gulty of a criminal offence?  MR JUSTICE FRASER: Would your Lordship bear with me? I understand the point that you are putting to me.  J intend to come to the Mr Abdulla story in the judgment  J intend to come to the Mr Abdulla story in the judgment  J or DRASER: Wes, of course, yes.  J ORD GRABINER: And then as I say, just coming back to the point about those paragraphs in my learned friend's  MR JUSTICE FRASER: Yes, of course, yes.  J LORD GRABINER: And then as I say, lust coming back to the point about those paragraphs in my learned friend's  MR JUSTICE FRASER: Yes  LORD GRABINER: -the claimants say that those findings were that your Lordship has reached concluded findings. And if follows that the essential difference between us is the issues before you, and we say the opposite.  MR JUSTICE FRASER: Yes.  LORD GRABINER: we, So that is a short point, but I think it does narrow the issues somewhat, what the claimants say that those findings were that your Lordship has reached concluded findings. And of the issues before you, and we say the opposite.  MR JUSTICE FRASER: Yes.  LORD GRABINER: we, of course, yes.  LORD GRABINER: whe claimants say that those indings were that your Lordship had to decide these matters, they make some play of the way that Post Office conducted the rail	1	cross-examined Mr Abdulla quite extensively by reference	1	conducted the trial . At all times, both before and
trial. We never, ever altered that position, and his branch accounts. In that interview, it was put to 5 Mr. McMadula that he had admitted false accounting, which 6 monthing that we fid or said can fairly be said to have some state of the secondly. The fact that he had admitted false accounting, which 6 monthing that we fid or said can fairly be said to have some state of the secondly. The fact that Post Office was reluctant to 8 months of that evidence suddenly relevant evidence to go unchallenged cannot make that that cross-commissions on it. Can it be said 1 months of the circumstances in which he was 1 months of the circumstances in which he was 1 months of the circumstances in which he was 1 months of the circumstances in which he was 1 months of the circumstances in which he was 1 months of the circumstances in which he was 1 months of the circumstances in which he was 1 months of the circumstances in which he was 1 months of the circumstances in which he was 1 months of the circumstances in which he was 1 months of the circumstances in which he was 1 months of the circumstances in which he was 1 months of the circumstances in which he was 1 months of the circumstances in which he was 1 months of the circumstances in which he was 1 months of the circumstances in which he was 1 months of the circumstance in which he was 1 months of the circumstance in which he was 1 months of the circumstance in which were 1 months of the circumstance in which he was 2 months of the circumstance in which were 1 months of the months of the circumstance in which were 1 months of the was 2 months of the was 2 months of the months of the was 2 months of th	2	to what I will call his suspension interview, which was	2	during the trial, Post Office made clear its position as
his branch accounts. In that interview, it was put to is a criminal officere, and that a obviously worth this is a criminal officere, and that obviously worth this recredit.  Mr Abdulla that he had admitted false accounting, which is a criminal officere, and that obviously worth this recredit.  Now, I assume, pausing there at that point, it can't be said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for the said - or maybe it can, but I would be grateful for - or were not excessary to decide the matters that were or were not necessary to decide the matters that were or were not necessary to decide the matters that were or were not necessary to decide the matters that were or were not necessary to decide the matters that were or were not necessary to decide the matters that were or were not necessary to decide the matters that were considered without taking - or were not necessary to decide the matters that were considered without taking - or were not necessary to decide the matters that were considered without taking - or were not necessary to decide the matters that were defined in the said and the near the possibility to make a submissions properly be considered without taking - or were n	3	the point at which the Post Office effectively sought	3	to the proper scope and limits of the Common Issues
mounted to some kind of waiver or enlargement of the definition of those issues.  servedit.  Now, I assume, pausing there at that point, it can't be said or maybe it can, but I would be grateful for low be said or maybe it can, but I would be grateful for low be said or maybe it can, but I would be grateful for low pour guidance or your submissions on it. Can it be said I The other side is proposition, if they do make a proposition to that effect, is simply a non sequitur.  The other side is proposition, if they do make a proposition to that effect, is simply a non sequitur.  The other side is proposition, if they do make a proposition to that effect, is simply a non sequiture.  The other side is proposition, if they do make a proposition to that effect, is simply a non sequiture.  The other side is proposition, if they do make a proposition to that effect, is simply a non sequiture.  The other side is proposition, if they do make a proposition to that effect, is simply a non sequiture.  The other side is proposition, if they do make a proposition to that effect, is simply a non sequiture.  The other side is proposition, if they do make a proposition to that effect, is simply a non sequiture.  The other side is proposition, if they do make a proposition to that effect, is simply a non sequiture.  The other side is proposition, if they do make a proposition to that effect, is simply a non sequiture.  The other side is proposition, if they do make a proposition to that effect, is simply a non sequiture.  The other side is proposition, if they do make a proposition to that effect, is simply a non sequiture.  The other side is proposition, if they do make a proposition to that effect, is simply a non sequiture.  The other side is proposition, if they do make a proposition of the condition of the sequence of the side is proposition of the sequence of	4	his side of the story for explanations for shortfall in	4	trial. We never, ever altered that position, and
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be said or maybe it can, but I would be grateful for 1.1 your guidance or your submissions on it. Can it be said 1.2 that that cross-examination of Mr Abdulla was irrelevant 1.2 a proposition to that effect, is simply a non sequitur. 1.2 because it went to the circumstances in which he was 1.3 The conclusions that your Lordship reached either were or were not necessary to decide the matters that were before you. 1.4 The conclusions that your Lordship reached either were or were not necessary to decide the matters that were before you. 1.4 The conclusions that your Lordship reached either were or were not necessary to decide the matters that were before you. 1.4 The conclusions that your Lordship reached either were or were not necessary to decide the matters that were before you. 1.5 Lords ORABINER: The answer to that is yes. 1.5 Defore you. 1.5 Now, I would like to turn next to the judgment. 1.6 Now, I would like to turn next to the judgment. 1.6 Now, I would like to turn next to the judgment. 1.6 Now, I would like to turn next to the judgment. 1.6 Now, I would like to turn next to the judgment. 1.6 Now, I would like to turn next to the judgment. 1.6 Now, I would like to turn next to the judgment. 1.6 Now, I would like to turn next to the judgment. 1.6 Now, I would like to turn next to the judgment. 1.6 Now, I would like to turn next to the judgment. 1.6 Now, I would like to turn next to the judgment. 1.6 Now, I would like to turn next to the judgment. 1.6 Now, I was upon to the fact that the Post Office had put to 2.1 the paragraphs in the judgment. 1 and then 1 and judgment. 2.1 the paragraphs in the judgment. 1 and then 1 and judgment. 2.2 a tedious process, but it is the only way to do this exercise. 2.3 Lord ORABINER: Would you Lordship be and then 1 and judgment. 2.3 the paragraphs in the judgment is the paragraphs in my learned friend's 2.4 So the seven matters are as follows: first of all, 2.5 Subpostmasters' experiences of using Horizon and its follows that the seating the paragraph your lordship w	8	credit.	8	Secondly, the fact that Post Office was reluctant to
that that cross-examination of Mr Abdulla was irrelevant because it went to the circumstances in which he was because it went to the circumstances in which he was before you.  MR JUSTICE FRASER: You say it was irrelevant.  MR JUSTICE FRASER: When the Post Office made submissions in closing that Mr Abdulla had been lying, how can those before you.  MR JUSTICE FRASER: When the Post Office made submissions in submissions properly be considered without taking closing that Mr Abdulla had been lying, how can those submissions properly be considered without taking closing that Mr Abdulla had been lying, how can those submissions properly be considered without taking data account of the fact that the Post Office had put to mr Abdulla had he was gulty of a criminal offence?  MR JUSTICE FRASER: Would your Lordship bear with me? I understand the point that you are putting to me.  J intend to come to the Mr Abdulla story in the judgment  J intend to come to the Mr Abdulla story in the judgment  J or DRASER: Wes, of course, yes.  J ORD GRABINER: And then as I say, just coming back to the point about those paragraphs in my learned friend's  MR JUSTICE FRASER: Yes, of course, yes.  J LORD GRABINER: And then as I say, lust coming back to the point about those paragraphs in my learned friend's  MR JUSTICE FRASER: Yes  LORD GRABINER: -the claimants say that those findings were that your Lordship has reached concluded findings. And if follows that the essential difference between us is the issues before you, and we say the opposite.  MR JUSTICE FRASER: Yes.  LORD GRABINER: we, So that is a short point, but I think it does narrow the issues somewhat, what the claimants say that those findings were that your Lordship has reached concluded findings. And of the issues before you, and we say the opposite.  MR JUSTICE FRASER: Yes.  LORD GRABINER: we, of course, yes.  LORD GRABINER: whe claimants say that those indings were that your Lordship had to decide these matters, they make some play of the way that Post Office conducted the rail	9	Now, I assume, pausing there at that point, it can't	9	allow irrelevant evidence to go unchallenged cannot make
that that cross-examination of Mr Abdulla was irrelevant because it went to the circumstances in which he was a superied or 14 or were not necessary to decide the matters that were suspended or 14 or were not necessary to decide the matters that were suspended or 14 or were not necessary to decide the matters that were suspended or 15 LORD GRABINER: The answer to that is yes. 15 before you. 16 MR JUSTICE FRASER: You say it was irrelevant. 16 Now, I would like to turn next to the judgment. 16 LORD GRABINER: Completely, 17 There are really two answers of shortfalls; is submissions properly be considered without taking 20 and then I am going to deal with rough a account of the fact that the Post Office had put to 21 the paragraphs in the judgment. I am sorry, it is a tedious process, but it is the only way to do this exercise. 17 LORD GRABINER: Would your Lordship perawith me? 23 exercise. 25 Very 10 LORD GRABINER: Would your Lordship or were not necessary to the seven items first a tedious process, but it is the only way to do this exercise. 18 LORD GRABINER: Would your Lordship are with me? 24 So the seven matters are as follows: first of all, Subpostmasters' experiences of using Horizon and its 25 LORD GRABINER: And then as I say, just coming back to the point about those paragraphs in my learned friend's skeleton 15 LORD GRABINER: He claimants say that your Lordship as reached concluded findings. And 16 Lord findings and 17 Lordship has reached concluded findings. And 18 Lordship as reached concluded findings. And 19 Lordship has reached concluded findings. And 19 Lordship has reached concluded findings. And 19 Lordship has reached concluded findings. And 20 Lordship has reached concluded findings. And 21 Lordship has reached concluded findings. And 22 Lordship has reached concluded findings. And 23 Lords Grabiners in Issue before you, and so they accept 31 Lordship has reached concluded findings. And 32 Lordship has reached concluded findings. And 33 Lordship has reached concluded findings. And	10	be said or maybe it can, but I would be grateful for	10	that evidence suddenly relevant.
because it went to the circumstances in which he was suspended or 14 or were not necessary to decide the matters that were before you. 15 before you. 16 Now, I would like to turn next to the judgment. 17 IORD GRABINER Completely. 17 There are really sevent or which we submit side your Lordship reached premature concluded closing that Mr Abdulla had been lying, how can those submissions in submissions properly be considered without taking cacount of the fact that the Post Office had put to 21 the paragraphs in the judgment. I am sorry, It is a tedious process, but it is the only way to do this exercise. 18 I understand the point that you are putting to me. 29 I understand the point that you are putting to me. 21 I understand the point that you are putting to me. 22 I intend to come to the Mr Abdulla story in the judgment 25 Subpostmasters' experiences of using Horizon and its 25 Subpostmasters' experiences of using Horizon and its 26 John Shaffing the point about those paragraphs in my learned friend's 4 Horizon; thirdly, the quality and operation of the paragraphs in the judgment 27 Subpostmasters' experiences of using Horizon and its 28 Just coming back to the point about those paragraphs in my learned friend's 4 Horizon; thirdly, the quality and operation of the helpline, in particular as an adjunct to the accounting 87 system, fourthly, the quality and operation of the helpline, in particular as an adjunct to the accounting 87 system, fourthly, the quality and operation of the helpline, in particular as an adjunct to the accounting 87 system, fourthly, the quality and operation of the helpline, in particular as an adjunct to the accounting 88 resolved matters in issue before you, and so they accept 4 star your Lordship are ached concluded findings. And 4 the Issues somewhat. 18 INJUSTICE FRASER: Yes. 19 So that is a short point, but I think it does narrow 14 So taking the first item, Subpostmasters' experiences of using Horizon and its functionality, including Subpostmasters' ability to identify the cause	11	your guidance or your submissions on it. Can it be said	11	The other side's proposition, if they do make
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LORD GRABINER: The answer to that is yes.  15	13	because it went to the circumstances in which he was	13	The conclusions that your Lordship reached either were
MR JUSTICE FRASER: You say it was irrelevant.  16 Now, I would like to turn next to the judgment.  17 IORD GRABINER: Completely.  18 MR JUSTICE FRASER: When the Post Office made submissions in a submit that your Lordship reached premature concluded findings. If I can just give you the seven items first submissions properly be considered without taking account of the fact that the Post Office hadp ut to 21 the paragraphs in the judgment. I am sorry, it is a tedious process, but it is the only way to do this careful a tocome to the Mr Abdulla that he was guilty of a criminal officne?  18 I understand the point that you are putting to me.  19 I intend to come to the Mr Abdulla story in the judgment  20 So the seven matters are as follows: first of all, Subpostmasters' experiences of using Horizon and its  21 Am Justice FRASER: Yes, of course, yes.  22 Intend to come to the Mr Abdulla story in the judgment  23 LORD GRABINER: And then as I say, just coming back to the point about those paragraphs in my learned friend's skeleton - 5 keleton - 6 km Justice FRASER: Yes. 6 keleton - 6 km Justice FRASER: Yes. 6 keleton - 7 km Justice FRASER: Yes. 6	14	suspended or	14	or were not necessary to decide the matters that were
17 LORD GRABINER: Completely.  18 MR [USTICE FRASER: When the Post Office made submissions in 18 submit that your Lordship reached premature concluded findings. If I can just give you the seven items first and then I am going to deal with each of them through account of the fact that the Post Office had put to 21 the paragraphs in the judgment. I am sorry, it is account of the fact that the Post Office had put to 22 the paragraphs in the judgment. I am sorry, it is 2 Mr Abdulla that he was guilty of a criminal offence? 22 a tedious process, but it is the only way to do this exercise.  10 LORD GRABINER: Would your Lordship bear with me? 23 exercise.  11 understand the point that you are putting to me. 24 So the seven matters are as follows: first of all, 25 Subpostmasters' experiences of using Horizon and its 25 Subpostmasters' ability to identify the causes of shortfalls; secondly, 27 Lords of GRABINER: And then as Isay, just coming back to the point about those paragraphs in my learned friend's 4 Horizon; thirdly, the quality and operation of the skeleton 5 helpline, in particular as an adjunct to the accounting MR [USTICE FRASER: Yes. 6 Gourse, was a stort point, but I think it does narrow 4 he issues somewhat.  10 Intended to come to the Mr Abdulla story in the judgment 25 subpostmasters' ability to identify the causes of shortfalls; fifthy, demands for payment and threats of legal action allegedly made by 25 that your Lordship as reached concluded findings. And 9 post Office is sixthly, the circumstances in which 10 it follows that the essential difference between us is 10 Subpostmasters' contracts were suspended or terminated; at the issues somewhat.  19 World of the way that post Office conducted the 12 subpost masters' only on the accounting of the issues before you, and we say the opposite. 13 paragraphs. 1 wour Lordship had to decide these matters, they make some play of the way that Post Office conducted the 14 payment and threats of legal action allegedly made by 20 payment and threats of legal ac	15	LORD GRABINER: The answer to that is yes.	15	before you.
MR JUSTICE FRASER: When the Post Office made submissions in closing that Mr Abdulla had been lying, how can those closing that Mr Abdulla had been lying, how can those submissions properly be considered without taking account of the fact that the Post Office had put to 21 the paragraphs in the judgment I am sorry, it is a redious process, but it is the only way to do this exercise.  10 Intend to come to the Mr Abdulla story in the judgment 25 Subpostmasters' experiences of using Horizon and its 25 LORD GRABINER: Would your Lordship bear with me? 24 So the seven matters are as follows: first of all, 25 Intend to come to the Mr Abdulla story in the judgment 25 Subpostmasters' experiences of using Horizon and its 25 LORD GRABINER: And then as I say, just coming back to the 4 point about those paragraphs in my learned friend's 4 Horizon; thirdly, the quality and operation of the skeleton 5 helpline, in particular as an adjunct to the accounting MR JUSTICE FRASER: Yes. 16 Subpostmasters' experiences in wise before you, and so they accept 4 that your Lordship has reached concluded findings. And 5 that is a short point, but I think it does narrow 4 the issues before you, and we say the opposite. 15 the issues somewhat. 15 was paragraph 9, to decide 16 the issues before you, and we say the opposite. 16 MR JUSTICE FRASER: Yes. 17 LORD GRABINER: Now, in support of their argument that your Lordship had to decide these matters, they make 3 some play of the way that Post Office conducted the 19 your Lordship, but 1 day to the paragraphs, and we have given full notice of all the matters that we rely upon. So the first paragraph I want to go to is 10 that point. 24 First, as explained in Parsons 14 and our skeleton. 24 First, as explained in Parsons 14 and our skeleton. 24 First, as chargen hi want to go to is 2 baragraph I want to go to is 2 baragraph I want to go to the paragraphs. 25 baragraph I want to go to the paragraph. 26 baragraph I w	16	MR JUSTICE FRASER: You say it was irrelevant.	16	Now, I would like to turn next to the judgment.
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submissions properly be considered without taking account of the fact that the Post Office had put to Mr Abdulla that he was guilty of a criminal offence? Lorr GRABINER: Would your Lordship bear with me? Linderstand the point that you are putting to me. Lorr GRABINER: Would your Lordship bear with me? Linderstand the point that you are putting to me. Lorr GRABINER: Would your Lordship bear with me? Linderstand the point that you are putting to me. Lorr GRABINER: Would your Lordship bear with me? Lorr GRABINER: Would your Lordship bear with me? Lorr GRABINER: Wow, in support of their argument that Lorr GRABINER: Wow, in support of their argument that Lorr GRABINER: Wow, in support of their argument that Lorr GRABINER: Now, in support of their argument that Lorr GRABINER: Now, in support of their argument that Lorr Grabiner: — the claimants ago in my exchange with your Lordship, but Lord GRABINER: Now, in support of their argument that Lorr Grabiner: — the plained these points, in part at least, a few moments ago in my exchange with your Lordship, but Lord GRABINER: Now, in support of their argument that Lorr Grabiner: — the plained these points, in part at least, a few moments ago in my exchange with your Lordship, but Lord Grabiner: — then I am going to deal with each of them through the paragraphs, at a tedious process, but it is the only way to do this a tedious process, but it is the only way to do this a tedious process, but it is the only way to do this a tedious process, but it is the only way to do this a tedious process, but it is the only way to do this a tedious process, but it is the only way to do this a tedious process, but it is the only way to dul.  Lord GRABINER: when all subjectes we rerised a tedious process, but it is the only way to dul.  Lord GRABINER: when all major to the paragraph shape were contained the point that that point the paragraph is a tedious process, but it is the only way to dul.  Lord Grabiner: a tedius, subpostmasters and land, was prevently, the decayers of believes with	18	MR JUSTICE FRASER: When the Post Office made submissions in	18	submit that your Lordship reached premature concluded
account of the fact that the Post Office had put to  Mr Abdulla that he was guilty of a criminal offence?  I understand the point that you are purting to me.  I understand the point that you are purting to me.  MR IUSTICE FRASER: Yes, of course, yes.  IORD GRABINER: And then as I say, just coming back to the point about those paragraphs in my learned friend's skeleton -  MR IUSTICE FRASER: Yes.  IORD GRABINER: who define the law of the point about those paragraphs in my learned friend's skeleton -  MR IUSTICE FRASER: Yes.  IORD GRABINER:	19	closing that Mr Abdulla had been lying, how can those	19	findings. If I can just give you the seven items first
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LORD GRABINER: Would your Lordship bear with me?  I understand the point that you are putting to me.  I intend to come to the Mr Abdulla story in the judgment  25  27  and if I may, I will deal with it at that point.  MR JUSTICE FRASER: Yes, of course, yes.  LORD GRABINER: And then as I say, just coming back to the point about those paragraphs in my learned friend's skeleton  MR JUSTICE FRASER: Yes.  LORD GRABINER: the claimants say that your Lordship resolved matters in issue before you, and so they accept that your Lordship has reached concluded findings were necessary, that is their word in paragraph 9, to decide the issues before you, and we say the opposite.  So taking the first item, Subpostmasters'  LORD GRABINER: Now, in support of their argument that So taking the first item, Subpostmasters'  Hop it accords with what would be convenient for your Lordship, is if you have a copy of the judgment that I can summarise them now. There are really two answers  MR JUSTICE FRASER: I do.  LORD GRABINER: Now, in support of their argument that So taking the first item, Subpostmasters'  A paragraphs.  LORD GRABINER: Now, in support of their argument that So taking the first item, Subpostmasters'  A paragraphs.  LORD GRABINER: Now, in support of their argument that MR JUSTICE FRASER: I do.  LORD GRABINER: Now, in support of their argument that A gour Lordship had to decide these matters, they make some play of the way that Post Office conducted the some play of the way that Post Office conducted the some play of the way that Post Office conducted the some play of the way that Post Office conducted the some play of the way that Post Office conducted the some play of the way that Post Office conducted the some play of the way that Post Office conducted the some play of the say that Post Office conducted the some play of the way that Post Office conducted the some play of the way that Post Office conducted the some play of the way that Post Office conducted the some play of the way that Post Office conducted the s	22	Mr Abdulla that he was guilty of a criminal offence?	22	a tedious process, but it is the only way to do this
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25 Subpostmasters' experiences of using Horizon and its  26 27  1 and if I may, I will deal with it at that point.  28 MR JUSTICE FRASER: Yes, of course, yes.  29 identify the causes of shortfalls; secondly,  10 LORD GRABINER: And then as I say, just coming back to the  4 point about those paragraphs in my learned friend's  5 skeleton  6 MR JUSTICE FRASER: Yes.  10 LORD GRABINER: the claimants say that your Lordship  8 resolved matters in issue before you, and so they accept  9 that your Lordship has reached concluded findings. And  10 it follows that the essential difference between us is  11 that the claimants say that those findings were  12 whened, as I indicated, to look at the relevant  13 the issues before you, and we say the opposite.  14 So that is a short point, but I think it does narrow  15 the issues somewhat.  16 MR JUSTICE FRASER: Yes.  17 We need, as I indicated, to look at the relevant  18 paragraphs.  19 Post Office; sixthly, the deadquacy of training.  20 We need, as I indicated, to look at the relevant  21 paragraphs.  22 We need, as I indicated, to look at the relevant  23 the issues somewhat.  24 So taking the first item, Subpostmasters'  25 experiences of using Horizon and its  26 subject that the claimants and threats of legal action allegedly made by  27 post Office; sixthly, the circumstances in which  28 Subpostmasters' contracts were suspended or terminated;  29 and seventhly, the adequacy of training.  20 We need, as I indicated, to look at the relevant  21 paragraphs.  22 paragraphs.  23 Dorn GRABINER: Now, in support of their argument that  24 Post Office on the first item, Subpostmasters'  25 apagraphs.  26 I I I hope it accords with what would be convenient for  26 your Lordship had to decide these matters, they make  27 a few moments ago in my exchange with your Lordship, but  28 a few moments ago in my exchange with your Lordship, but  29 and we have given full notice of all the matters that we  20 rely upon. So the first paragraph I want to go to is	24	I understand the point that you are putting to me.	24	So the seven matters are as follows: first of all,
and if I may, I will deal with it at that point.  MR JUSTICE FRASER: Yes, of course, yes.  LORD GRABINER: And then as I say, just coming back to the point about those paragraphs in my learned friend's skeleton  KR JUSTICE FRASER: Yes.  LORD GRABINER: And then as I say, just coming back to the skeleton  KR JUSTICE FRASER: Yes.  LORD GRABINER: He claimants say that your Lordship fresolved matters in issue before you, and so they accept that your Lordship has reached concluded findings. And it follows that the essential difference between us is that the claimants say that those findings were the issues specified by that is a short point, but I think it does narrow the issues somewhat.  MR JUSTICE FRASER: Yes.  So that is a short point, but I think it does narrow the issues somewhat.  MR JUSTICE FRASER: Yes.  LORD GRABINER: Now, in support of their argument that your Lordship had to decide these matters, they make some play of the way that Post Office conducted the trial. I anticipated these points, in part at least, a few moments ago in my exchange with your Lordship, but I can summarise them now. There are really two answers the intention of the success of shortfalls; secondly, identify the causes of shortfalls; secondly, identify the causes of shortfalls; secondly, in dentify the causes of shortfalls; secondly, in the decide of problems with he helpline, in particular as an adjunct to the accounting system; fourthly, the quality and operation of the helpline, in particular as an adjunct to the accounting system; fourthly, the quality and operation of the helpline, in particular as an adjunct to the accounting system; fourthly, the quality and operation of the helpline, in particular as an adjunct to the accounting system; fourthly, the quality and operation of the suptement say in the first item, subpostmasters' contracts were suspended or terminated; and seventhly, the adequacy of training.  We need, as I indicated, to look at the relevant paragraphs.  So taking the first item, Subpostmasters' because of	25	I intend to come to the Mr Abdulla story in the judgment	25	Subpostmasters' experiences of using Horizon and its
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skeleton  skeleton  skeleton  skeleton  helpline, in particular as an adjunct to the accounting system; fourthly, the quality of Post Office's investigations into shortfalls; fifthly, demands for payment and threats of legal action allegedly made by abyment that subject on the paragraphs, and seventhly, the circumstances in which  Subpostmasters' contracts were suspended or terminated; and seventhly, the circumstances in which  Subpostmasters' contracts were suspended or terminated; and seventhly, the circumstances in which  Subpostmasters' contracts were suspended or terminated; and seventhly, the circumstances in which	3	LORD GRABINER: And then as I say, just coming back to the	3	Post Office's alleged knowledge of problems with
6 MR JUSTICE FRASER: Yes. 6 system; fourthly, the quality of Post Office 's 7 LORD GRABINER: the claimants say that your Lordship 8 resolved matters in issue before you, and so they accept 9 that your Lordship has reached concluded findings. And 10 it follows that the essential difference between us is 11 and seventhly, the adequacy of training. 12 he issues before you, and we say the opposite. 13 paragraphs. 14 So that is a short point, but I think it does narrow 15 the issues somewhat. 16 MR JUSTICE FRASER: Yes. 17 LORD GRABINER: Now, in support of their argument that 18 your Lordship had to decide these matters, they make 19 your Lordship, is if you have a copy of the judgment 19 your Lordship, is if you have a copy of the judgment 10 that point. 11 the reaction of the paragraphs, 12 to that point. 13 paragraphs. 14 So taking the first item, Subpostmasters' 15 experiences of using Horizon and its functionality, 16 including Subpostmasters' ability to identify the causes 17 LORD GRABINER: Now, in support of their argument that 18 J hope it accords with what would be convenient for 19 your Lordship, is if you have a copy of the judgment 19 your Lordship, is if you have a copy of the judgment 20 trial. I anticipated these points, in part at least, 21 a few moments ago in my exchange with your Lordship, but 22 I can summarise them now. There are really two answers 23 and we have given full notice of all the matters that we 24 First, as explained in Parsons 14 and our skeleton, 25 Tords GRABINER: then I will just go to the paragraphs.	4	point about those paragraphs in my learned friend's	4	Horizon; thirdly, the quality and operation of the
Tord Grabiner:	5	skeleton	5	helpline, in particular as an adjunct to the accounting
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the issues somewhat.  15 experiences of using Horizon and its functionality,  16 MR JUSTICE FRASER: Yes.  16 including Subpostmasters' ability to identify the causes  17 of shortfalls, so the way I propose to do this, and  18 your Lordship had to decide these matters, they make  19 your Lordship, is if you have a copy of the judgment  20 trial. I anticipated these points, in part at least,  21 a few moments ago in my exchange with your Lordship, but  22 I AR JUSTICE FRASER: I do.  23 and we have given full notice of all the matters that we  24 rely upon. So the first paragraph I want to go to is	13	the issues before you, and we say the opposite.	13	paragraphs.
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LORD GRABINER: Now, in support of their argument that your Lordship had to decide these matters, they make some play of the way that Post Office conducted the trial. I anticipated these points, in part at least, a few moments ago in my exchange with your Lordship, but I can summarise them now. There are really two answers to that point.  17 of shortfalls, so the way I propose to do this, and I hope it accords with what would be convenient for your Lordship, is if you have a copy of the judgment handy 21 MR JUSTICE FRASER: I do. 22 LORD GRABINER: then I will just go to the paragraphs, and we have given full notice of all the matters that we rely upon. So the first paragraph I want to go to is	15	the issues somewhat.	15	experiences of using Horizon and its functionality,
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trial . I anticipated these points, in part at least, a few moments ago in my exchange with your Lordship, but I can summarise them now. There are really two answers to that point.  20 handy 21 MR JUSTICE FRASER: I do. 22 LORD GRABINER: then I will just go to the paragraphs, and we have given full notice of all the matters that we rely upon. So the first paragraph I want to go to is	18	your Lordship had to decide these matters, they make	18	I hope it accords with what would be convenient for
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to that point. 23 and we have given full notice of all the matters that we First, as explained in Parsons 14 and our skeleton, 24 rely upon. So the first paragraph I want to go to is	22	I can summarise them now. There are really two answers	22	LORD GRABINER: then I will just go to the paragraphs,
	23		23	and we have given full notice of all the matters that we
	24	First, as explained in Parsons 14 and our skeleton,	24	rely upon. So the first paragraph I want to go to is
this is irrelevant, ie the way that Post Office 25 172 [B7/29/64].	25	this is irrelevant, ie the way that Post Office	25	172 {B7/29/64}.

1	MR JUSTICE FRASER: Is this numbered the first of your seven	1	"I make it quite clear that I do not speculate on
2	categories?	2	any of that, nor is it possible to know what the outcome
3	LORD GRABINER: Yes.	3	of the trial of the Horizon Issues will be later this
4	MR JUSTICE FRASER: Yes, all right.	4	year."
5	LORD GRABINER: So when I have just gone to the relevant	5	LORD GRABINER: No, you do say that, and I am going to come
6	paragraphs, I am going to make a very brief submission,	6	to that point towards the end of these submissions
7	invariably I will make a brief submission in relation to	7	MR JUSTICE FRASER: I understand.
8	the bit that we just emphasised.	8	LORD GRABINER: because your Lordship does make that kind
9	MR JUSTICE FRASER: Yes.	9	of point, not always, but fairly regularly, during the
10	LORD GRABINER: So in 172, the emphasised passage is:	10	judgment.
11	"Mrs Stubbs is a careful and honest witness. She	11	MR JUSTICE FRASER: Yes, all right.
12	did her best at the time to try and work out what was	12	LORD GRABINER: I am going to say something about that, if
13	happening, the reasons for it, and also notified the	13	I may, at the appropriate moment.
14	helpline on numerous occasions, as well as keeping her	14	Then 217, paragraph 217, this deals with the
15	own separate paper records in an attempt, or more	15	position of Mr Sabir. And there are, just for context
16	accurately numerous and concerted attempts, to work out	16	your Lordship will glance down you must be, I am
17	precisely how these shortfalls could have arisen. None	17	afraid, very familiar with this judgment, of course
18	of the Post Office personnel involved at the time with	18	but if you go down to 217, subparagraph 8, you say:
19	Mrs Stubbs, who attempted to obtain some input or	19	"Post Office's case is that Mr Sabir falsified his
20	explanation from Fujitsu were called as witnesses."	20	accounts and misstated his stock by completing the
21	Then several lines below there:	21	branch trading statements from the period he discovered
22	"Mrs Stubbs ran the branch perfectly satisfactorily	22	the mistake."
23	for many years."	23	Then in 218:
24	And a couple of lines below that:	24	"Mr Sabir's account is substantiated by the audit
25	"On the evidence before me in this trial, and upon	25	report itself , prepared by the auditors two days after
	29		31
1	my assessment of Mrs Stubbs as a witness, I consider	1	the audit."
2	that she is reliable, thorough and honest."	2	And then on to 219, five or six line down:
3	And honest."	3	"Any findings as to specific breach or breaches must
4	For completeness, there you say:	4	await a later trial . I do, however, take this evidence
5	"I accept her account of contract formation and the	5	into account in reaching my conclusions on the category
6	fact that she never received, nor did she have any	6	two facts that are disputed by the Post Office. I deal
7	knowledge of, the SPMC."	7	with that at the end of my review."
8	Your Lordship has come to a clear, concluded view in	8	Now, an important issue in the Horizon trial is how
9	that paragraph as to her evidence and credibility.	9	easy or difficult it was for Subpostmasters to work out
10	Those views went far beyond what was necessary to reach	10	from Horizon what the accounting position was. In this
11	a conclusion about the contractual documents she	11	passage, your Lordship has reached firm conclusions on
12	received. If, at a subsequent trial, her credibility is	12	the facts and also on the credibility of Mr Sabir.
13	challenged, the claimants will obviously rely upon that	13	Your Lordship also says here that you are not making any
14	passage in your Lordship's judgment as showing that	14	findings on breach. As I say, I will come back to that
15	your Lordship should and indeed would be bound to accept	15	and similar sentences in the course of these
16	the correctness of her evidence.	16	submissions.
17	So in other words, it would have been perfectly	17	302, paragraph 302. This is in relation to
18	possible for your Lordship to have accepted her evidence	18	Mrs Stockdale, and it is the third sentence.
19	about the contract formation, but without making all the	19	"There were no explanations for these [this is
20	observations that you have made, particularly in	20	experience of running the branch, not a happy one,
21	relation to helpline and the satisfactory running of the	21	unexplained shortfalls and so on] and there was no way
22	branch that she had undertaken over the period of the	22	available for her to get to the bottom of them either."
23	contract, ie post-contractually.	23	At 309, a few paragraphs on:
24	MR JUSTICE FRASER: You have rather missed out the two	24	"Mrs Stockdale was obviously in an extremely
25	sentences in the middle of that paragraph that say:	25	difficult position. She did not know what product had
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1	caused her loss ."	1	submission.
2	And at 310:	2	That is all of piece with your Lordship's findings
3	"She felt that she had no choice but to agree.	3	in paragraphs 819 and 852. If we go to 819:
4	I find that on the options presented to her at the time,	4	"The whole issue with the information available to
5	she indeed had no choice but to agree."	5	an SPM on Horizon is that they could not identify
6	And in 311:	6	discrepancies or shortfalls or understand the basis on
7	"Mrs Stockdale then took very sensible and extremely	7	which transaction corrections [TCs] with which they
8	thorough measures"	8	disagreed were issued."
9	Then your Lordship describes the measures, and then	9	Then in 852, roughly in the middle of the
10	several lines down in the same paragraph:	10	paragraph
11	"She explained that she spent hours with the	11	MR JUSTICE FRASER: 852?
12	records, including her own paper records, trying to	12	LORD GRABINER: My Lord, yes.
13	investigate. These shortfalls simply kept occurring and	13	MR JUSTICE FRASER: Just give me a second. Yes.
14	she could not work out why."	14	LORD GRABINER: "Unexplained shortfalls or discrepancies
15	In these passages, your Lordship reached conclusions	15	became apparent at the end of a branch trading period.
16	as to how easy or difficult it was for Subpostmasters to	16	It was simply not possible, on the information available
17	use Horizon to get to the bottom of shortfalls, and	17	to an SPM, on the Horizon system, for them to identify
18	alongside that, your Lordship made broad findings as to	18	the day, product, and still less the time of day that
19	the claimant witnesses' credibility . So again, in my	19	was responsible for this ."
20	respectful submission, this has nothing to do with	20	In my submission, that is classically a Horizon
21	contract formation issues which that trial should have	21	Issue, but your Lordship has reached, on that point,
22	been concerned with, but everything to do with matters	22	a concluded view.
23	yet to be the subject of future trials.	23	Paragraph 569, that is the famous paragraph. It has
24	In 824	24	got lots of factual matrix points annexed to it.
25	MR JUSTICE FRASER: Before we go to 824, though,	25	Your Lordship will recall that paragraph. It is the
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	33		33
1	Mrs Stockdale was also accused of a criminal offence in	1	paragraph with lots of subparagraphs.
2	her cross-examination.	2	MR JUSTICE FRASER: Where I go through category 2 and
3	LORD GRABINER: Right.	3	category 3 and make findings as to the factual matrix,
4	MR JUSTICE FRASER: There was a dispute of fact about what	4	yes.
5	was said to her at an interview before she was	5	LORD GRABINER: And there are just a few of them that $ I $ want
6	appointed. So in terms of resolving the dispute of fact	6	to make reference to.
7	at the interview, do you say I should have made	7	MR JUSTICE FRASER: I think it might break a record as being
8	a finding as to her or I was entitled to make	8	the longest paragraph in the judgment, which is probably
9	a finding as to her credit, but in doing so, shouldn't	9	not a particularly good record to break.
10	have taken account of anything to do with her departure	10	LORD GRABINER: You will be relieved to know that I am not
11	from the Post Office?	11	going to go through all the paragraphs.
12	LORD GRABINER: I do say that, yes.	12	MR JUSTICE FRASER: It runs on for a number of pages.
13	MR JUSTICE FRASER: You do?	13	LORD GRABINER: Yes. The ones that I want to pick on are
14	LORD GRABINER: Yes.	14	51, and your Lordship says:
15	MR JUSTICE FRASER: Thank you very much.	15	"The introduction of Horizon limited the claimants'
16	LORD GRABINER: Then in 824, this is in relation to	16	ability to investigate apparent shortfalls, particularly
17	Mr Bates.	17	as to the underlying cause thereof. Both this and 50
18	MR JUSTICE FRASER: Yes.	18	immediately preceding it are obvious on the evidence and
19	LORD GRABINER: The last couple of sentences:	19	could readily have been agreed. It can't sensibly be
20	"He realised that the information for him to do so	20	argued to the contrary, in my judgment."
21	was simply not available to him or to any Subpostmaster	21	So that is an Horizon conclusion, paragraph 61:
22	in a branch. The Horizon system did not allow him to do	22	"The Post Office has, on occasion, detected that
23	this ."	23	Horizon generated errors, caused the appearance of
24	Now, that is a conclusion of fact, but it is wholly	24	shortfalls and errors which the claimants themselves had
25	irrelevant for the purposes of the Common Issues, in my	25	not been able to identify as the cause of those apparent

1	shortfalls ."	1	So the implication from that is that you have made
2	Now, these are all matters for the Horizon trial.	2	some findings there and that more detailed ones would,
3	These findings are made in general and unqualified	3	in fact, be dealt at the later trial, but for some
4	terms. They have a wide-ranging impact and are not	4	reason, your Lordship thought it was appropriate in that
5	realistically going to be challengeable in later trials	5	trial to make those conclusions which I have just
6	in the light of further evidence and disclosure, because	6	identified .
7	what will be said when there is a debate about this in	7	Can I go to the next heading, which is "Post
8	a future trial, as inevitably there will be, is that the	8	Office's alleged knowledge of problems with Horizon".
9	other side will point to this analysis of your Lordship	9	MR JUSTICE FRASER: Yes.
10	and it is going to be impossible, in my respectful	10	LORD GRABINER: This is starting with paragraph 541. There
11	submission, and unrealistic to expect your Lordship to	11	your Lordship says:
12	depart from those conclusions.	12	"Secondly, a number of contemporaneous documents
13	In 54 to 57, which I think you aggregate, the	13	internal to the Post Office show that there has been, at
14	passage there:	14	least to some degree, an awareness of Horizon problems
15	"I cannot make detailed findings about Fujitsu's	15	within the Post Office itself over a number of years."
16	role on the basis of the evidence before me. However,	16	Then in $543$ , in about the second or third lines, you
17	it is clear that Fujitsu were able to obtain greater	17	say:
18	information about a particular branch's transactions	18	"Behind the scenes, there were at least a number of
19	than either the Post Office or the Subpostmaster."	19	people within the Post Office who realised that there
20	Then you say:	20	were difficulties with the Horizon system."
21	"How this was done and whether it included providing	21	Then in paragraph 1115, so you have to jump forward,
22	a data transfer service between the central data centres	22	your Lordship says:
23	and clients of Post Office must await the Horizon	23	"Horizon was introduced in 2000 and from then
24	trial."	24	onwards, unexplained discrepancies and losses began to
25	Notwithstanding that final caveat, this passage also	25	be reported by SPMs. Internal documents obtained in
	37		39
1	contains a clear finding on a Horizon Issue. The same	1	this litigation show that some personnel within the
2	is true of the passage at 569, factual matrix point 59.	2	Post Office believed at the time that at least some of
3	MR JUSTICE FRASER: Which Horizon Issue does that make	3	these were caused by Horizon."
4	a finding on?	4	And then the passages that I have been emphasising
5	LORD GRABINER: Which one, my Lord, 59?	5	in those paragraphs express a view on Post Office 's
6	MR JUSTICE FRASER: No, before that, I think you said 54 to	6	internal knowledge of the alleged problems with Horizon.
7	57 makes a clear finding on a Horizon Issue.	7	Now, those findings are going to be relied upon by
8	LORD GRABINER: Yes.	8	the other side in support of their allegations that
9	MR JUSTICE FRASER: Which Horizon Issue? Maybe we can come	9	there was here deliberate concealment and deceit on the
10	back to it if you want to.	10	part of Post Office.
11	LORD GRABINER: I think the point being here that the	11	Now, those are matters which are to be dealt with in
12	information that should have been provided by the	12	later trials . They are very, very important findings
13	Post Office or should have been available to the	13	and holdings and they are not provisional, they are
14	Subpostmaster was not available, but it was apparently	14	concluded views. And they are undoubtedly matters which
15	available to Fujitsu, so it is a breach issue.	15	will going to arise in the later trials.
16	MR JUSTICE FRASER: Understood.	16	MR JUSTICE FRASER: But on that point, because it $$ is ,
17	LORD GRABINER: Then matrix point 59, your Lordship says:	17	I think, notable that you say those findings are going
18	"I find in some instances there was discussion	18	to be relied upon to found deceit, if one goes back to
19	internally at the Post Office about the altering of	19	the extracts from the documents and look at 542, which
20	branch transaction data directly and also of the	20	is $% \left( 1\right) =\left( 1\right) \left( 1\right) =\left( 1\right) \left( 1\right) \left( 1\right) $ is where the reasons that $% \left( 1\right) \left( 1\right) \left( 1\right) $ in
21	Post Office and of Fujitsu carrying out changes to	21	541 are identified, and have a look at 541.
22	Horizon and/or transaction data which could affect	22	At 542, for example, just looking at the first
23	branch accounts. Mrs Van Den Bogerd accepted this could	23	extract of the contemporaneous document which is an
24	be done. Further detailed findings on this will be	24	email:
25	dealt with in a later trial ."	25	"Both Frank Manning and Sue Lock work for
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1	Post Office."	1	service that he received and as to the points of fact,
2	Ignore the underlining because that is my	2	such as whether he could get through to the helpline .
3	underlining, but if you look over the page, this is in	3	And I am sorry that $\ I \ am$ beginning to sound like
4	relation to Mrs Stubbs, who was having certain problems	4	a broken record, but these were not matters for the
5	with Horizon, the phrase, "It is Horizon related", which	5	first trial and, specifically , they are matters for
6	the sender of that email chose to put in bold. It then	6	subsequent trials .
7	goes on to say:	7	Now, these, 303:
8	"The problems have only arisen since install and the	8	"These shortfalls continued. On 15 October 2014,
9	postmistress is now barking, and rightly so in my view.	9	there were unexplained shortfalls of over £3,500. When
10	Help, please."	10	she [and I think this is Mrs Stockdale] phoned the
11	Do you say that the conclusion of what that document	11	helpline, she was told this was only £3,000 and it is
12	shows, which I have summarised in 543, is something that	12	a drop in the ocean compared to some people's problems.
13	I shouldn't have done?	13	This contradicted an earlier statement from the helpline
14	LORD GRABINER: Definitely.	14	when she had been told that she was the only SPM
15	MR JUSTICE FRASER: So I shouldn't have given the summary of	15	experiencing these problems, which just made her feel
16	the document.	16	inadequate. I will track this particular shortfall
17	LORD GRABINER: Definitely. Whether you did or not, you	17	through in terms of her evidence."
18	certainly should not have expressed a view about it,	18	And your Lordship does that, and at the end of that
19	knowing that this will be a key issue at a future trial.	19	paragraph or further on in it , your Lordship says:
20	MR JUSTICE FRASER: Thank you very much. What about the	20	"I accept this evidence by Mrs Stockdale. There can
21	extract of the document itself which was relied on both	21	be no doubt that the shortfall was clearly in dispute,
22	in evidence and in opening?	22	even on the Post Office's understanding of how disputes
23	LORD GRABINER: I mean, I have no particular view about	23	were to be raised."
24	that. What I am much more concerned about is what you	24	MR JUSTICE FRASER: I am sorry, I have lost where you are.
25	have said in the judgment and whether, through the eyes	25	LORD GRABINER: I am sorry, it is the end of paragraph 303.
23	have said in the jaugment and whether, through the eyes	23	2012 Gialding. Tum borry, it is the end of puragraph coo.
	41		43
1	of a fair-minded observer, it can be said that it is	1	Yes.
2	possible for your Lordship to keep an open mind.	2	MR JUSTICE FRASER: Yes, thank you.
3	MR JUSTICE FRASER: Understood. Thank you very much.	3	LORD GRABINER: "I accept that evidence."
4	LORD GRABINER: Could I go next to helpline.	4	MR JUSTICE FRASER: Yes, thank you.
5	MR JUSTICE FRASER: Yes.	5	LORD GRABINER: So in my submission, this is a good example
6	LORD GRABINER: So paragraph 248, and this deals with	6	of your Lordship undertaking a detailed analysis of the
7	Mr Abdulla to whom we had a reference to a little	7	evidence, in this case, that of Mrs Stockdale, and her
8	earlier:	8	evidence is expressly accepted by your Lordship as
9	"Turning to Mr Abdulla's operation of the branch,	9	accurate. This was not a matter for determination in
10	I have already identified his account of how even	10	the first trial and when this issue does arise at
11	disputed transaction corrections had to be dealt with at	11	a future trial, a fair-minded observer of this story
12	some stage prior to the next branch trading period by	12	would say that your Lordship had reached a concluded
13		13	view as to the accuracy and reliability of
14	clicking the 'accept now' button. He would contact	14	· · ·
15	helpline six or seven times a month and was shocked at	15	Mrs Stockdale's testimony.
16	the inadequate support."	16	Your Lordship's concluded view about her evidence
	Just below there, or next:		was then reinforced in your summary of her evidence and
17	"He would often experience apparent shortfalls on	17	for that purpose, if we go forward to paragraph 328.
18	the days when he would perform balances, but could	18	Your Lordship says there:
19	rarely get through to the helplines on these occasions.	19	"I found Mrs Stockdale to be a careful and accurate
20	He thought the advisers were ill-informed and would	20	witness and I consider she was telling me the truth."
21	often give the impression of reading off a script."	21	Then you say at the end of that paragraph:
22	In 249:	22	"I'm making no findings in respect of breach,
23	"He could not resolve these through the helpline."	23	causation or loss."
24	So here your Lordship was accepting Mr Abdulla's	24	As I say, I will come back to that mantra later on
25	evidence both as to his subjective impression of the	25	in these submissions.

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And at 357, in relation to Mrs Dar, your Lordship says:

"Her experience with the helpline was not a positive one. She contacted them two to three times a month, often in relation to apparent shortfalls or balances. 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, and she considered there was some kind of fault within the system."

So this, in my submission, is the same point. Your Lordship here accepted Mrs Dar's evidence on what happened when she called the helpline, although this is a matter yet to be addressed in a different  $\ \ trial$  .

At 556, still on the helpline, 556, my Lord, yes, your Lordship says:

"The helpline does not seem to have operated in that way and on the evidence before me for the issues in this trial, the matters in dispute reported to the helpline were not treated differently even when they were reported. The lead claimants' evidence made it clear that just getting through to the helpline was an achievement in itself. 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."

Then your Lordship can read the intervening passages. Then at the end, you say that was simply not made out on the evidence before you, that is the position of Post Office.

This paragraph of the judgment reveals your Lordship broadly accepting the claimants' case on the quality of the helpline and how the disputes process functioned, but again, these are prime issues for a resolution at a subsequent breach trial.

In that passage, your Lordship is making no distinction between the contractual obligation involved in notifying a dispute via the helpline. So pausing there, that would be entirely understandable in the context of the contract issues or those issues, working out or deciding what the contractual obligation was, rather than what is, in fact, happening in that paragraph, namely whether or not the Post Office fulfilled its obligations, ie was it a breach of contract, which is an entirely distinct, self-contained issue for a later trial.

At 558, at the beginning of the paragraph:

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"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."

3 Then you say at the end of that paragraph:

> "Detailed findings of fact as to this must however wait for a later trial."

So this was a conclusory statement about what happened when claimants called the helpline, it was not relevant, in my submission, to any Common Issues. It will be relevant at a future trial. And your Lordship's use of the word "detailed" at the end of that paragraph rather reinforces the concern. The implication from that word is a recognition that you were making findings of fact, albeit in outline, and that when you get to the later trial, you are going to elaborate on those findings in the light of the evidence in that case. But the idea that you are going to be in a position fairly to depart from those conclusions, in my submission, is the gravamen of the charge.

MR JUSTICE FRASER: Is it not relevant though to the status

20 of a branch trading statement? 21 LORD GRABINER: With great respect, it isn't. The status, 22 the particular status of a branch trading statement, 23 would depend upon the facts surrounding that branch 24 statement. So, for example, suppose the complaint was, 25

"Well, I have got the branch statement, I was forced to

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1 press the accept button, and I did so, and then when 2 I tried to register my complaint through the helpline, 3

I was unable to do so for whatever reason".

Now, the correctness or otherwise of that debate is a breach issue. If and to the extent that there was a failure of the helpline, operating in conjunction with the statement, to enable that complaint to be registered, that is a breach of contract complaint understandably. But to investigate those matters at the contract creation stage, in my submission, was a wrong

12 MR JUSTICE FRASER: The Common Issues didn't only involve 13 contract creation, because they also involved issues of 14 agency.

15 LORD GRABINER: Yes.

16 MR JUSTICE FRASER: But it was factually in issue for about 17 three weeks of the Common Issues trial as to what 18 options were available to a Subpostmaster in respect of 19 how they would perform their branch accounts.

> So, for example, if we just look back at paragraph 558, which you have been drawing to my attention, the meaning of the phrase in inverted commas in the ante-penultimate line, "settled centrally", took some time to unravel. By the time the trial ended, the factual position was almost essentially agreed, but it

1	took some weeks to get there.	1	contract, for example as to the effectiveness of the
2	And so far as that point is concerned, is your	2	helpline after the event to improve or clarify the
3	submission that it would have been necessary or	3	factual matrix, which is absolutely impermissible.
4	acceptable to decide what "settled centrally" meant, but	4	Now, the next topic of the seven is how good or bad
5	I shouldn't have then gone on to consider the mechanism	5	Post Office's investigations of shortfalls were, and
6	of dealing with the helpline, is that right?	6	whether Post Office disclosed what it knew about
7	LORD GRABINER: Absolutely.	7	shortfalls to Subpostmasters.
8	MR JUSTICE FRASER: All right.	8	MR JUSTICE FRASER: Can I just check, before you move on to
9	LORD GRABINER: Because by definition, by definition , by	9	that. The third of your seven categories, I think we
10	engaging in that investigation and indeed reaching some	10	went to 248, 303, 357, 556 and 558, is that right?
11	conclusions in relation to the functioning and operation	11	LORD GRABINER: That is exactly right.
12	of the helpline, what is happening is that there is	12	MR JUSTICE FRASER: Now we are going on to the fourth of the
13	a trespassing into later matters which are not relevant	13	seven.
14	to the immediate question.	14	LORD GRABINER: Yes. I haven't gone back to count, but
15	For example, the question of the meaning of "settled	15	I think it is the fourth.
16	centrally " would have been a classic example of	16	MR JUSTICE FRASER: Yes.
17	something that needed to be determined in the	17	LORD GRABINER: The first paragraph that I want to refer to
18	Common Issues trial. Construction questions were open	18	is 115.
19	for debate, absolutely.	19	MR JUSTICE FRASER: 115, yes.
20	MR JUSTICE FRASER: Yes, but what then do you say about the	20	LORD GRABINER: Your Lordship says:
21	Post Office evidence that had been contained in the	21	"Putting entirely to one side the fact that it has
22	Post Office's witness statements about the operation of	22	taken Post Office 15 months to finalise how it was to
23	the helpline, because there was evidence on it from	23	resolve this matter and Mr Bates was given only 16 days
24	both parties?	24	to reply."
25	LORD GRABINER: Well, all I can say about that is that the	25	And your Lordship says:
	49		51
1	key point in this debate is the relationship between the	1	"Which attitude appears to me to be symptomatic of
2	functioning of the helpline and the account statement	2	how Post Office regularly treated at least some of its
3	MR JUSTICE FRASER: Right.	3	SPMs."
4	LORD GRABINER: and in what circumstances the account	4	That is a very strong statement, my Lord, and that
5	statement could be relied upon or would or would not be	5	is exactly the kind of statement and I appreciate
6	binding? And that is classically a contract question,	6	that was and is your Lordship's view, but it is not
7	if I can put it in a very concertinaed way. But to	7	necessary for the purposes of the judgment that you were
8	investigate events which are really breach events and	8	dealing with, or that you were giving. And also, it is
9	then to make findings about them after the event was, in	9	obviously going to be relied upon by the other side. If
10	my submission, a false step.	10	I were on the other side, I would be banging the drum on
11	MR JUSTICE FRASER: I understand, thank you very much.	11	a sentence like that. I would be accusing Post Office
12	LORD GRABINER: And it is trite law, of course, but the fact	12	of being a disgraceful bunch and, "That is already
13	is that what was not legitimate was to participate in	13	your Lordship's view: see your judgment in the
14	a post-contractual factual investigation, is what it	14	Common Issues case", that is obvious.
15	comes to. The factual investigation of that kind is	15	MR JUSTICE FRASER: When you say, "That is already
16	entirely distinct from matters which should have been	16	your Lordship's view", do you mean that you are
17	investigated at the Common Issues trial. The	17	summarising what Mr Green would be saying, relying on?
18	contractual position as to the trading statement and the	18	You are not telling me I don't assume you are
19	helpline falls to be analysed at the time of	19	expressing that as that is a view that I, the judge,
20	contracting. Classic law.	20	currently hold.
21	For this purpose, the factual matrix must be	21	LORD GRABINER: What I am submitting is that having, so to
22	examined at that point in time, but what happened here	22	speak, committed yourself in print on that point, a
23	was that there is then an investigation of, by	23	fair -minded I don't care what Mr Green will say or
			· · · · · · · · · · · · · · · · · · ·
24	definition, post-contractual events and conclusions in	24	won't say or indeed what I think or say. It is all

relation to matters such as alleged breaches of

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irrelevant, and in a sense, what your Lordship thinks or

1	says is irrelevant for this purpose because it is an	1	Mr Bates. Your Lordship is saying that Post Office's
2	objective test . The fair-minded observer will look at	2	investigation was inadequate and that Post Office
3	this along with all the other material that we are going	3	demanded payment without a proper basis. Again, in my
4	through at the moment and will have to come to	4	submission, those findings had no place in the
5	a judgment as to whether your Lordship can fairly	5	Common Issues trial.
6	approach the future trials given the conclusive	6	In 208, and your Lordship can glance at the
7	expression of opinion that you have given there.	7	paragraph for context, and there was a sort of help
8	MR JUSTICE FRASER: Yes.	8	issue that is identified there, this is in relation to
9	LORD GRABINER: It is just another example. And then in	9	Mr Sabir, but your Lordship concludes in the last
10	subparagraph 1 of 115, you say in the $$ first $$ line :	10	sentence of 208:
11	"It suggests that Mr Bates' experience was not an	11	"That help simply never came."
12	isolated one."	12	MR JUSTICE FRASER: I am sorry.
13	Then we can leave over $1$ and go straight to $2$ ,	13	LORD GRABINER: 208.
14	sub-2, the second sentence:	14	MR JUSTICE FRASER: I am in 208.
15	"I'm satisfied that if he had simply paid the amount	15	LORD GRABINER: The last sentence. {B7/29/74}
16	to the Post Office as demanded in the Post Office letter	16	MR JUSTICE FRASER: "This was counted against him at the
17	of 16 July 2001, which sought as matter of some urgency	17	time and used as a"
18	that he 'advise me of your proposals to now make good	18	LORD GRABINER: "That help simply never came."
19	the loss', in other words, how he would pay the	19	MR JUSTICE FRASER: That is in the middle.
20	Post Office that money which was at that stage demanded,	20	LORD GRABINER: I am sorry. I don't have the whole
21	this would not have occurred.	21	paragraph in front of me.
22	"3. No explanation was provided to Mr Bates as to	22	MR JUSTICE FRASER: That is in the middle.
23	how the shortfall had occurred.	23	LORD GRABINER: Very good. That is also a finding as to how
24	"5. The consistent policy, if indeed there was one,	24	co-operative or unco-operative Post Office was in trying
25	seems to have been that the Post Office would simply	25	to establish the cause of the shortfall . In my
	53		55
1	claim all such sums from the SPMs in question."	1	submission, it is a breach question.
2	These are all findings to the effect that	2	MR JUSTICE FRASER: Yes.
3	Post Office's investigation was, in your Lordship's	3	LORD GRABINER: 217, sub-2:
4	view, inadequate and that Post Office demanded payment	4	"Mr Sabir had no separate record and no access on
5	without a proper basis. Now, in my respectful	5	Horizon to the number of scratchcards he should have
6	submission, those findings had no place in the	6	had."
7	Common Issues trial. They trespass into matters which	7	And then your Lordship says:
8	we all know fall to be determined in a later case or	8	"He requested this information from the Post Office,
9	cases.	9	who did have it . It was not provided. He used the
10	165 deals with the evidence of Mrs Stubbs, and if we	10	helpline to notify Post Office of a problem. This is
11	go 15 or 20 lines down, maybe fewer than 20,	11	the way that the Post Office maintained disputes should
12	your Lordship says:	12	be notified ."
13	"It might be thought that if there were any proper	13	Then in 223:
14	investigation which actually reported on this, it could	14	"In my judgment, the attack on Mr Sabir's credit,
15	and should have been put to Mrs Stubbs, but if what was	15	which I have identified above, fundamentally ignores the
16	put to Mrs Stubbs in this trial is said by the	16	reality. The fact that he had contacted the helpline
17	Post Office to amount to such an investigation, then	17	and sought assistance and the fact that the vital piece
18	it is telling. The investigation appears, on the	18	of information he needed, the number of scratchcards the
19	material deployed in this Common Issues trial, to have	19	system was showing that he should have, was so readily
20	consisted of nothing more than Fujitsu asserting that	20	accessible to the Post Office auditors, but never
	or a morning more man rapida abberting that		, but never

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provided to him."

So again, those are findings that Post Office  $\mbox{\sc did}$ 

not supply Mr Sabir with information, which he could not

obtain himself through Horizon and which could have

enabled him to establish the extent of the shortfall.

generally ."

there was nothing wrong with the kit. That is not, in

That is really the same point that we just saw for

my judgment, an investigation under any normal

understanding or meaning of that word in society

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1	Again, those are findings on Horizon and on breach.	1	subject of that trial, bearing in mind the fact that
2	MR JUSTICE FRASER: I did have to make a finding on his	2	under the case management arrangement, there were going
3	credit, though, did I not?	3	to be future trials where these matters would be
4	LORD GRABINER: That may be. You mean because of challenge	4	investigated. It is a very it is a difficult task,
5	in relation to the contract formation?	5	I absolutely respect that and I accept that, but we do
6	MR JUSTICE FRASER: There were various challenges to	6	respectfully submit that you went over the line.
7	Mr Sabir's credit, but not least I think it is	7	MR JUSTICE FRASER: I understand.
8	a point that has been	8	LORD GRABINER: Mr Cavender draws to my attention the
9	LORD GRABINER: I am told by Mr Cavender that we never	9	closing transcript on {Day 14/46}.
10	relied on any of this material.	10	MR JUSTICE FRASER: Do you want me to pull that up on the
11	MR JUSTICE FRASER: Mr Cavender well, the transcript	11	screen?
12	shows the way that Mr Sabir was cross-examined, but	12	LORD GRABINER: I can just read it into the transcript.
13	let's not waste time on that at the moment. So that is	13	Your Lordship's question was:
14	223.	14	"So far as the claimants' evidence is concerned,
15	LORD GRABINER: 557, still under the same heading, 557:	15	therefore, you say treat it all with caution for all the
16	"Mrs Stockdale telephoned the helpline . She then	16	reasons that you have gone through, but you are inviting
17	assumed the debt recovery letter she received meant an	17	me not to make any findings on their credibility .
18	investigation had been done and resolved against her.	18	"MR CAVENDER: Indeed.
19	That assumption was not correct. Mrs Stubbs had been	19	"MR JUSTICE FRASER: Any adverse findings on their
20	pressing for many years to find out the outcome of	20	credibility, is that right?
21	whatever investigation was in fact performed in her	21	"MR CAVENDER: Yes, because to do so you would have
22	case. In both cases, the helpline had been notified by	22	to make findings as to the accounting system, to the
23	each of these lead claimants. In neither case	23	TCs, what happened in fact, and you haven't had full
24	[your Lordship says] could the Post Office produce and	24	evidence on that by any means."
25	put to each of these lead claimants or show the court	25	Then on the following page of the transcript,
	partition calculate read columniate of short the court		ruen on the tono mag page of the transcript,
	57		59
1	the end product of any such investigation ."	1	{Day 14/51}, line 12, Mr Green:
2	So here your Lordship found that Post Office had not	2	"I'm sorry to interrupt, but I have let this run
3	conducted an investigation into Mrs Stockdale's	3	since {Day14/38:14}, what my learned friend is saying.
4	shortfalls and your Lordship also criticised Post Office	4	He said someone in his position might say Mr Abdulla
5	for not adducing what would have been inadmissible	5	lied. Well, that is exactly what he does say at
6	breach of contract evidence. So if they had produced	6	paragraph 592 of his closing submissions. So I don't
7	this material at that trial, it would actually not have	7	understand "
8	been relevant to the issues in that trial, but obviously	8	Then your Lordship interrupted and said:
9	it would have been relevant material for the purposes of	9	"MR JUSTICE FRASER: All right.
10	a breach trial or a trial about Horizon and its	10	"MR GREEN: where he is on it.
11	effectiveness or otherwise.	11	"MR CAVENDER: But I don't ask for findings on it.
12	MR JUSTICE FRASER: Mr Cavender did put to Mrs Stubbs at	12	"MR JUSTICE FRASER: Mr Green, as a rule, I am not
13	least that there had been an investigation on the basis	13	saying you can't make these points, but you might want
14	that I mean, it is the same point perhaps as the one	14	to store them up.
15	that I explored with you earlier about Mr Sabir, but if	15	"MR GREEN: I am grateful ."
16	a positive point is put to a witness, for example, that	16	MR JUSTICE FRASER: The position on finding so far as credit
17	an investigation has happened, do you say I should weigh	17	were concerned, I gave the Post Office an opportunity to
18	that up in respect of the credit of the witness so far	18	consider their position on that after the oral
19	as contract formation is concerned but then stop there,	19	submissions were over, because I had difficulty
20	effectively ?	20	following it . And there was a written explanation
21	LORD GRABINER: Yes, because it would have been ex hypothesi	21	provided by the Post Office which explained to me what
22	cross-examination on irrelevant material. I mean,	22	the Post Office said I should do in terms of findings as
23	I think what is revealed by just our exchanges here this	23	to credit, because as the exchange that you have just
24	morning, my Lord, is the absolute difficulty of keeping	24	read out demonstrates, on the one hand, the closing
25	a clear bright line between the matters which were the	25	submissions accuse some of the lead claimants of lying,

1	but orally, Mr Cavender said, "Don't make findings on	1	MR JUSTICE FRASER: Thank you very much.
2	credit ". I am sure the dichotomy in those two positions	2	LORD GRABINER: which are in B7/14/4.
3	needed to be resolved.	3	MR JUSTICE FRASER: Thank you very much.
4	So I~think the correct place to start or finish in	4	LORD GRABINER: Turning then to the next topic, and I am
5	terms of findings as to credit is probably what the	5	going to try to speed up if I may, because there is
6	Post Office said in their written submissions after the	6	going to be a time issue.
7	hearing.	7	So the next topic is whether Post Office sent
8	LORD GRABINER: I	8	unjustified demands for payment and/or threats of legal
9	MR JUSTICE FRASER: I understand your submission.	9	action to SPMs. Paragraph 222:
10	LORD GRABINER: What I would respectfully submit is that	10	"There can be no excuse, in my judgment, for an
11	bearing in mind the fact that there was yet to be	11	entity such as Post Office to misstate in such clearly
12	a breach trial	12	express terms in letters that threaten legal action and
13	MR JUSTICE FRASER: I understand.	13	the extent of the contractual obligation upon an SPM for
14	LORD GRABINER: enormous care was required	14	losses. The only reason for doing so in my judgment
15	MR JUSTICE FRASER: I understand.	15	must have been to lead recipients to believe that they
16	LORD GRABINER: in order to ensure that the concerns that	16	had absolutely no option but to pay the sums demanded.
17	we are now expressing would not arise.	17	It is oppressive behaviour."
18	MR JUSTICE FRASER: I entirely understand.	18	In 327, towards the end of it:
19	LORD GRABINER: Now, my Lord, I don't know if that is a good	19	"The documents available in this litigation show
20	moment to break? I could, because I am just going to	20	that this simply was not true and she had expressly done
21	a new topic.	21	both of those things."
22	MR JUSTICE FRASER: If you have finished number four of your	22	This is in relation to Mrs Stockdale. At 462, after
23	seven	23	a few lines:
24	LORD GRABINER: Would you bear with me a moment.	24	"This conclusion means that the Post Office fraud
25	MR JUSTICE FRASER: The last paragraph before I distracted	25	prevention and debt recovery procedures will be used
	61		63
1	you I think was 557.	1	against SPMs in this position unless an SPM can show
2	LORD GRABINER: You did not distract me. Yes, that is	2	that the shortfall or discrepancy was not their fault."
3	convenient. That would be a convenient moment. I have	3	Then your Lordship says:
4	got quite a lot still to get through, but I will go as	4	"This judgment does not contain findings on breach,
5	fast as I can.	5	loss or causation."
6	MR JUSTICE FRASER: Understood. Shall we say five minutes?	6	So in the same vein, your Lordship made a number of
7	LORD GRABINER: My Lord, yes, I am grateful.	7	findings in your section of the factual matrix at
8	MR JUSTICE FRASER: We will have a five minute break. I am	8	paragraph 569, which go to show how transaction
9	going to see if I can turn the temperature down a bit.	9	corrections were treated. So for example, factual
10	It seems to be quite hot. I don't know if I am alone.	10	matrix point 35:
11	LORD GRABINER: You are quite right, it is .	11	"However, even amounts that were disputed in this
12	MR JUSTICE FRASER: I will see if I can do something about	12	way were treated by Post Office as debts owed by the
13	that. Five minutes.	13	SPM."
14	(11.50 am)	14	And factual matrix point 40:
15	(Short break)	15	"The defendant sought recovery from the claimants
16	(11.55 am)	16	for apparent shortfalls , and I would add also on the
17	LORD GRABINER: My Lord, there just one point from this	17	evidence that the Post Office did this regardless of
18	morning. Your Lordship wanted to know which Horizon	18	whether disputes had been reported to the helpline or
19	Issues. This was in the context of my referring to	19	not."
20	paragraph 569	20	And then factual matrix point 42:
21	MR JUSTICE FRASER: Yes.	21	"The Post Office required claimants to accept
22	LORD GRABINER: and those points 54 to 57.	22	changes to records of branch transactions unless the
23	MR JUSTICE FRASER: Yes.	23	claimant was effectively able to prove that the
24	LORD GRABINER: And the Horizon Issues referred to were	24	transaction correction was not correct."
25	issues 7 to 9	25	And factual matrix point 43:
25			-

Τ	The Post Office did sometimes issue transaction	Τ	"It's not clear if 'my investigation' included any
2	corrections after the end of the branch trading period	2	further information from or investigation of the
3	in which the transaction had taken place."	3	situation regarding Camelot either by Mrs Ridge or
4	So, in my submission, none of this was relevant	4	Mr Mylchreest. Given the timescale, this appears
5	matrix for the Common Issues trial.	5	unlikely. Certainly no documents were produced in this
6	Then at 7231:	6	trial that suggested it was."
7	"Even though Post Office 's own case on the relevant	7	And so on. If your Lordship would look at the rest
8	provision in the SPMC [that is one of the contracts]	8	of that paragraph and 402 for context. Then after the
9	dealing with liability for losses requires negligence or	9	reference to the statement and the appeals process in
10	fault on the part of an SPMC, this was routinely and	10	the rehearing, there is a reference to Mrs Ridge, and
11	comprehensively ignored by Post Office, who sent letters	11	then about halfway through that paragraph:
12	of demand for disputed sums in express terms as though	12	"It is more than an academic nicety. Terminating
13	SPM had strict liability for losses. These letters	13	without notice is a severe step. A right of appeal was
14	entirely misstate the legal basis of SPMs' liability	14	supposed to be present under the SPMC. The Post
15	even where they had been appointed under the SPMC."	15	Office 's own witnesses do not know what that appeal
16	723, subparagraph 4:	16	consisted of and what the test was. This is deeply
17	"The approach of the Post Office is to brook no	17	unsatisfactory ."
18	dissent. It will adopt whatever measures are necessary	18	403:
19	to achieve this ."	19	"I do not know why risk to the Post Office
20	And then after the reference to section 15,	20	reputation should be a relevant factor in such an
21	clause 19 of the SPMC, your Lordship says:	21	appeal, which is what I find Mr Breeden's evidence to
22	"Other parts of section 15 deals with the	22	consist of, or why SPM's entitlement to be heard on
23	requirement for caution, but I find it somewhat unusual	23	appeal would differ from case to case."
24	and potentially oppressive that the Post Office should	24	Further down:
25	seek to use the Official Secrets Acts in this way.	25	"Unjustified suspension ought to be a factor in
	65		67
1	I don't see how in a routine case these Acts could	1	favour of an appeal succeeding on any sensible view."
2	possibly apply in the way suggested by a Post Office in	2	At the end of that paragraph:
3	this contract."	3	"The reputation of the Post Office would best be
4	So again, in my submission, all of this was	4	served by appeals that were justified, succeeding, and
5	irrelevant to the Common Issues trial.	5	those that were not, failing, should not have formed any
6	The next topic is whether Post Office acted properly	6	part of the criteria ."
7	in suspending and/or terminating SPMs' contract. The	7	479 {B7/29/147} a long way into it:
8	relevant paragraph in the judgment is paragraph 20	8	"Given the odd combination of various items all for
9	{B7/29/8}. Perhaps your Lordship would just look at	9	£1,092 - which she accepted 'was a bit odd' - this
10	this to remind your Lordship of it for context. This is	10	information would evidently have been very useful."
11	all about termination, sometimes abrupt termination, and	11	Then a couple of lines on:
12	you are looking at Mr Bates' position and Mrs Stubbs'	12	"I found he was giving her an account concerning
13	position.	13	£1,092 which she would have been more willing to
14	Then, in my submission, this again shows	14	consider was truthful had she had the Excel spreadsheet
15	your Lordship's hand in a concluded way. The reasonable	15	at the interview."
16	onlooker would think that your Lordship's mind is at	16	And so on. Your Lordship can read to the end of
17	least or may be closed as to the proprietary of	17	that paragraph:
18	Post Office's actions in effecting these suspension and	18	480 {B7/29/148}:
19	terminations. Again, this is wholly irrelevant to the	19	"The hearing process in respect of Mr Abdulla's
20	Common Issues.	20	suspension and eventual termination therefore proceeded
21	Paragraph 263, {B7/29/90} just for context, this is	21	with incomplete information being provided to the person
22	in relation to the letter sent to Mr Abdulla dismissing	22	tasked with conducting the hearing, making this
23	his internal appeal. Your Lordship will recall all of	23	important decision, and still less information being
24	this, and then 263 sets out the letter. 264,	24	given to Mr Abdulla by the Post Office ."
25	your Lordship says:	25	Towards the end of that paragraph:

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1 "I make no findings on any matters connected with 2 breach, causation or loss," 3 All of that consists of criticisms of Post Office's 4 process for determining whether or not to suspend or 5 terminate a postmaster. They go directly to allegations 6 of breach of contract and have nothing whatever to do 7 with the contractual matters or the Common Issues --8 I am always concertinaing into contract matters, but 9 your Lordship knows what I mean by that -- which were 10 the subject of that trial. 11 In 514 {B7/29/155}: 12 "Mr Carpenter was also responsible for the decision 13 to suspend Mrs Stockdale. Because this happened after 14 the litigation had commenced, I was most interested in 15 the exact sequence." 16 Then your Lordship goes through a good deal, or you 17 recite a good deal, of extract from the transcript, and then after going through summarising and setting out the 18 19 transcript at 515, your Lordship says: 20 "The following pertinent points arise from this 21 evidence, which I found of considerable interest." 22 And then you set out your conclusions from that 23 evidence, and at paragraph 5 underneath as part of 515: 24 "Mr Carpenter wasn't 100% sure that he did not know 25 Mrs Stockdale was a claimant when he recommended her 1 2 3 his recommendation to suspend at all." 4 In 516, at the end of the paragraph: 5 "Also expressly stated to her factually untrue 6

suspension, even though on his evidence he found out on the day. That does not seem to have had any effect on statements, namely she had not contacted the NBSC or

asked Post Office for assistance. I find that she had." "It must be understood with crystal clarity."

I think your Lordship will recall this paragraph. And then a few lines down:

"However, even putting it at its best for the Post Office, such conduct towards Mrs Stockdale during this early stage of the litigation could potentially be construed as threatening, oppressive and potentially discouraging to other potential claimants to become involved in the litigation , whether by accident or design. I can think of no reason why such an approach was taken unilaterally by Post Office in such a way without the Post Office's solicitors giving advance notice to her solicitors so a less confrontational and aggressive path was adopted. However, even once it was done and she that was suspended Post Office continued to act in a highly regrettable fashion."

519, a few lines down: 70

"Post Office put itself in the position of giving itself the appearance that this behaviour towards her was directly influenced by her having issued proceedings."

So that was a response to the fact that she had commenced proceedings against her, appears to be your Lordship's view.

Now, as to those passages your Lordship said that these points were of considerable interest, but, in my submission, they were obviously not relevant to the Common Issues, not least because they concern events post-dating the commencement of the litigation, which your Lordship very fairly points out. A fair reading of the analysis is that your Lordship was criticising Post Office for its suspension decision-making, which is a serious criticism of systems adopted by the Post Office in its dealings with Subpostmasters.

This also contains findings as to the threats and the hostile statements that the Post Office allegedly made. These points bear on the breach issues which are to be the subject of future trials.

Then in 723, sub-2, there is a discussion about legal representation in the Post Office interview process in connection with a suspension mechanism, and then your Lordship says:

"Regardless of whether this is justified or not [ie the fact that you can't have representation], 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 lead claimants who face such procedures.

"Mr Abdulla tried at his interview to explain the situation regarding TCs and of 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 him at the time."

Again, these are criticisms of Post Office's termination procedure. They are irrelevant, in my submission, to the Common Issues. They might be very relevant indeed in future trials .

The next topic is training, paragraph 104, and there is just one emphasised passage in that paragraph. This is in relation to Mr Bates:

"There was no explanation for how to identify the

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cause of any shortfalls or discrepancies or how to

how to investigate or resolve discrepancies or apparent

Т	cause of any shortfalls or discrepancies or how to	Τ	how to investigate or resolve discrepancies or apparent
2	dispute them."	2	shortfalls . He was simply told to contact the
3	105 is part of that, but there is no specific piece	3	helpline ."
4	that I want to make reference to. But again, in my	4	And finally Mrs Dar:
5	submission, this is all irrelevant post-contractual	5	"Mrs Dar considered [on the fourth or fifth line]
6	evidence.	6	the training was inadequate."
7	Your Lordship made similar findings or comments in	7	MR JUSTICE FRASER: Which paragraph?
8	relation to Mrs Stubbs in paragraph 142, where	8	LORD GRABINER: Paragraph 346. So that is in about the sort
9	your Lordship says in the middle of the paragraph:	9	of third or fourth line:
10	"The training did include balancing, but did not	10	"Mrs Dar considered the training inadequate."
11	include shortfalls , how to get to the root cause of them	11	And at the end of the paragraph:
12	or how they should be disputed."	12	"Mrs Guthrie spent some of her time trying to fix
13	Then looking at Mr Sabir, this is paragraph 193:	13	problems with Horizon rather than doing the induction
14	"Thereafter, Mr Sabir accepted the appointment and	14	training that Mrs Dar was expecting."
15	received training."	15	So here your Lordship was accepting Mrs Dar's
16	Then a long way into that paragraph:	16	evidence at face value both as to what she believed
17	"Mr Sabir's evidence on this, which I accept,	17	about the quality of the training and as to what
18	matches the other evidence from other lead claimants	18	happened, notwithstanding the fact that the training
19	about in branch training. It is characterised by the	19	issue is for a later trial.
20	trainers observing rather than training and also by	20	In paragraph 352, I think we are still with
21	early departures from the branch itself by the trainers.	21	Mrs Guthrie and Mrs Dar, and at the end of that
22	I do, however, make these comments without making	22	paragraph, that is 352:
23	•	23	
	findings on anything to do with breach, causation or		"Mrs Guthrie did not attend on Mrs Dar's first
24	loss."	24	balance day as she was supposed to. Mrs Guthrie also
25	And I will come back to that mantra, if I may.	25	said she would come back to give further training and
	73		75
1	MR JUSTICE FRASER: Is that at the end of 193? Is that the	1	support. In fact she did not, at least not until some
1 2	MR JUSTICE FRASER: Is that at the end of 193? Is that the part that you have just read?	1 2	support. In fact she did not, at least not until some months later on 15 July 2015, when she came back to
2	part that you have just read?	2	months later on 15 July 2015, when she came back to
2	part that you have just read?  LORD GRABINER: Yes, exactly right. Yes, precisely.	2	months later on 15 July 2015, when she came back to carry out an audit."
2 3 4	part that you have just read?  LORD GRABINER: Yes, exactly right. Yes, precisely.  And:	2 3 4	months later on 15 July 2015, when she came back to carry out an audit."  Paragraph 569, factual matrix point 70:
2 3 4 5	part that you have just read?  LORD GRABINER: Yes, exactly right. Yes, precisely.  And:  "Mrs Stockdale [at 297] was accepted as an SPM and	2 3 4 5 6	months later on 15 July 2015, when she came back to carry out an audit."  Paragraph 569, factual matrix point 70:  "On the evidence of six lead claimants, even when
2 3 4 5 6	part that you have just read?  LORD GRABINER: Yes, exactly right. Yes, precisely.  And:  "Mrs Stockdale [at 297] was accepted as an SPM and had some training. She attended the classroom training	2 3 4 5	months later on 15 July 2015, when she came back to carry out an audit."  Paragraph 569, factual matrix point 70:  "On the evidence of six lead claimants, even when further training was specifically questioned, it was not
2 3 4 5 6 7 8	part that you have just read?  LORD GRABINER: Yes, exactly right. Yes, precisely.  And:  "Mrs Stockdale [at 297] was accepted as an SPM and had some training. She attended the classroom training with her son. She did not have all the training she was told she would receive."	2 3 4 5 6 7 8	months later on 15 July 2015, when she came back to carry out an audit."  Paragraph 569, factual matrix point 70:  "On the evidence of six lead claimants, even when further training was specifically questioned, it was not provided."  437:
2 3 4 5 6 7 8 9	part that you have just read?  LORD GRABINER: Yes, exactly right. Yes, precisely.  And:  "Mrs Stockdale [at 297] was accepted as an SPM and had some training. She attended the classroom training with her son. She did not have all the training she was told she would receive."  And then there is some explanation of that factual	2 3 4 5 6 7 8 9	months later on 15 July 2015, when she came back to carry out an audit."  Paragraph 569, factual matrix point 70:  "On the evidence of six lead claimants, even when further training was specifically questioned, it was not provided."  437:  "Nowhere in the training or the interview or
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1	training, the approach to that did not appear to be	1	regardless of the evidence which might subsequently be
2	uniform either. It can be seen [a couple of lines down]	2	given in one or other of those later trials .
3	that inadequate training is not likely to be readily	3	So, in my submission, the fair-minded observer of
4	discernible to the Post Office."	4	this story would perceive that as a real and concerning
5	MR JUSTICE FRASER: That rather skips over the introductory	5	risk.
6	sentence to 954, though, doesn't it:	6	If I can turn away now from the individual seven
7	"I have certain non-binding observations on the	7	items that I have been addressing. So in addition to
8	evidence given before me by both sides in terms of	8	all the points I have been making, there is a separate
9	training ."	9	category of examples of what we call negative findings
10	LORD GRABINER: Your Lordship's point is the non-binding	10	or comments as to Post Office's integrity and behaviour.
11	point.	11	And the passages to which I now refer, taken together
12	MR JUSTICE FRASER: And that it was evidence from both	12	with the matters that I have already dealt with,
13	sides.	13	reinforce our concern that your Lordship's mind is
14	LORD GRABINER: Okay.	14	closed against Post Office.
15	MR JUSTICE FRASER: But I think, if I understand your	15	That concern, we submit, would be shared by
16	submissions correctly, I should have resisted the	16	a reasonable observer possessed of the facts.
17	temptation to do that.	17	MR JUSTICE FRASER: I think you mean gives the appearance of
18	LORD GRABINER: Precisely.	18	being closed.
19	MR JUSTICE FRASER: Right. Thank you very much.	19	LORD GRABINER: Yes.
20	LORD GRABINER: So the paragraphs that I have been drawing	20	MR JUSTICE FRASER: Because if it were your case that it
21	to your Lordship's attention in this context reveal, in	21	were closed, it would be an application based on actual,
22	my submission, concluded views and observations on	22	not apparent, bias.
23	matters arising for determination in subsequent trials .	23	LORD GRABINER: I apologise for having misspoken.
24	We have done a separate exercise . Actually, I have done	24	MR JUSTICE FRASER: It is a question of my being clear.
25	this separate exercise, but I hope it is nonetheless	25	LORD GRABINER: No, you should be absolutely clear, there is
	77		79
1	accurate. So these paragraphs appear in the course of	1	no such allegation being made.
2	very extensive recitation by your Lordship and analysis	2	So under the particular headings that we have
3	of the evidence of each of the lead claimants.	3	devised, first of all, Post Office's alleged
4	So it is interesting. For the record, Mr Bates,	4	mistreatment of Subpostmasters, or indeed mistresses.
5	your Lordship deals with his evidence between	5	Paragraph 117:
6	paragraphs 69 and 124, 55 paragraphs. Mrs Stubbs,	6	"The full subsequent trial of Mr Bates' claim will
7	paragraphs 125 to 172, 47 paragraphs. Mr Sabir,	7	show what if any consideration was given at the
8	paragraphs 173 to 223, 50 paragraphs, Mr Abdulla,	8	Post Office internally not only to this shortfall but
9	paragraphs 224 to 274, 50 paragraphs. Mrs Stockdale,	9	others, if there were others, in the period December
10	paragraphs 275 to 328, 53 paragraphs. Mrs Dar,	10	2000 to March 2002. If the Post Office did in reality
11	paragraphs 329 to 364, 35 paragraphs.	11	do what Mr Bates suggested they did, namely bury their
12	The point I want to make is that the individual	12	heads in the hand, press on regardless and press
13	paragraphs I have been drawing to your Lordship's	13	numerous SPMs for shortfalls and discrepancies caused by
14	attention were not observations by the way. In each	14	the Horizon system, that would be behaviour of an

received from each of these witnesses, and when you were expressing concluded views about them, they were what they are; concluded views which are now immovable

case, they came out of a very, very detailed scrutiny of

the witnesses' testimony. And it is obvious that in

a future case when these points are litigated, breach,

Horizon and so on, there is at least a real possibility

The other side will say you could not have done

that your Lordship will simply not be able to revisit

a more thorough analysis of the evidence that you

your own conclusions with an open mind.

 $25\,$  case, and you have skipped over the passage that says:

proceedings in this judgment."

the part of Post Office.

extraordinary kind, and given the criminal implications

"I make no findings either way at this stage of the

Here your Lordship specifically does not make any

finding, but you were prepared to speculate as to the

MR JUSTICE FRASER: Lord Grabiner, that is the claimants'

possibility of extraordinarily serious misbehaviour on

for some SPMs may be extraordinarily serious."

Then you say at the end of that paragraph:

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1	"On the other hand, his shortfall may, upon	1	Post Office witness who explained the evolution of one
2	investigation"	2	contract form to the other told me that the intention
3	Et cetera, et cetera.	3	was that there would be no difference in scope for
4	LORD GRABINER: Fine. When you say skipped over, I am just	4	liability . In other words, the NTC, on his evidence,
5	trying to do this at speed, and I apologise.	5	was intended also to require fault, and the finding that
6	MR JUSTICE FRASER: I understand.	6	I made on the clauses themselves is that that plainly
7	LORD GRABINER: And I accept your Lordship's point, but I do	7	wasn't the case on the actual words, and I rejected his
8	emphasise the point that the expression "extraordinarily	8	evidence.
9	serious behaviour" is a strong expression. It is an	9	In those circumstances, there was no explanation for
10	eye-catching expression. And in the context of this	10	the change in extent of liability from the SPMC into the
11	debate, there was no warrant for it and, in my	11	NTC, and any comments I have made in 1059 have to be
12	submission, it is extremely prejudicial and certainly	12	read in the context of the fact that I had rejected
13	wasn't necessary for the purposes of the Common Issues.	13	Mr Beal's evidence and what Mr Beal's evidence in fact
14	523, you say:	14	was.
15	"For the reasons I have expressed above, I have	15	But do I understand the submission to be effectively
16	considerable misgivings about Post Office's motivation	16	that I should simply have made the findings on the
17	for the treatment of Mrs Stockdale during this	17	contractual effect of the two different contract forms
18	litigation and for the treatment itself in terms of	18	and not dealt with Mr Beal's evidence about them at all.
19	refusal to provide obviously relevant documents. The	19	LORD GRABINER: Absolutely, because what you have actually
	· ·	20	·
20	evidence of Mr Carpenter, far from satisfying these		done is to lay the ground for a very strong attack on
21	concerns, actually increases them. The Post Office	21 22	the basis that the contract amendments were specially
22	appears, at least at times, to conduct itself as though		designed in order to make life much tougher for
23	it is answerable only to itself."	23	Subpostmasters in the future, and this would have been
24	And then missing a couple of lines:	24	obviously a matter for breach debate or for a more
25	"This would be a worrying position were it to be	25	general view about the conduct of Post Office in the
	81		83
1	adopted by any litigant . The Post Office is an	1	whole of this litigation .
2	organisation responsible for providing a public service	2	MR JUSTICE FRASER: I understand.
3	which, in my judgment, makes it even worse."	3	LORD GRABINER: But to say it at that stage, in my
4	In 724, in the closing sentence:	4	submission, is unnecessary and prejudicial.
5	"It appears to wield that power with a degree of	5	MR JUSTICE FRASER: I understand.
6	impunity."	6	LORD GRABINER: In paragraph 1111, your Lordship says:
7	That, of course, is the Post Office.	7	"The Post Office describes itself as the nation's
8	And 1059, at the end of that paragraph:	8	most trusted brand."
9	"It would be perhaps too cynical for even the most	9	You say:
10	hardened Post Office watcher to suggest that the	10	"So far as these claimants and the subject matter of
11	problems with Horizon led to changes to and extension of	11	this group litigation are concerned, this might be
12	the contractual liability of SPMs for losses that were	12	thought to be wholly wishful thinking."
13	adopted in the NTC. However, that option can't be	13	Then at the end of the paragraph:
14	entirely discounted."	14	"The Post Office asserts that its brand is trusted
15	In my submission, this is an unnecessary and	15	by the nation. The SPMs who are claimants do not trust
16	speculative and offensive observation about Post Office,	16	it very far, based on their individual and collective
17	and there was simply no justification for the	17	experience of Horizon."
18	incorporation of that passage and it reveals a mindset	18	Well, I mean, your Lordship can imagine what I would
19	impacting upon the future cases.	19	be saying about that, but my submission is that the
20	MR JUSTICE FRASER: Lord Grabiner, that passage at 1059	20	passage speaks for itself .
21	arises in the following circumstances. The clause that	21	Criticisms under a new rubric, criticisms of
22	deals with liability for losses in the SPMC expressly	22	Post Office's behaviour in this litigation,
23	requires negligence, carelessness or fault on the part	23	paragraph 34. Your Lordship describes the evidence that
24	of an SPM. The NTC clause that deals with liability for	24	you received, and at the end of that paragraph,
25	losses does not have that limitation, and the	25	your Lordship says:
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1	"The Post Office seemed to adopt an extraordinarily	1	'challenge to the court '."
2	narrow approach to relevance, generally along the lines	2	Then just at the end of that paragraph:
3	that any evidence that is unfavourable to Post Office is	3	"The Post Office may have made these submissions
4	not relevant."	4	because, on an objective analysis, it fears objective
5	Obviously that is a serious criticism of the way	5	scrutiny of its behaviour, or it may have made them for
6	that the Post Office conducted the litigation .	6	other reasons."
7	Then paragraph 21, you begin with the words:	7	This, with respect, is a common theme in the
8	"Nothing in the judgment should be taken as my	8	judgment. Your Lordship is speculating on all the bad
9	expressing any concluded view on the functionality of	9	things Post Office might have done. Even though
10	Horizon systems."	10	your Lordship doesn't reach a concluded view, the
11	So your Lordship is obviously aware of the concern	11	fair -minded observer would still be struck by the
12	that we are now focused upon. And I will not go through	12	one-sided and, in my submission, prejudicial speculation
13	the whole of that paragraph, but towards the end,	13	contained in that observation.
14	your Lordship says:	14	Paragraph 30 at the end, when your Lordship is
15	"However, Post Office seemed to want findings on	15	summarising another approach adopted by the Post Office,
16	that only if they were in the Post Office's favour.	16	and you say at the end:
17	This is a peculiarly one-way approach by any litigant ."	17	"This seemed to me to be an attempt to put the court
18	Then I think what I want to do is to show	18	in terrorem."
19	your Lordship the closing submissions. Could you look	19	And then at paragraph 123, your Lordship can look at
20	at transcript Day 14/36, lines 17 to 25, which are in	20	that for context, but the bit I am interested in is
21	{B9.3/2/682}.	21	towards the end of the paragraph, the last 15 lines or
22	MR JUSTICE FRASER: I am afraid it has not come up yet.	22	so:
23	LORD GRABINER: Day 14, page 36, lines 17 to 25. It is in	23	"The Post Office must have decided to attack him
24	the bottom right-hand corner there. So it is line 17.	24	[that, I think, is Mr Bates]"
25	So the closing submission is:	25	MR JUSTICE FRASER: Where are we? I am sorry.
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Does your Lordship have it? Line 17, page 36, if you are on the four on a page, right-hand corner. MR JUSTICE FRASER: Yes, I do, sorry. LORD GRABINER: "On credibility we have a problem here because, of course, someone in my position would like to rely on the answers of these individuals and how they accounted, some of which, in my submission, was dishonest or at least not credible. The trouble with that submission is that would require your Lordship to make findings as to that which, given the nature of this trial, I am not in a position to do, because at least there has not been full disclosure of the accounting relationship."

"On credibility, we have a problem here."

Now, what I say about that is this. It may be a good submission and it may be a bad submission, but my learned friend Mr Cavender was certainly not submitting that findings on credit should only be made if they were in Post Office's favour, and, in my submission, the conclusion that your Lordship has reached in the earlier paragraph we are complaining about, namely 21, I think, and 34, were not justified.

Then paragraph 28 you say:

"Another point with which I have to deal is what Mr Cavender called or described in Opening as a

LORD GRABINER: Paragraph 123. I am sorry.

2 MR JUSTICE FRASER: Not at all, 123, yes.

3 LORD GRABINER: Just the last 15 lines or so:

> "The Post Office must decided to attack him [I think that is Mr Bates] because the whole case of the Post Office requires an assumption or acceptance that the predominant, or only, cause of shortfalls is fault (or worse) on the part of SPMs. The case by the Post Office is that careful and/or diligent and/or honest SPMs and/or their assistants do not experience shortfalls. Therefore, so far as the Post Office is concerned, in each branch where such shortfalls occurred, either the Claimants and/or their assistants must have at least some, and potentially all, of those characteristics. If it were otherwise, the Post Office edifice would run the risk of collapse."

Again, this is an offensive conclusion and it does, in my submission, or would in the minds of the observer, reveal a mindset on the part of your Lordship.

Paragraph 295 --

21 MR JUSTICE FRASER: Before you move on, if you go back to 22 the end of paragraph 121, if you would.

23 LORD GRABINER: Yes, my Lord.

24 MR JUSTICE FRASER: I summarise in the last four lines the 25 submissions that the Post Office made to me about

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1	Mr Bates and/or put to him in his cross-examination,	1	statement."
2	which I described as a sustained attack, and terms used	2	So this is an implied allegation of professional
3	by the Post Office to describe his evidence included the	3	impropriety against Post Office's legal advisers. We
4	following words: risible, meaningless, nonsensical and	4	are all familiar with the context, but your Lordship is
5	weak, and the Post Office's case also was that he had	5	speculating about something which is actually very
6	convinced himself of the truth of his own account	6	serious and it was entirely inappropriate, in my
7	because he had been campaigning against them for years.	7	submission, to incorporate that into the judgment.
8	So in terms of putting the findings at the end of	8	Then in 532, you wholly:
9	I beg your pardon, not the findings, the criticisms at	9	"I wholly reject this evidence by Mr Trotter."
10	the end of 121 in context, they have to be read with	10	Then at the end of that paragraph, 532:
11	123, don't they?	11	"This next point was not put to him. It appeared as
12	LORD GRABINER: That is fair enough, and I apologise. That	12	though his witness statement had been written by someone
13	is perfectly fair, but my submission nevertheless is	13	else and not by Mr Trotter."
14	that what is at the end of 123 does involve some	14	A similar point, 476, 10 or 12 lines down, reference
15	conclusions, and revealing your Lordship's thinking.	15	to Mr Abdulla:
16	But the real point is that regardless of what the	16	"This part of her written evidence [this must be
17	evidence was or the cross-examination was, this has	17	Mrs Dar's evidence] sought to give the impression,
18	nothing to do with the contract issues, but it has	18	through careful wording of her witness statement, that
19	everything to do with other matters yet to be tried.	19	she had covered the same ground in the interview as
20	Of course, the last sentence is particularly	20	contained in these much later checklists."
21	revealing:	21	Several lines down on, but towards the end of the
22	"If it were otherwise, the Post Office edifice would	22	paragraph
23	run the risk of collapse."	23	MR JUSTICE FRASER: I think it is Mrs Ridge's evidence.
24	So it looks like a fanciful construct. It does	24	LORD GRABINER: You may well be right and I apologise, yes,
25	reveal a view, in my submission.	25	that is right, and then just further on, towards the end
	89		91
1	MR JUSTICE FRASER: Understood.	1	of the paragraph:
2	LORD GRABINER: 295 {B7/29/100}, this is in relation to	2	"This passage of her evidence appears to have been
3	Mrs Stockdale, and her interview. The last few lines:	3	written for her, but again the point was not put so
4	"If that replacement took place after April 2016,	4	I make no findings about it ."
5	and if it is because of the replacement that this	5	This is another example of an implicit allegation of
6	recording is not available, then that means that	6	what would be professional impropriety. Why speculate
7	Post Office has failed properly to deal with an	7	about it? It is quite unnecessary but very, very
8	important record directly relevant to the litigation	8	damaging to the view of the observer looking at this
9	during the proceedings themselves."	9	bearing in $% \left( 1\right) =\left( 1\right) \left( 1\right) =\left( 1\right) \left( 1\right) $ bearing in $% \left( 1\right) \left( 1\right) =\left( 1\right) \left( 1\right) $
10	So the implication from that is that Post Office has	10	483 is the next paragraph. It is again for context.
11	failed to preserve evidence or may have destroyed	11	If your Lordship could be kind enough to look at the

In 393 (B7/29/129), again, if your Lordship would be kind enough just to look at that for context.

evidence, but it is all left up in the air and it is

16 MR JUSTICE FRASER: 393.

a speculative observation.

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LORD GRABINER: The passage that I am going to go is to 394, a few lines down, after reference to Mrs Rimmer's team:

"It may well not have been drafted by Mrs Rimmer at all, as some litigants' solicitors are often responsible for the content of witness statements. This was not pursued in cross-examination, so it is neither necessary nor desirable to make any finding about it . I certainly don't criticise Mrs Rimmer for it, although if it were not written by her, it should not have been in her

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If your Lordship could be kind enough to look at the paragraph. But at the end of the paragraph:

"Given by early 2017 this litigation was well under way it may be an example of internal suppression of material, but I make no specific findings on that as the point wasn't raised. I can think of no rational explanation for this however."

This is, in my submission, wholly inappropriate, not least the conclusion that apart from the suggested impropriety your Lordship could think of no other rational explanation for Post Office's behaviour. That is a conclusory statement and it is an incredibly damaging statement. And it is a highly prejudicial statement.

MR JUSTICE FRASER: This was a Post Office auditor asking

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1	for internal documents from the Post Office .	1	My understanding is that that was explained to
2	LORD GRABINER: It doesn't matter, my Lord, because these	2	your Lordship during the $$ trial . $$ But I $$ am not going to
3	were matters which everybody knows were going to be	3	invite him to deal with it now, but it may be that
4	subsequently dealt with.	4	Mr Cavender can deal with it .
5	Paragraph 560, in subparagraph 5, even the identity	5	MR JUSTICE FRASER: No. Of course.
6	of both the sender and the recipients of internal emails	6	LORD GRABINER: Then in 561 your Lordship says:
7	have been redacted from disclosed correspondence.	7	"These are examples in my judgment of a culture of
8	MR JUSTICE FRASER: Where are we now?	8	excessive secrecy at the Post Office about the whole
9	LORD GRABINER: Sorry, it is paragraph 560, subparagraph 5.	9	subject matter of this litigation . They are directly
10	Your Lordship may recall this . This is where the	10	contrary to how the Post Office should be conducting
11	disclosed correspondence was redacted.	11	itself . $\ \ I \ \ do \ not \ consider \ that \ \ there \ can \ be \ a \ sensible$
12	MR JUSTICE FRASER: Yes.	12	or rational explanation for any of them."
13	LORD GRABINER: Then in later submissions on typographical	13	The criticism $\ \ I \ \ would \ make speaks for itself$ .
14	corrections:	14	Then turning to another heading: "Criticism of
15	" maintain this was done for data protection	15	Post Office witnesses". 375:
16	reasons. The contents of the emails heavily redacted	16	"Mr Beal's way of giving evidence was very much the
17	the court will not go behind an assertion of	17	house Post Office style, certainly for the more senior
18	privilege ."	18	of its management personnel who gave evidence. This was
19	Your Lordship says:	19	to glide away from pertinent questions or questions to
20	"However, given that part of the emails are accepted	20	which the witness realised a frank answer would not be
21	as not being privileged and have not been redacted	21	helpful to Post Office's cause."
22	I can't see any sensible basis for maintaining any	22	Then just below that:
23	redaction of the identity of the sender and recipients ."	23	"He sought to give me evidence highly favourable to
24	That is a serious criticism of the disclosure	24	Post Office which I consider was slanted more towards
25	process adopted by Post Office . It proceeds actually on	25	public relations consumption rather than factual
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1	a falsa hasia. Dage Office did not reduct these	1	accumant."
1	a false basis. Post Office did not redact those	1	accuracy."
2	documents for the purposes of these proceedings. They	2	Then in 400, the sentence:
3	had been disclosed in these proceedings in exactly the	3	"That is simply not correct. I do not accept that
4	same form that they were in when originally provided to	4 5	Mr Breeden could believe it was."
5 6	Mr Bates. The original versions had been redacted for	6	In 425 in relation to Mrs Van Den Bogerd your
	data protection reasons.	7	Lordship said:
7 8	MR JUSTICE FRASER: But the contents were redacted as well	/	
9		0	"This, therefore, must mean that Mrs Van Den Bogerd
	as the senders and the recipients.	8	is an extremely poor judge of relevance."
	So, Lord Grabiner, if you look at line 5 of 560,	9	is an extremely poor judge of relevance."  In 544:
10	So, Lord Grabiner, if you look at line 5 of 560, subparagraph 5 $\{B7/29/175\}$ , the contents of the emails	9 10	is an extremely poor judge of relevance."  In 544:  "I have no reason to think that any of Post Office
10 11	So, Lord Grabiner, if you look at line 5 of 560, subparagraph 5 {B7/29/175}, the contents of the emails were themselves heavily redacted. So if the sender and	9 10 11	is an extremely poor judge of relevance."  In 544:  "I have no reason to think that any of Post Office witnesses were doing anything other than stating their
10 11 12	So, Lord Grabiner, if you look at line 5 of 560, subparagraph 5 {B7/29/175}, the contents of the emails were themselves heavily redacted. So if the sender and the recipient's identity were redacted at the time for	9 10 11 12	is an extremely poor judge of relevance."  In 544:  "I have no reason to think that any of Post Office witnesses were doing anything other than stating their genuine belief as at 2018 based on their recollection,
10 11 12 13	So, Lord Grabiner, if you look at line 5 of 560, subparagraph 5 {B7/29/175}, the contents of the emails were themselves heavily redacted. So if the sender and the recipient's identity were redacted at the time for data protection I entirely accepted the correction	9 10 11 12 13	is an extremely poor judge of relevance."  In 544:  "I have no reason to think that any of Post Office witnesses were doing anything other than stating their genuine belief as at 2018 based on their recollection, with two exceptions. The first is some of Mr Beal's
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10 11 12 13 14 15 16 17 18 19 20	So, Lord Grabiner, if you look at line 5 of 560, subparagraph 5 {B7/29/175}, the contents of the emails were themselves heavily redacted. So if the sender and the recipient's identity were redacted at the time for data protection I entirely accepted the correction Mr Cavender I think submitted.  LORD GRABINER: I understand your Lordship's point.  If we may, we may come back to you.  MR JUSTICE FRASER: Yes, of course.  LORD GRABINER: All the redactions I am told were related to third party data. All the redactions.  MR JUSTICE FRASER: Does that, therefore, mean that the	9 10 11 12 13 14 15 16 17 18 19	is an extremely poor judge of relevance."  In 544:  "I have no reason to think that any of Post Office witnesses were doing anything other than stating their genuine belief as at 2018 based on their recollection, with two exceptions. The first is some of Mr Beal's more extreme claims that the drafting of the NTC was designed to replicate a SPM's responsibility for losses under the SPMC. It was also intended by Post Office that the contract with NFSP would be made public.  Neither of those claims bear analysis when compared with the detailed drafting of each of those documents, both of which have been carefully drafted, no doubt with the
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10 11 12 13 14 15 16 17 18 19 20 21 22	So, Lord Grabiner, if you look at line 5 of 560, subparagraph 5 {B7/29/175}, the contents of the emails were themselves heavily redacted. So if the sender and the recipient's identity were redacted at the time for data protection I entirely accepted the correction Mr Cavender I think submitted.  LORD GRABINER: I understand your Lordship's point.  If we may, we may come back to you.  MR JUSTICE FRASER: Yes, of course.  LORD GRABINER: All the redactions I am told were related to third party data. All the redactions.  MR JUSTICE FRASER: Does that, therefore, mean that the redactions within the contents of the emails need to be reviewed again?	9 10 11 12 13 14 15 16 17 18 19 20 21 22	is an extremely poor judge of relevance."  In 544:  "I have no reason to think that any of Post Office witnesses were doing anything other than stating their genuine belief as at 2018 based on their recollection, with two exceptions. The first is some of Mr Beal's more extreme claims that the drafting of the NTC was designed to replicate a SPM's responsibility for losses under the SPMC. It was also intended by Post Office that the contract with NFSP would be made public.  Neither of those claims bear analysis when compared with the detailed drafting of each of those documents, both of which have been carefully drafted, no doubt with the assistance of sophisticated legal advisers.  "The second is Mrs Van Den Bogerd. She tried to
10 11 12 13 14 15 16 17 18 19 20 21	So, Lord Grabiner, if you look at line 5 of 560, subparagraph 5 {B7/29/175}, the contents of the emails were themselves heavily redacted. So if the sender and the recipient's identity were redacted at the time for data protection I entirely accepted the correction Mr Cavender I think submitted.  LORD GRABINER: I understand your Lordship's point.  If we may, we may come back to you.  MR JUSTICE FRASER: Yes, of course.  LORD GRABINER: All the redactions I am told were related to third party data. All the redactions.  MR JUSTICE FRASER: Does that, therefore, mean that the redactions within the contents of the emails need to be	9 10 11 12 13 14 15 16 17 18 19 20 21	is an extremely poor judge of relevance."  In 544:  "I have no reason to think that any of Post Office witnesses were doing anything other than stating their genuine belief as at 2018 based on their recollection, with two exceptions. The first is some of Mr Beal's more extreme claims that the drafting of the NTC was designed to replicate a SPM's responsibility for losses under the SPMC. It was also intended by Post Office that the contract with NFSP would be made public. Neither of those claims bear analysis when compared with the detailed drafting of each of those documents, both of which have been carefully drafted, no doubt with the assistance of sophisticated legal advisers.

in the originals .

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with because she had no detailed knowledge in the

1	witness-box. That is simply not correct. She had	1	comment on your Lordship's judgment.
2	signed a very detailed witness statement just a few days	2	So in 368 you say:
3	before for the Horizon Issues trial which dealt with the	3	"It is obvious, in my judgment, that the NFSP is not
4	matters being put to her about Mr Abdulla in	4	remotely independent of Post Office , nor does it appear
5	considerable detail . I find that she was simply trying	5	to put its members' interests above its own separate
6	to mislead me."	6	commercial interests ."
7	Further on your Lordship described an answer from	7	In 369 just for context, 370, the second sentence:
8	her was "simply disingenuous". Then further on in the	8	"Such matters plainly should not be linked in the
9	emboldened part:	9	way that NFSP and the Post Office link them in this
10	"Mrs Van Den Bogerd did not provide any reference in	10	instance. I don't consider that NFSP can, in these
11	his witness statement to matters unfavourable to the	11	circumstances, properly be considered to be independent
12	Post Office case."	12	or to be acting in the interests of SPMs, given the way
13	So two things are especially striking, in my	13	it involved its own commercial interests as a condition
14	submission, about these extracts.	14	in the way explained in Part F of the judgment."
15	First your Lordship makes a very general statement	15	Then if your Lordship would just be kind enough to
16	about Post Office's house-style of giving evidence.	16	look for context at 576 and 577, and then I want just to
17	That shows that from now on you are likely to disbelieve	17	pick up on a emboldened passage at the end of 577. This
18	Post Office's evidence because it comes from	18	is in relation to Paula Vennells, the chief executive of
19	Post Office . In my submission that is how it would be	19	the Post Office . Then at the end of 577 your Lordship
20	viewed by an objective observer.	20	says:
21	Secondly, those criticisms of Post Office witnesses	21	"Rather curiously, therefore, the email above
22	are founded on what they said or did not say about	22	demonstrates that the NFSP was only prepared to agree
23	evidence which was irrelevant. Ie irrelevant for that	23	what amounted to an increase in its members' potential
24	trial .	24	compensation if its own future was assured by the
25	Mr Beal is criticised for his understanding of how	25	payment of substantial sums to it . I find that this
	97		99
1	the liability provisions in the NTC should be construed.	1	shows that the NFSP put its own members' interests well
2	But his subjective understanding is quite irrelevant to	2	below its own. I also find that NFSP is not fully
3	their proper interpretation or construction. That is	3	independent."
4	always a matter for the court.	4	So your Lordship has there embarked on a lengthy
5	He is also criticised for his evidence on the NFSP.	5	discussion of the circumstances in which Post Office
6	This too was irrelevant . Mrs Van Den Bogerd was	6	disclosed a copy of its grant agreement with NFSP in
7	criticised for not giving evidence on Horizon. Her	7	response to a freedom of information request.
8	evidence on Horizon belongs properly to the Horizon	8	Your Lordship was especially interested in the fact
9	trial .	9	that NFSP's website had been altered in the course of
10	So we say that your Lordship's conclusions as to the	10	the trial . You will probably remember that. This is in
11	credibility of these witnesses are unfair, not least	11	your Lordship's 589. Then towards the end of 589
12	because the evidence they were giving was supposed to be	12	your Lordship said:
13	confined to the Common Issues, which is what their	13	"I was given no evidence by anyone from Post Office
14	witness statements were directed to.	14	about why this was done and done in terms that suited
15	The other point about these conclusions is that they	15	the Post Office's case on this point. I find this
16	will inevitably colour your Lordship's view of these	16	behaviour highly suspicious. It also undermines yet
17	witnesses as and when they come before you in one or	17	further the claim by Post Office that NFSP is

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independent."

So here your Lordship seems to be adopting the

conspiracy theory approach to the evidence. That would

be matter of grave concern to the fair-minded observer

aware of the context. And, of course, a party to that

no detailed evidence on any of this because it simply

wasn't relevant to the Common Issues trial.

conspiracy apparently was the Post Office, but there was

other of the later trials.

the short adjournment, my Lord.

Post Office's relationship with NFSP".

Then I think with a bit of luck I will get done by

The next topic heading is "Attacks on the NFSP and

So there were attacks on Post Office's relationship

with the National Federation of Subpostmasters. It was

not represented in court and had no opportunity to

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1	Then earlier in these submissions and from time to	1	what he said, went well beyond giving counsel an initial
2	time by reference to various paragraphs of the judgment	2	indication of his thinking and expressed firm views
3	I drew attention to observations of your Lordship to the	3	adverse to a defendant whose evidence he had not yet
4	effect that you were specifically going out of your way	4	heard. When, therefore, in his judgment the next day he
5	to make it clear that you were not making any findings	5	found against the defendant, a reasonable observer,
6	on Horizon or breach.	6	knowing what we have recounted, would infer that he
7	So if we can go back now to paragraph 517, which	7	might well have done so because of a prior prejudice in
8	I think is the classic example in the judgment,	8	favour of the claimants and against the defendant."
9	your Lordship will be familiar with this paragraph and	9	I cite that merely to make it clear beyond argument
10	I will not re-read it, but 517. It is the "crystal	10	that it was a case of apparent bias and not actual bias,
11	clarity " paragraph.	11	because the learned Lord Justice is using the formula
12	MR JUSTICE FRASER: Just give me a moment.	12	applicable to the apparent bias cases. Then at
13	LORD GRABINER: 517.	13	paragraph 12 Lord Justice Sedley says:
14	MR JUSTICE FRASER: Yes, thank you. Yes.	14	"The claimants rely strongly on the remark recorded
15	LORD GRABINER: Your Lordship will obviously recall what you	15	by their counsel but not recalled by the defendant's
16	said there.	16	counsel; namely that the judge wanted to give both
17	That form of words, in my respectful submission,	17	counsel an indication of his thoughts. We are entirely
18	would appear to the fair-minded observer to be aimed at	18	content to accept that whether the district judge said
19	pre-empting the substantive criticisms that I have been	19	it or not it is what he was seeking to do. The question
20	making throughout. It is just a mantra which would not	20	remains whether the thoughts he communicated were
21	convince the observer that your Lordship had not	21	nevertheless such as to suggest to a reasonable observer
22	prejudged the issues which still fall to be tried by	22	that his mind was all but closed against the defendant."
23	your Lordship.	23	Then in paragraph 16 the learned Lord Justice says:
24	Unsurprisingly there is some learning on this	24	"Both the common law and the convention for the
25	subject. The authority is the case of Steadman-Byrne.	25	protection of human rights and the fundamental freedoms
	·		
	404		400
	101		103
1		1	
1 2	Could I invite your Lordship's attention to it .	1 2	recognise the fundamentality of every litigant 's right
2	$\label{lem:could_I} \begin{tabular}{ll} Could\ I & invite\ your\ Lordship's\ attention\ to\ it\ . \\ MR\ JUSTICE\ FRASER:\ Yes.\ Is\ this\ the\ one\ where\ the\ parties \end{tabular}$	2	recognise the fundamentality of every litigant 's right to a Tribunal free both of bias and of the objective
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2 3 4 5	Could I invite your Lordship's attention to it.  MR JUSTICE FRASER: Yes. Is this the one where the parties were called in over the short adjournment, having heard the claimant's evidence, and the district judge said he believed them and he made various other comments. There	2 3 4 5	recognise the fundamentality of every litigant 's right to a Tribunal free both of bias and of the objective appearance of bias. The appearance of bias includes a clear indication of a prematurely closed mind. In our respectful view the district judge, albeit acting out of
2 3 4 5 6	Could I invite your Lordship's attention to it.  MR JUSTICE FRASER: Yes. Is this the one where the parties were called in over the short adjournment, having heard the claimant's evidence, and the district judge said he believed them and he made various other comments. There are about maybe 16 comments in the judgment of	2 3 4 5 6	recognise the fundamentality of every litigant 's right to a Tribunal free both of bias and of the objective appearance of bias. The appearance of bias includes a clear indication of a prematurely closed mind. In our respectful view the district judge, albeit acting out of the best of motives, gave the parties an inescapable
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case -- that is the only other case that I want to make

"The defendant's case is that the judge, by saying

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1	reference tothat the benefit of any real doubt should	1	been going on for?
2	be resolved in favour of recusal.	2	MR JUSTICE FRASER: Two weeks.
3	Perhaps we can just look at that. This is	3	LORD GRABINER: Would your Lordship bear with me for
4	Lord Justice Bingham's judgment [B9.5/7/480] at the foot	4	a moment.
5	of the page between G and H.	5	MR JUSTICE FRASER: Yes. (Pause)
6	Lord Justice Bingham says, do you see that, between	6	LORD GRABINER: Yes, I think that would be the consequence.
7	G and H:	7	Yes.
8	"In most cases we think the answer, one way or the	8	MR JUSTICE FRASER: It is really abandon or stop the Horizon
9	•	9	trial .
	other, will be obvious, but if in any case there is real		
10	ground for doubt that doubt should be resolved in favour	10	LORD GRABINER: Yes.
11	of recusal."	11	MR JUSTICE FRASER: So it can be reheard from scratch.
12	Your Lordship's use of what I have called, I hope	12	LORD GRABINER: Precisely.
13	not disrespectfully , the mantra, demonstrates your	13	MR JUSTICE FRASER: Yes. Right, thank you very much. That
14	understanding that you should not have made findings for	14	is the first question.
15	example about Horizon or breaches of contract or	15	The second question is slightly mundane in terms of
16	breaches of duty.	16	the observations and submissions that you have made
17	Our case is that your Lordship nevertheless went	17	already in respect of Mr Beal, but just to ask
18	ahead and made those findings. Many of your conclusions	18	a specific question about Mr Beal with particularity .
19	and observations are strongly expressed.	19	At page 94 of today's transcript when you were
20	So in a nutshell my submission is that in the eyes	20	taking me through the passages in respect of my
21	of the fair-minded observer this is a very plain case	21	observations on the relationship with the NFSP you said
22	where there is a risk of an appearance of bias infecting	22	that I had criticised Mr Beal for giving irrelevant
23	the current Horizon trial and the future trials between	23	evidence, or I had criticised him in respect of
24	these parties.	24	irrelevant evidence. Do you recall those submissions?
25	For that reason I respectfully invite your Lordship	25	LORD GRABINER: Let me just look at my
	105		107
1	to recuse yourself from these proceedings and also	1	MR JUSTICE FRASER: 544 is the paragraph of the judgment
2	either to stay or adjourn the Horizon trial .	2	where I deal with an observation on Mr Beal and an
3	My Lord, those are my submissions. I am sorry they	3	observation on Mrs Van Den Bogerd.
4	were undertaken at great speed, but they are my	4	LORD GRABINER: What I said was Mr Beal is criticised for
5	submissions.	5	his understanding of how the liability provisions in the
6	If there is anything you would like to ask me about	6	NTC should be construed.
7	I am very happy to try and help you.	7	MR JUSTICE FRASER: Yes, that is correct, you did say that.
8	MR JUSTICE FRASER: I just had a couple of questions.	8	If we can just call up on the common screen for the
9	LORD GRABINER: My Lord, yes.	9	Common Issues trial, please, {C2/2/6}.
10	MR JUSTICE FRASER: So far as relief on the application,	10	That is Mr Beal's witness statement where he gives
11	I think the application itself said adjournthe Horizon	11	evidence about a point which you and I have already
12	trial , which obviously is underway at the moment, and	12	debated a little bit, which was the difference in fault
13	today you have said adjourn or stay.	13	or no fault liability under each of the two contract
14	LORD GRABINER: My Lord, yes.	14	forms.
15	MR JUSTICE FRASER: Can I just be clear what in fact is	15	Now on the basis that he had given that evidence in
16	meant by either or each of those terms.	16	his witness statement I assume the Post Office's
17	The evidence of fact is almost finished. If I were	17	position is that that was relevant evidence and Mr Green
18		18	could cross-examine on it. But if I have misunderstood
	to recuse myself from being the managing judge of the		
19	group litigation that would obviously include recusing	19	that would you tell me.
20	myself from any further involvement in the Horizon	20	LORD GRABINER: My response to that is first of all it
21	Issues trial .	21	obviously was in the witness statement but it was
22	LORD GRABINER: My Lord, yes.	22	irrelevant to the matters in the trial.
23	MR JUSTICE FRASER: That would then have to start again in	23	MR JUSTICE FRASER: Understood.
24	front of another judge. Is that correct?	24	LORD GRABINER: And whatever came out of the
25	LORD GRABINER: Yes, is the answer. How long has this trial	25	cross-examination was similarly irrelevant .

1	MR JUSTICE FRASER: Yes.	1	There is a preliminary point to make about the
2	LORD GRABINER: It goes back to a point that I sought to	2	informed observer test . The informed observer is
3	make at the beginning of these submissions, which is the	3	someone who is presumed to actually have been at the
4	fact that irrelevant material was incorporated into any	4	trial and know what happened, not commenting on it from
5	of the witness statements and/or was cross-examined is	5	afar and not island-hopping between different findings
6	supremely irrelevant because it doesn't thereby enlarge	6	and observations to make assertions about those without
7	the Common Issues that were the subject of the $\  $ trial .	7	having regard to the judgment as a whole.
8	MR JUSTICE FRASER: I understand. That is very helpful,	8	Taking the points in stages
9	thank you.	9	MR JUSTICE FRASER: Is that right, though? Is it not
10	Then the final point and it may be that you are	10	sufficient for the reasonable well-informed observer
11	not able to give me an answer immediately, in which case	11	just to read judgment number 3?
12	you can just give me the brief answer at the beginning	12	MR GREEN: My Lord, no, the law is clear that the
13	of your reply am I entitled or not, would	13	reasonably well, the informed observer test is (a) an
14	a fair -minded hypothetical observer take account of the	14	objective one and (b) an informed one. So the informed
15	result in the Common Issues judgment in terms of how	15	observer knows about the trial as it was presented to
16	many issues were resolved in the Post Office's favour	16	your Lordship.
17	and how many were resolved in the claimants' favour or	17	In one case, there is even a point about knowing
18	not?	18	things that perhaps even weren't in the public domain
19	LORD GRABINER: Absolutely not.	19	about the trial . So "informed" I would underline in
20	MR JUSTICE FRASER: Wouldn't take note. Thank you very	20	relation to the approach of the informed observer test.
21	much. That is very helpful.	21	A couple of short points in relation to context, and
22	LORD GRABINER: Absolutely not. It would be irrelevant.	22	those points are these, and I think your Lordship will
23	The only matters that are relevant is whether it can	23	have apprehended what these submissions would be anyway
24	fairly be said that there are passages in the judgment	24	The first point is that specific findings or
25	which give rise to the concern I have been describing.	25	observations in a judgment should not be taken out of
	100		•••
	109		111
1	MR JUSTICE FRASER: Thank you very much.	1	their immediate context. That is, either lines which
2	LORD GRABINER: The fact that at the end of the day the	2	are within the same paragraph but have been omitted from
3	weight of the findings was in favour of one side or the	3	mention, which either directly contraindicate what is
4	other would, in my submission, be irrelevant.	4	being said of the other lines that are mentioned or put
5	MR JUSTICE FRASER: Thank you very much indeed. That is	5	those lines into a context which is explanatory, or
6	almost perfectly timed on your part, if I may say so,	6	adjacent paragraphs which give the overall context
7	and we will come back at 5 past 2 and I will hear from	7	within which the particular paragraph falls . I refer to
8	Mr Green.	8	that as the immediate context.
9	(1.00 pm	9	The second point of context is that those passages
10	(The short adjournment)	10	should not be considered without regard to the judgment
11	(2.05 pm)	11	as a whole and read as a whole, including
12	Submissions by MR GREEN	12	your Lordship's findings in favour of some of
13	MR JUSTICE FRASER: Mr Green.	13	Post Office's witnesses, for example, and having due
14	MR GREEN: May it please your Lordship. The claimants'	14	regard to the presence or absence of a careful and
15	submission is that this is an application without merit	15	meticulous approach to analysing with precision what
16	and without foundation. There are effectively three	16	evidence was and was not given, how it was challenged
17	strands to that submission.	17	and what submissions were made about it.

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The first  $\,$  is that  $\,$  it wholly ignores the proper role

of context. The second is that it appears to proceed on

analysing apparent bias. The third is that it proceeds

judicial assessment of the proceedings as they actually

specifically on a misapprehension as to the proper

were before your Lordship during the Common Issues

a misapprehension as to the correct approach to

trial .

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The third matter of context is to look at the

presented their cases before the court.

proceedings themselves and the issues that your Lordship

had directed to be tried and how the parties had in fact

The fourth matter of background, but important

frequently the managing judges are put in a position

where parts of trials have to be separated off, as

context, is the fact that this is group litigation where

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sensibly as they can be, never perfectly hermetically sealed from other aspects, and tried  $% \left( 1\right) =\left( 1\right) +\left( 1\right)$ 

That is the quintessential role of the managing judge for which part 19 of the Civil Procedure Rules makes provision.

I will take your Lordship, if it is necessary, to the British Coal case, which we have in the bundle, which addresses the generosity of approach to a managing judge in those circumstances.

Your Lordship is very familiar with the passages that have been identified in Mr Parsons' 15th witness statement and the words that precede and follow them and their context, because it is in your Lordship's judgment, so I am not going to spend the time that I do have taking your Lordship through them paragraph by paragraph, not least because I hope we have given sufficiently illustrative examples of our answers in our written skeleton argument.

But it is important to address some of the points which arise in relation to the Common Issues themselves, and how they in fact arose before your Lordship. So the first point to note is that the Common Issues were not plucked out of the air.

The Common Issues were agreed between the parties

and they were derived from the parties' generic pleadings, which is an important point, and the key paragraphs to which they referred, although inevitably not all paragraphs, were identified in the schedule to the order which defined the Common Issues themselves.

Your Lordship will know that, for example, some of the more famous paragraphs in the generic defence, like 93 and 94 about the approach to construction and where the burden of proof should lie, were identified in that Common Issues document.

And what then followed was the service of evidence by Post Office for their part, which was designed to support the factual premises which they had pleaded as being expressly relevant to construction of the contracts. I will very briefly make these points good in a moment.

What then followed was Post Office's attempt to strike out the only evidence that the lead claimants individually could give in response to whether or not the factual assertions designed to support Post Office's pleaded case on construction were in fact a reliable and realistic account of what would happen on the ground or not.

That was unsuccessful for a number of reasons which your Lordship will remember in the admissibility

judgment, which is judgment number 2, which I will also come to very briefly in a moment.

From there, Post Office then elected not to put in any more evidence, not to abandon the evidence that it had chosen to put in on matters such as training and so forth, but in its opening and closing to continue with the premise for construction upon which Post Office's entire case on the Common Issues depended.

There were two particularly important facets to that. The first facet was what had been pleaded at paragraphs 76, 85, 93 and 94 of the generic defence, and those factual assertions which I will take your Lordship to in a moment. That is one side of it.

The other facet of the Post Office's case was the agency relationship, because Post Office expressly opened and closed on the footing that the agency relationship suffused the entire contractual relationship, and the contractual relationship sat atop of the agency relationship and any findings as to the nature of the agency relationship and the role of the account as between principal and agent necessarily involved the court determining what the branch trading statement was, in fact, because that was disputed, as your Lordship records in the judgment, and how it came about and what it included.

That was necessary, and I don't think that can sensibly be disputed.

So those were the two key facets in relation to construction. The third area was credit. That loomed very, very large in the proceedings as they were actually conducted before the court.

My Lord, can I just take your Lordship very briefly to the generic pleadings, which I think your Lordship will remember. Rather than going through them in detail, your Lordship will remember --

MR JUSTICE FRASER: I don't think on an application such as
 this, given its subject matter, it is necessary to go
 through the pleadings in detail.

14 MR GREEN: I am grateful.

15 MR JUSTICE FRASER: But if you are going to draw my
16 attention to what a part of a pleading says -- because
17 I remember the Common Issues' schedule or schedule 1 to
18 the order that set down the Common Issues was drafted
19 and agreed by the parties, but it was approved by the
20 court.

21 MR GREEN: Exactly.

MR JUSTICE FRASER: And within it, it had numerous
 references to pleading paragraphs, a point which, during
 the trial, I required both parties to get rid of those
 so that it was a standalone document.

1	MR GREEN: Indeed.	1	and/or presume that the shortfall arose from losses for
2	MR JUSTICE FRASER: Where do you want me to go?	2	which he or she was responsible. Such an inference
3	MR GREEN: Maybe the most convenient place to look, my Lord,	3	and/or presumption is appropriate because (1) branches
4	is in judgment number 2, in the admissibility judgment,	4	are under the management of Subpostmasters or their
5	which I think your Lordship may have in a separate hard	5	assistants, (2) losses do not arise in the ordinary
6	copy folder . {B7/27/1} on Opus.	6	course of things without fault or error on the part of
7	If we look at paragraph 40 (B7/27/14) of that, this	7	Subpostmasters or their Assistants and (3) it would not
8	is your Lordship's judgment on the admissibility	8	be right to infer or presume that a shortfall or loss
9	application, and so this highlighted the relevance of	9	was caused instead by a bug or error in Horizon."
10	these paragraphs, if it was ever in doubt, which I will	10	Then it goes on:
11	submit it wasn't to Post Office:	11	"Subpostmasters bear the legal burden of proof that
12	"This paragraph is pleaded to by the defendant in	12	a shortfall did not result from the losses for which
13	paragraphs 93 and 94 of the generic defence. These	13	they were responsible. This is because (1) the truth of
14	state as quoted below."	14	the matter lies peculiarly within the knowledge of
15	Another relevant passages precedes these in	15	Subpostmasters as the persons with responsibility for
16	paragraph 76. 76 sets out some subparagraphs and in	16	
		17	branch operations and the conduct of transactions in
17	particular, if we look at (4) onwards:		branches, (2) it would be unjust for Post Office to be
18	"Post Office was unable to monitor at first hand the	18	required to prove allegations relating to matters that
19	transactions undertaken in branches on"	19	fall peculiarly within the knowledge of Subpostmasters,
20	MR JUSTICE FRASER: Pause for a moment. I think we need to	20	and/or(3) where a person is subject to fiduciary
21	go on to page 15.	21	obligations as regards his or her dealing with assets
22	MR GREEN: It is on the next page, if we can. {B7/27/15}	22	the burden is on that person"
23	MR JUSTICE FRASER: Yes.	23	And so forth.
24	MR GREEN: There we go:	24	So if your Lordship looks at the foot of that page,
25	"Post Office was unable to monitor at first hand the	25	94 as to section 12, clause 12 of the SPMC:
	117		119
1	transactions undertaken in branches on its behalf, in	1	"That should construed in accordance with the
2	relation to which it was liable to Post Office clients .	2	principles set out in paragraph 93 above."
3	These transactions and the manner in which they were	3	So that is all from the generic defence, not recited
4	carried out were the responsibility of the relevant	4	there, but from paragraph 85 of the generic defence,
5	Subpostmasters."	5	which is page 39 of the generic defence is:
6	Then the same point about custody of property, and	6	"The written Subpostmasters' contracts are to be
7	then (6):	7	construed as a whole and in light of the relevant
8	"Post Office relies on the accurate reporting by	8	factual matrix pleaded in paragraph 76 above."
9	Subpostmasters of accounts, transactions and the cash	9	Which is the paragraph to which I have already
10	and stock held at the branch."	10	referred the court.
11	And then at 93, paragraph 93, which is just below:	11	So the starting point was that your Lordship had
12	"Post Office notes the claimants' case set out in	12	regard to the positive case being advanced by the
13	paragraph 55 applies only to section 12, clause 12	13	
14			Post Office when considering the relevance of the
	[which is the burden of proof point]. More generally,	14	evidence that was sought to be struck out by the
15	as regards shortfalls disclosed in a Subpostmaster's	15	Post Office.
16	accounts, the Post Office notes the following	16	That is essential context, and I note my noble and
17	principles, each of which applies to Subpostmasters."	17	my learned friend Lord Grabiner did not actually I refer
18	And then the subparagraph (1):	18	to the basis upon which the Post Office itself invited
19	"Where a Subpostmaster asserts that he or she is not	19	this court to construe the contracts at all in his
20	responsible or liable for a shortfall, the legal and/or	20	submissions.
21	evidential burden of proof is on him or her to establish	21	We respectfully say that is an impermissible
22	the factual basis for such assertion in that:	22	omission because it seeks to advance a criticism of the
23	"(a) In the absence of evidence from a Subpostmaster	23	judgment which is unfounded when you go back to look at
24	to suggest that a shortfall arose from losses for which	24	the case that your Lordship was considering as advanced

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he or she was responsible, it is appropriate to infer

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by Post Office and the case in support of which the

1	relevant evidence was adduced by Post Office through its	1	the claimants' contention, was unworkable. I am not
2	witness statements.	2	going to take your Lordship through the statement.
3	Now, the evidence of Mrs Van Den Bogerd was	3	MR JUSTICE FRASER: I don't think, on the basis of how
4	considered in some detail and your Lordship made	4	Lord Grabiner puts the application, you need to or ought
5	findings in relation to her evidence. And the reading	5	to, because it is put fairly squarely on the contents of
6	note which Post Office submitted to the court explaining	6	judgment number 3.
7	the relevance of different aspects of their evidence	7	MR GREEN: My Lord, indeed. The only problem is that ${\rm I}$ was
8	MR JUSTICE FRASER: Bear with me one moment, Mr Green, just	8	going to briefly identify a couple of points, if I may,
9	one moment. (Pause)	9	and then explain why I say it is relevant to how the
10	Yes, sorry. I mislaid a file. Reading note.	10	application is put.
11	MR GREEN: The reading note is at $\{C2/0/1\}$ on Opus.	11	Just by way of a couple of points, page 23 of that
12	MR JUSTICE FRASER: I think I mentioned the reading note in	12	document at paragraph 78 {C2/1/23}, does your Lordship
13	the judgment.	13	have the bottom three lines from the middle:
14	MR GREEN: Indeed.	14	"This means that the Subpostmaster has complete
15	MR JUSTICE FRASER: Do you have a reference for where I did	15	control over the branch accounts and transactions only
16	that?	16	enter the branch accounts with the Subpostmaster's (or
17	MR GREEN: I don't, my Lord, but I can find one. And the	17	his assistant's) knowledge."
18	reading note identified, if we go over the page	18	And that rather teases out the point that
19	{C2/0/2}, there is Mrs Van Den Bogerd's evidence.	19	your Lordship asked my learned friend about in relation
20	MR JUSTICE FRASER: Paragraph 365, I described it as	20	to transaction corrections entering the accounts and how
21	a helpful reading note, I think.	21	the branch trading statement would come about.
22	MR GREEN: Indeed, and your Lordship will see at page 2 of	22	On page 37 at page 135 at the end of that paragraph
23	that reading note under "Subpostmasters and their	23	{C2/1/37}, it says:
24	branches" there are, for example, Horizon, training and	24	"It would be unlikely that a Subpostmaster, having
25	support, causes of shortfalls , see also Helen Dickinson,	25	kept his accounts diligently, still had no idea where
121			123
1	Post Office's reliance on Subpostmasters and	1	a material problem was arising from."
2	responsibility for shortfalls .	2	MR JUSTICE FRASER: Where have you just read from?
3	MR JUSTICE FRASER: Yes.	3	MR GREEN: It is the foot of paragraph 135.
4	MR GREEN: Then Helen Dickinson we can see at the bottom	4	MR JUSTICE FRASER: Yes.
5	gives evidence about fraud in branches and concealing	5	MR GREEN: These are just examples, my Lord, but page 39,
6	shortfalls and so forth.	6	paragraph 145 {C2/1/39}, says:
7	What is striking in Mrs Van Den Bogerd's statement	7	"In any event, for the reasons set out above, the
8	was the extent to which she covered matters which did in	8	Subpostmaster is best placed to investigate shortfalls
9	fact or purport to support the case that Post Office	9	and Post Office generally cannot find the root cause of
10	Post Office's pleaded case in those pleaded paragraphs	10	a shortfall without the Subpostmaster's cooperation.
11	to which I have just referred. If we look at $\{C2/1/1\}$	11	A reversal of the burden for determining the root cause
12	• · · · · · · · · · · · · · · · · · · ·	12	of shortfalls would also create the perverse situation
13	MR JUSTICE FRASER: That is her witness statement.	13	whereby the greater the scale and sophistication of the
14	MR GREEN: That is her witness statement. And at the foot	14	false accounting by a Subpostmaster, the less likely
15	of that, there is an index, but just above that, she	15	Post Office will be able to find the root cause of
16	says:	16	a shortfall ."
17	"I also provide some commentary on what the	17	Et cetera. And that refers back up to evidence or
18	real-world effects of the Claimants' alleged	18	argument about the fact in branch, for example 142, no
19	interpretation of the Subpostmasters contracts."	19	transaction enters their accounts without their consent.
20	I think it should say "are" or "would be" and	20	This includes transaction corrections, which must be
21	I think that is suggesting relevance because it may	21	accepted by the Subpostmasters before they form part of
22	assist the court to test the commercial sense of	22	the branch accounts, and causation in 143.
23	different constructions contended for.	23	Now, it is right I am sorry to just to have
24	But it is clearly, as we can see in a moment,	24	pressed on to that, because I wanted to show
<b>4</b>			

designed to show that the Subpostmasters' contention,

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your Lordship why I say those passages are relevant, and

they are relevant because the correct approach on an application such as this is to consider and the informed observer is taken to know what the issues were and how they were presented before the court. And it was their positive case pleaded case, which they repeatedly refused to abandon, notwithstanding being instructed do it at least two CMCs, as we have explained in our skeleton argument. MR JUSTICE FRASER: Not invited to abandon by me. MR GREEN: No, by the claimants. MR JUSTICE FRASER: But the fact that they were invited to abandon it by the other side is neither here nor there. It was their pleaded case. MR GREEN: It was their pleaded case. It might sharpen any argument on election, having elected to persist with it, but I take your Lordship's point. It was their pleaded case, and all this evidence, which is the flip-side of many of the findings that my learned friend Lord Grabiner has been referring to, were positively asserted by Post Office. So they were positively in issue as to whether or not Post Office was entitled to take succour from Mrs Van Den Bogerd's evidence in support of its pleaded case before the court. So we say it is extremely surprising that neither the application nor the submissions that your Lordship

persuasion.

Your Lordship will remember the warnings that you gave me about putting in irrelevant evidence and, if necessary, sitting there and crossing them out line by line, because they have included them in their application. And those indications were robust and they were repeated at a number of hearings before your Lordship had heard full argument on the detail of what that evidence might be relevant to.

That is all just part of normal adult behaviour in court. What then happens is that there is an admissibility hearing and it goes the other way.

So in Mr Parsons' 14th witness statement, he is actually relying on a sequence of interlocutory events that positively demonstrate that notwithstanding having expressed extremely robust views at a number of interlocutory hearings, your Lordship was amenable and dealt with the admissibility application with an open mind. The irony of that is not actually acknowledged anywhere either in the application or in my learned friend's submissions.

Now, it is right too to identify that, as your Lordship will have seen from the conclusion to our skeleton argument at page 51, which is at {B9.4/2/51} -- MR JUSTICE FRASER: Did you say your page 51 of your

has heard this morning face up to and deal with head-on the fact that Post Office positively advanced in its pleadings and directly in its evidence the case I have just identified. That is a matter of context which it would be completely wrong to leave out of account.

Against that background, my learned friend suggested there was a bit of a quandary after judgment number 2 about how to play the cross-examination.

We respectfully say that is not right, partly because of the case positively being advanced and still being advanced at that stage. Secondly, because the admissibility application had itself spelt out -- the judgment on the admissibility application had itself spelt out why it was that these matters might be relevant to the matters pleaded by Post Office.

So Post Office was not trying to get what your Lordship's view could be; but had at the very lowest a careful steer about its potential relevance in the admissibility judgment number 2.

My Lord, there is an irony in the reliance that is placed by the Post Office on the transcripts of the hearings that run up to the admissibility application, because the premise of this application is that your Lordship, having expressed a robust view, will be regarded by the informed observer as not amenable to

1 skeleton?

2 MR GREEN: My Lord, yes.

3 MR JUSTICE FRASER: That is your final paragraph, is that 4 right?

5 MR GREEN: That is the final paragraph before the annex.

6 MR JUSTICE FRASER: Yes.

MR GREEN: This just one example, but quite a striking one:

8 "The Post Office's invocation to the Court in both 9 Opening and Closing Submissions to construe the contract 10 on the basis of its evidence, by way of particular 11 example, that of Mrs Van Den Bogerd:

"Issues 8 and 9 concern the proper approach to responsibility for losses. They should be considered against the factual background of how accounting works in a Post Office branch as described by Angela Van Den Bogerd at paragraphs 73 to 82 and 126 to 140 ..."

Now, pausing there, there is an element of Groundhog Day here, my Lord, because what actually seems to be the position is that when Post Office sought to strike out the claimants' evidence, they wanted a one-sided trial where they could tell your Lordship what the factual background was in support of their pleaded case, and we couldn't adduce any evidence to contradict it. And your Lordship didn't accept that was

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the appropriate way to conduct the trial on those factual issues.

Then what happens is at the trial in opening and closing, they are still saying to the court that that is the right approach. So when your Lordship makes findings on those matters or matters on which they may depend -- so the suggestion, for example -- I will give a concrete example of this. The suggestion that Subpostmasters are best placed to find the root cause of shortfalls, you cannot sensibly identify that and test that proposition, which is, after all, the Post Office's own case. Without saying, well, was there any training on that, it is absolutely impossible.

And that is why Mrs Van Den Bogerd sought to put in evidence about training in her witness statement. It was the underpinning, the base layer, beneath which the proposition that for various reasons, including the training which told them how to do it, they would be well placed or peculiarly well placed to find the cause of shortfalls.

Not only is there the definition of the Common Issues by reference to the pleadings, there is also the highlighting of the significance of those issues and the relevant evidence that goes to them in the admissibility judgment. Then there is the opening

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and the closing which invites the court to determine these issues in the light of evidence actually given by Post Office and then there is the middle of that sandwich of opening and closing, we have got how cross-examination was actually conducted.

I hesitate to say so, but my learned friend Mr Cavender did actually go first in cross-examining. So the idea that, as I think is suggested, at the very least tentatively if not more firmly, that somehow the scope of cross-examination was all my fault because of how I cross-examined or others with me is a little bit surprising, because actually, what happened is there was widespread cross-examination by Post Office of the lead claimants on a wide-ranging series of matters. There are some particular categories which are important. One key category is on pre-contract dealings.

The reason it is a key category is because it is one which no one can sensibly dispute was in issue. And there were very, very firm challenges made, as your Lordship knows, in relation to the credit and credibility of the lead claimants in relation to those matters.

MR JUSTICE FRASER: All the lead claimants had their credit challenged and there were factual issues in relation to contract formation of all six of them.

1 MR GREEN: Exactly. So credit was bound to be -- was
2 necessarily relevant, we say, to any proper judicial
3 assessments. And I will make this submission good in
4 a moment by reference to an authority, but on any view,
5 it is absolutely common sense that credit generally was
6 relevant to the acceptance or rejection of the lead

claimants' evidence.

In our respectful submission, it was right that your Lordship should have regard to the challenges in fact made, as your Lordship did, not to parse them in the way rather artificially that Post Office invited the course to do.

So category 1 was pre-contract. And then category 2 was lots of evidence about credit, and category 3 was evidence about how things worked in reality. That was essentially responsive evidence to the defendants' evidence that it was adducing in support of its pleaded case.

19 MR JUSTICE FRASER: It also goes to credit too, though,

20 doesn't it?

MR GREEN: I was going to say there is a big overlap, as your Lordship I think put to my learned friend.

MR JUSTICE FRASER: Say, for example, Mr Abdulla, if
 Mr Abdulla had not been accused of lying and had not

been accused of a criminal offence and had not in fact

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been asked at all about his suspension and termination,
 then, for example, Mrs Ridge's suspension interview with
 him would not necessarily be relevant.

 $4\,$   $\,$  MR GREEN: I might not have needed to cross-examine on it .

5 MR JUSTICE FRASER: Whether you needed or not, let's put it 6 to one side. I am talking about strict admissibility 7 and relevance, because evidence has to be relevant in 8 order to be admissible.

9 MR GREEN: Precisely.

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on the transcript of his suspension interview, then you became entitled to ask questions. The way that Lord Grabiner explained it this morning, though, is that that attack on Mr Abdulla's credit should only have been considered insofar as it went to pre-contractual --

MR JUSTICE FRASER: Once, for example, he was cross-examined

well, to contractual formation matters and that

 $17 \hspace{1cm} \hbox{I\ crossed\ the\ line\ by\ going\ wider\ than\ that\ and\ dealing}$ 

with the other matters that Mr Cavender had put to

Mr Abdulla. What do you have to say about that?

20 MR GREEN: With no disrespect to my learned friend, that isa hopeless and unrealistic submission and it is wrong.

22 MR JUSTICE FRASER: All right.

MR GREEN: If a challenge is adduced as to credit, and
I would say a fortiori where someone is accused of

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a criminal offence or dishonesty --

1	MR JUSTICE FRASER: That is why I chose Mr Abdulla as an		happens is that t
2	example. There were two lead claimants accused of		cleared up by the
3	criminal offences, and I think Mrs Stockdale was the	3	because the court
4	other one.	4	dividing line wa
5	MR GREEN: Yes.	5	This is the n
6	MR JUSTICE FRASER: All right.		position by that
7	MR GREEN: There is a powerful argument that ex debito		"The court sh
8	justitiae they're entitled to a finding openly in the	8	of fact on matter
9	judgment if the court does not agree with what has been	9	the Common Issu
10	put openly to them. And even if that is not right, if	10	issues of breach
11	there is no entitlement, it is certainly permissible.	11	that no findings
12	MR JUSTICE FRASER: I didn't make any findings in respect of	12	claimants were g
13	either of those points.	13	parity of reasoni
14	MR GREEN: No, my Lord. That is my point, and I am saying	14	Post Office inves
15	what your Lordship did fell well below that.	15	with false accoun
16	Your Lordship took a view about credibility in the light	16	"Conversely,
17	of the matters that were put and the answers that were	17	on matters going,
18	given.	18	Common Issues, in
19	And the extraordinary contortions that the	19	claimants did or
20	Post Office found themselves in are reflected at	20	documents and ot
21	paragraphs 80 to 82 in our skeleton argument.	21	Common Issues at
22	MR JUSTICE FRASER: Let me have a look.	22	Those findings w
23	MR GREEN: I know that my learned friend Lord Grabiner read	23	take a view as to
24	out the passage in the transcript where I interrupted my	24	the Post Office v
25	learned friend Mr Cavender, who was saying: well,	25	matters.
	133		
1	someone in my position would normally want to say that	1	"Post Office'
2	Mr Abdulla wasn't telling the truth.	2	findings and in t

happens is that the matter is effectively sought to be cleared up by the document that we have at  $\{A/18/1\}$  because the court was not clear precisely where this dividing line was drawn.

This is the note at A/18/1, and the Post Office's position by that stage, after closing, was that:

"The court should refrain from making any findings of fact on matters going to issues outside the scope of the Common Issues trial, specifically matters going to issues of breach and causation. It follows, for example that no findings should be made on whether various claimants were guilty of false accounting, nor, by parity of reasoning, should findings be made as to how Post Office investigated losses or issues associated with false accounting.

"Conversely, findings of fact will need to be made on matters going, or arguably going, to the Common Issues, in particular, on whether the various claimants did or did not receive various contractual documents and other documents relevant to the Common Issues at or before the time of contracting. Those findings will necessarily require the court to take a view as to the credibility of the claimant and the Post Office witnesses in their evidence on those

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"Post Office's position is that in making those findings and in taking that view on credibility, the court should:

"(a) Take account of evidence given by witnesses on matters within the scope of the Common Issues trial. So, for example, the court's findings on whether Mr Bates received a copy ... will presumably take into account the evidence he gave on that issue, and on associated issues raised in cross-examination, (for example, whether he is careful generally or whether he had a copy of the SPMC when writing to the Post Office ..."

And so on:

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"(b) Take account of evidence on matters which go to the witnesses' credibility, but do not risk trespassing on any future trial, because they do not go to issues of breach or causation. For example, Mr Abdulla's evidence on whether Christine Adams and Christine Stephens were the same person can be taken into account in assessing his credibility.

"(c) Not take account of evidence which, while it may go to the witness's credibility risks trespassing on a future trial or trials. For example, the Court should not make any findings on whether Mr Abdulla falsely accounted, even though such matters might be relevant to

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MR JUSTICE FRASER: Where am I going?
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     MR GREEN: Page 80.
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     MR JUSTICE FRASER: I thought you said paragraph 80, I am
 6
         sorry. This is in the annex.
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     MR GREEN: Yes, in the annex, annex 1.
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     MR JUSTICE FRASER: Which paragraphs?
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     MR GREEN: It starts at 197, my Lord. {B9.4/2/80}
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     MR JUSTICE FRASER: Yes.
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     MR GREEN: The reason this arose, as reflected in the
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          transcript, was my learned friend was making the
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         submission that someone in his position would normally
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         want to say is that Mr Abdulla had not given honest
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         evidence. I interrupted to point out that is exactly
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         what their closing submissions in writing did say at
17
         paragraph 592.
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     MR JUSTICE FRASER: That is the passage that Lord Grabiner
19
         took me to this morning.
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     MR GREEN: Precisely, and what follows from that, as your
21
         Lordship rightly remembered --
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     MR JUSTICE FRASER: I think I politely told you to stop
23
          interrupting.
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     MR GREEN: I think you politely told me to stop
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interrupting, which I did and was noted. What then

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1	his $$ credibility . Nor (staying with this example) should	1	MR GREEN: It is a trailblazer , if we can put it in those
2	the court base any findings on Mr Abdulla's credibility	2	terms, because it is difficult to find an example of
3	which are necessary to decide the Common Issues on his	3	a recusal and I will show your Lordship why I say
4	evidence as to the allegations of false accounting made	4	this very carefully in a momentit is difficult to
5	against him."	5	find any example in the authorities of a judge carrying
6	Pausing there, they then go on to say that:	6	out the judicial assessment that he is required to carry
7	"To facilitate drawing that line as cleanly is	7	out and giving judgment and the losing party then
8	a possible in the circumstances, the Post Office	8	alleging bias against him on a proper foundation.
9	withdraws the submissions made in the seventh and eighth	9	MR JUSTICE FRASER: I think there is well, the case in
10	sentences of paragraph 592 of its closing submissions."	10	the bundle which seems closest is possibly Otkritie, but
11	We have reproduced that at page 81 and page 82 of	11	I don't want to knock you off your course. I assume we
12	our skeleton argument {B9.4/2/82}.	12	will get to the law at some point.
13	MR JUSTICE FRASER: Is that the strike through in	13	MR GREEN: My Lord let's do it now. Otkritie is at tab 26,
14	paragraph 200?	14	it is {B9.5/25/1}.
15	MR GREEN: Exactly, and what it leaves in place is:	15	MR JUSTICE FRASER: But I do remain of the view, Mr Green,
16	"The central fact about Mr Abdulla's evidence can't	16	that whether it is unique or not is not relevant.
17	be avoided. He lied frequently and brazenly."	17	MR GREEN: It is not dispositive , I agree. I am just trying
18	MR JUSTICE FRASER: That specifically wasn't withdrawn.	18	to identify where we are in the pantheon of types of
19	MR GREEN: Precisely, and that is left in play and	19	apparent bias that have been recognised by the courts
20	specifically not withdrawn.	20	and I respectfully say on a proper analysis nowhere.
21	And moreover, if your Lordship looks at the bottom	21	If we look at Otkritie, the can I just make one
22	of that paragraph:	22	final point in relation to those passages I was looking
23	"He said that he was given the impression in the	23	at?
24	interview held following the revelation of his	24	MR JUSTICE FRASER: Yes.
25	wrongdoing that if he paid back the money he would be	25	MR GREEN: I respectfully say that when a witness is accused
	137		139
1	reinstated; that was untrue, as the transcript showed.	1	of dishonesty, the court will assess the witness'
2	He claimed to have called the helpline very frequently,	2	honesty in the round in the light of the atmosphere in
3	then, when the call logs were put to him, said that in	3	court, the witness' demeanour and all the answers and
4	fact he gave up and stopped calling. And he claimed to	4	all the questions that the witness was asked. It is
5	believe this was all a conspiracy to eject him from his	5	quite wrong to urge upon the court a contrary approach.
6	branch."	6	For example, a witness who might have had difficulty
7	Pausing there, not only was the very carefully	7	answering a question which was directly related to
8	parsed approach to bright line relevance and irrelevance	8	a Common Issue, but gave answers which suggested he was
9	such as to leave in the allegation that he lied	9	compellingly honest on a matter that one would now be
10	frequently and brazenly, but it was also specifically to	10	urged to leave out of account, we say is that
11	leave in all these post-contractual matters, including	11	a completely wrong approach and not justified, and
	reare in an these post contractan matters, meraning		a completely wrong approach and not justified; and
12	helpline and all these other things and the impression		I have not found any authority to support it.
	helpline and all these other things and the impression in the interview with Mrs Ridge.	12	I have not found any authority to support it.  MR IUSTICE FRASER: However Lassess the credit of any of
13	in the interview with Mrs Ridge.	12 13	MR JUSTICE FRASER: However I assess the credit of any of
13 14	in the interview with Mrs Ridge.  MR JUSTICE FRASER: That is the suspension interview, isn't	12 13 14	MR JUSTICE FRASER: However I assess the credit of any of the witnesses, that is contained on the face of judgment
13 14 15	in the interview with Mrs Ridge.  MR JUSTICE FRASER: That is the suspension interview, isn't it?	12 13 14 15	MR JUSTICE FRASER: However I assess the credit of any of the witnesses, that is contained on the face of judgment number 3.
13 14 15 16	in the interview with Mrs Ridge.  MR JUSTICE FRASER: That is the suspension interview, isn't it?  MR GREEN: Indeed. All of these later matters were left in	12 13 14 15 16	MR JUSTICE FRASER: However I assess the credit of any of the witnesses, that is contained on the face of judgment number 3.  MR GREEN: Precisely.
12 13 14 15 16 17	in the interview with Mrs Ridge.  MR JUSTICE FRASER: That is the suspension interview, isn't it?  MR GREEN: Indeed. All of these later matters were left in for your Lordship to consider, and your Lordship is now	12 13 14 15 16 17	MR JUSTICE FRASER: However I assess the credit of any of the witnesses, that is contained on the face of judgment number 3.  MR GREEN: Precisely.  MR JUSTICE FRASER: So any amplification or an argument
13 14 15 16 17	in the interview with Mrs Ridge.  MR JUSTICE FRASER: That is the suspension interview, isn't it?  MR GREEN: Indeed. All of these later matters were left in for your Lordship to consider, and your Lordship is now saying there's an appearance of bias because you did.	12 13 14 15 16 17	MR JUSTICE FRASER: However I assess the credit of any of the witnesses, that is contained on the face of judgment number 3.  MR GREEN: Precisely.  MR JUSTICE FRASER: So any amplification or an argument about it or analysis doesn't much matter, really.
13 14 15 16 17 18 19	in the interview with Mrs Ridge.  MR JUSTICE FRASER: That is the suspension interview, isn't it?  MR GREEN: Indeed. All of these later matters were left in for your Lordship to consider, and your Lordship is now saying there's an appearance of bias because you did.  MR JUSTICE FRASER: I am not, Lord Grabiner is saying.	12 13 14 15 16 17 18	MR JUSTICE FRASER: However I assess the credit of any of the witnesses, that is contained on the face of judgment number 3.  MR GREEN: Precisely.  MR JUSTICE FRASER: So any amplification or an argument about it or analysis doesn't much matter, really.  MR GREEN: No. No, my Lord. The only point we are
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13 14 15 16 17 18 19 20 21	in the interview with Mrs Ridge.  MR JUSTICE FRASER: That is the suspension interview, isn't it?  MR GREEN: Indeed. All of these later matters were left in for your Lordship to consider, and your Lordship is now saying there's an appearance of bias because you did.  MR JUSTICE FRASER: I am not, Lord Grabiner is saying.  MR GREEN: Lord Grabiner is saying there is an appearance of bias because your Lordship did what you were asked to,	12 13 14 15 16 17 18 19 20 21	MR JUSTICE FRASER: However I assess the credit of any of the witnesses, that is contained on the face of judgment number 3.  MR GREEN: Precisely.  MR JUSTICE FRASER: So any amplification or an argument about it or analysis doesn't much matter, really.  MR GREEN: No. No, my Lord. The only point we are respectfully saying is that the basis of the application criticising your Lordship's judgment is wrong.

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 $25\,$  MR JUSTICE FRASER: That is not entirely relevant, though.

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fallen into the error of considering irrelevant

1 1 material, because that is present in all three on page 25 just go back to the discussion on apparent 2 2 categories, but studiously avoided is any suggestion bias and where it begins. 3 3 MR JUSTICE FRASER: Page 25. that such findings would not have been otherwise 4 4 available to you. MR GREEN: Page 25 at paragraph 65 {B9.5/21/25}. 5 So there is no suggestion that the impugned findings 5 MR JUSTICE FRASER: Yes. 6 6 were without proper foundation in the evidence you did MR GREEN: At the foot of that page, your Lordship will see: 7 7 hear at all. What is said is they are irrelevant and "Although the principles of apparent bias are now 8 8 your Lordship should not have made those findings for well-established and have not been in dispute in this 9 9 a number of reasons. case, the application of them is wholly fact - sensitive." 10 10 In the category of -- in the second two categories, So the submission I made earlier about context is 11 what is said about -- or the third category, perhaps, 11 underpinned throughout the authorities. 12 the witnesses, my learned friend said this morning at 12 MR JUSTICE FRASER: Yes. 13 page 94 of the transcript between lines 14 and 19 that 13 MR GREEN: At 66, just above 66, there is a qualification to 14 14 your Lordship's findings against witnesses would the normal rule that findings against a party won't be 15 15 a ground for a bias in a future trial. It says here: effectively create apparent bias in relation to 16 16 your Lordship entertaining their evidence in future "A case for recusal may always arise, however, where 17 trials. That is effectively the submission that is 17 a judge has previously expressed himself in vituperative 18 18 or intemperate terms. That however, has not been 19 19 My Lord, that is wrong in law, and demonstrably so, alleged in this case." 20 20 and I will explain why. If we go to paragraph 40 of And just above that your Lordship will see --21 21 MR JUSTICE FRASER: It is alleged in the instant 22 22 MR JUSTICE FRASER: 14. application, though. 23 23 MR GREEN: 40, which is on page 14 {B9.5/25/14}. One can MR GREEN: Not quite in those words, but critical invective. 24 see in the second line of paragraph 4: 24 MR JUSTICE FRASER: It's critical invective. I interpreted 25 25 "The authorities to which I have referred make it that as meaning nonjudicial language. 141 143 1 clear that the mere fact that the judge has made adverse 1 MR GREEN: Indeed. 2 2 findings against a defendant (or any party to an action) And just above, your Lordship will note just below 3 does not mean that a fair -minded and informed observer 3 4 4 would think the judge was biased." "Fifthly no example of a designated judge being 5 And your Lordship will have seen our treatment of 5 required to recuse himself or herself has been found." 6 6 the Ablyazov decision in the skeleton, and the point That is in the context of a designated judge in the 7 7 about the Ablyazov decision was the prior consideration Commercial Court, we say a fortiori the case of 8 8 by the court in that case of matters going directly to a managing judge in group litigation, and that is 9 relevant context and it goes to that fourth point on 9 credibility in the context of contempt. 10 MR JUSTICE FRASER: Mr Justice Teare sentenced Mr Ablyazov 10 context by way of background that I identified in 11 11 to 22 months, I think. opening. 12 MR GREEN: Precisely, and you could not get a more extreme 12 At 68 the court is looking at {B9.5.21/27} where 13 context for the Ablyazov decision than that. And if 13 a judge has heard pre-trial evidence and may have come 14 I could take your Lordship to Ablyazov for a moment, 14 to conclusions. 15 please, which is at {B9.5/21/27}. 15 MR JUSTICE FRASER: Where are we looking now? 16 MR JUSTICE FRASER: Are we going away from Otkritie or are 16 MR GREEN: On page 27, paragraph 68: 17 we coming back? 17 "Special considerations may arise in such cases. 18 MR GREEN: I was going to come back to that in a minute, if 18 Where a judge has had to form and express a view as to 19 19 the credibility of a party or an important witness as 20 MR JUSTICE FRASER: Where is Ablyazov? 20 a result of such cross-examination, should that require 21 MR GREEN: It is hard copy tab 22. 21 the recusal of that judge from further involvement in 22 22 MR JUSTICE FRASER: Okay. the litigation, even where he does so, as in this case, 23 23 MR GREEN: {B9.5/21/27}. in moderate terms? Committal applications have to be

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MR JUSTICE FRASER: Yes.

MR GREEN: This is in the context of -- perhaps we can start

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judged on the criminal standard of proof, so that, where

such an application has resulted in a finding of

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contempt of court, the judge has applied a standard of proof higher than that of a civil trial.

"On the other hand, in any event, the findings of the judge are part of the res gestae of the proceedings. They are, as it were, writings on the wall and would need to be considered (subject to appeal of course), for any relevance in any subsequent proceedings and at trial by the same judge or by any other judge. They may not even be appealed or, as in this case, this may be appealed and upheld so that in either event, it is not possible to say that the judge was in error. In this connection, certain findings might give rise to issue estoppels, which would not only have to be taken into consideration by any judge at trial but would be binding on him, as Mr Béar accepts. What then is the difference between the judge who bears in mind his own findings and observations and another judge who reads what the first judge has written, as he must be entitled to do? Mr Béar submits that in the case of the first judge who has heard and written, the impact of what he has learned is more direct, immediate and powerful, and is that the critical distinction. However, it seems to me that, unless the first judge has shown by some judicial error, such as the use of intemperate, let me say unjudicial, language, or some misjudgment, might set up a complaint

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of the appearance of bias, the fair-minded and informed observer is unlikely to think that the first judge is in any different position from the second judge - other than he is more experienced in the litigation ."

My Lord, this is quite important, because we learned this morning from Lord Grabiner that the Post Office's position is again one of these very nuanced positions in relation to what the consequence of the application -of your Lordship acceding to the recusal application would be, and it is a surprising and difficult proposition, because the entire premise of the application, the thread which runs through all three categories, is irrelevant material to which your Lordship has wrongly had regard in the judgment. Then that is deployed for different purposes.

But what is said is that, even though the paragraphs, the two parts of paragraph 25 in Mr Parsons' 14th witness statement which deal with the second and third categories, specifically say that there is an appearance that your Lordship has not acted impartially in the past in the Common Issues judgment, it is said that that is not going to mean that the Common Issues judgment has to be undone on that footing.

Now, in reality, I think that is an extremely difficult submission to mount, because what is -- is it

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1 truly the Post Office's position that when they seek to 2 appeal, as they have said they will, the Common Issues 3 judgment they are not going to trespass on the 4 suggestion that your Lordship took into account 5 irrelevant evidence? I doubt that.

> If your Lordship has acceded to the recusal application on the footing that you have taken into account or addressed irrelevant evidence, why won't they be able to say this to the Court of Appeal?

So it is a difficult position for them to adopt.

MR JUSTICE FRASER: Well, the position vis-a-vis judgment number 3 and its future life depends on an application for permission to appeal being made at some point, permission either being granted and an appeal happening or permission not being granted either by me or the Court of Appeal, and we have not reached that point yet.

17 MR GREEN: No, my Lord, we haven't, but what your Lordship 18 was told immediately when my learned friend 19 Lord Grabiner rose to his feet was to put the court at 20 ease that acceding to the recusal application would not 21 mean that the Common Issues trial had to be re-run.

22 MR JUSTICE FRASER: In a sense, what happens to the 23 Common Issues trial has nothing to do with me. 24 MR GREEN: My Lord --

25 MR JUSTICE FRASER: So far as judgment number 3 is

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1 concerned, the only order still available that any party 2 could ask me for is permission to appeal that judgment.

3 MR GREEN: Indeed.

4 MR JUSTICE FRASER: The order that reflected it has been 5 sealed.

6 MR GREEN: Indeed.

7 MR JUSTICE FRASER: So retrial, correction on appeal, any of 8 those points are nothing to do with me, are they?

9 MR GREEN: Let's approach it on that basis.

10 MR JUSTICE FRASER: Just in terms of jurisdiction --

11 MR GREEN: Jurisdictionally, that is right.

12 MR JUSTICE FRASER: It is a judgment that has been handed 13 down in final form and has been sealed.

14 MR GREEN: I think there was a sort of reassuring,

15 authoritative suggestion to your Lordship that you 16 needn't worry too much if you do accede to this because 17 it will all be all right.

18 MR JUSTICE FRASER: I didn't interpret it in those terms.

19 MR GREEN: I wrongly did, so I needn't address your Lordship 20 further on it --

21 MR JUSTICE FRASER: As far as I am concerned, I am pretty

22 clear that this is what the Post Office is submitting, 23 but if it is not, then Lord Grabiner will correct me at

24 the reply stage. This application concerns two parts of

25 the litigation, the extant Horizon trial --

Т	MR GREEN: Indeed.	Τ	your Lordship duty-bound to do? There is a ready answer
2	MR JUSTICE FRASER: he has been very clear about that	2	in the bundle at tab 29, in the Harb case, which is at
3	indeed, and it is a point that I made myself nearly two	3	{B9.5/28/1}.
4	weeks ago, because although it says adjourn, it really	4	MR JUSTICE FRASER: Which paragraph?
5	means a backstop and restart in front of someone else.	5	MR GREEN: If we look first of all at paragraph 28 on
6	And the other is my role as managing judge in the group	6	page 8.
7	litigation . Those are the two heads.	7	MR JUSTICE FRASER: Paragraph?
8	MR GREEN: My Lord, they are.	8	MR GREEN: 28 on page {B9/5/28/8} of the report, this is my
9	MR JUSTICE FRASER: Whatever concomitant effect there might	9	learned friend making submissions in that case, and:
10	be on judgment number 3 is gloriously off-stage, isn't	10	"Lord Grabiner submits that in the light of
11	it?	11	Mrs Harb's evidence the doubt expressed by the judge was
12	MR GREEN: My Lord, I'll move on. Shall we leave it	12	fully justified ."
13	gloriously off-stage? I think I made the submission to	13	This is where the judge in the end accepted
14	your Lordship that in effect there is a collateral	14	Mrs Harb's evidence in circumstances where the basis for
15	attack on the Common Issues judgment number 3 because	15	doing so was hotly disputed, and I will come in a little
16	what is being said is that your Lordship had regard to	16	more detail to why in a moment:
17	irrelevant matters and didn't behave impartially in	17	"But despite that, he had failed to explain what had
18	drafting that judgment.	18	given rise to the doubt or what had enabled him to
19	MR JUSTICE FRASER: I am not sure the second of those two	19	overcome it. Lord Grabiner has identified several
20	points is necessarily correct, but let's put it to one	20	aspects of both her evidence and that of
21	side because it is not part of this application.	21	Mrs Mustafa-Hasan which he submits called for careful
22	MR GREEN: I will just press on with the primary submission,	22	consideration, but which had not been identified or
23	which is simply this: that the authorities effectively	23	discussed in the judgment. In his submission, the judge
24	sing with one voice at the highest level of authority	24	failed to analyse the evidence properly. He had
25	that the litmus test really is whether what the first	25	accepted the $$ evidence of $$ Mrs Harb and Mrs Mustafa-Hasan $$
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1	judge does he does is part and parcel of his judicial	1	uncritically and as a result had reached conclusions
2	assessment of the litigation before him.	2	which were unsustainable on the totality of the evidence
3	And that is in Ablyazov at paragraph 70, as	3	before him. It is necessary, therefore, to examine more
4	your Lordship will probably know {B9.5/21/27}. What	4	closely the criticisms made of their evidence."
5	Lord Justice Rix says there is:	5	Now, pausing there, your Lordship will remember
6	"In this connection, it seems to me that the	6	possibly the most hard-edged submission that my learned
7	critical consideration is that what the first judge does	7	friend Lord Grabiner made to your Lordship was in
8	he does is part and parcel of his judicial assessment of	8	relation to speculations that evidence that some of the
9	the litigation before him. He is not prejudging by	9	Post Office's witnesses were giving was not necessarily
10	reference to extraneous matters or predilections or	10	their own. And a number of passages
11	preferences. He is not even bringing to this litigation	11	MR JUSTICE FRASER: That was on the contents of witness

possibility of bias."

And, my Lord, I only mention in passing that in the next tab in the bundle we have got O'Neill, number 2, And at page 23 of that {B9.5/22/23}, paragraph 51, that passage, although in the context of a criminal case that the Supreme Court was dealing with there, that passage is cited with approval as applicable not just to civil cases and criminal cases.

matters from another case [et cetera and so forth]. He

is judging the matter before him, as he is required by

his office to do, and if he does so fairly and

informed observer would consider there was any

judicially, I do not see that the fair-minded and

And that begs the question, my Lord, well, what is

witness' own words. It was one of the questions.
 MR GREEN: Precisely.
 MR JUSTICE FRASER: And it was circulated every specialist

MR GREEN: Precisely, that what was in their witness

MR JUSTICE FRASER: There was an extensive survey on the

contents of witness statements in the commercial and

business and property courts about a year ago which

material for a witness statement that wasn't in the

specific questions in it dealt with solicitors providing

received nearly a thousand responses. One of the

statements was not originally theirs.

Bar Association and the London Litigation Solicitors

25 Association and widely advertised in magazines such as

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1	Counsel.	1	contained her true recollection of events."
2	MR GREEN: I was only going to I wasn't going to refer to	2	Pausing there, these are all criticisms le
3	that survey particularly .	3	the court for failing properly to make the ne
4	MR JUSTICE FRASER: That is in the public domain.	4	judicial assessment of the matters before it .
5	MR GREEN: Completely, and it is a point frequently made and	5	So we respectfully say not only were your
6	thought about carefully since witness statements were	6	observations available to you, but the analys
7	introduced, because when I started and certainly when my	7	underpinned them was actually necessary on the
8	noble and my learned friend Lord Grabiner started, we	8	urged upon the court by my learned friend in
9	didn't have them. You rocked up in court, the witness	9	At paragraph 34 on {B9.5/28/12}:
10	stood up and you found out what they said and then you	10	"In our view the judge's approach to the
11	cross-examined them without knowing what they were going	11	was unsatisfactory in a number of significant
12	to say.	12	First, he failed to identify in sufficient de
13	MR JUSTICE FRASER: I am not sure "rocking up" is right.	13	questions that needed to be answered if he we
14	MR GREEN: I might have put that a bit lightly .	14	decide whether an agreement of the kind allege
15	MR JUSTICE FRASER: You might have rocked up. I am not sure	15	Mrs Harb had been made. In addition, he faile
16	that is the correct way of putting it, in all	16	out a proper evaluation of all the evidence ir
17	seriousness. Evidence-in-chief was given orally .	17	test its strengths and weaknesses. Having re
18	MR GREEN: Yes, evidence-in-chief $$ was given $$ orally . $$ What	18	paragraph 80 to the fact that counsel for the
19	I was trying to convey, albeit rather slightly clumsily,	19	made extensive criticisms of Mrs Harb's evide
20	was you didn't pore over somebody's evidence for weeks	20	grounds that it was inconsistent with her with
21	in advance of arriving at court and listening to what	21	statement, he failed to deal with any of those
22	they were going to say. So the observations that my	22	criticisms and brushed them aside by saying th
23	learned friend took your Lordship to about the contents	23	unrealistic to expect Mrs Harb to have a clear
24	of the Post Office witness statements were directed to	24	recollection of events 13 years after the even
25	your Lordship's judicial consideration of whether or not	25	It goes on to say at the bottom of that p
	153		155
1	that evidence was actually properly theirs.	1	"It also fails to deal with the criticisms
2	And if we do ever the nede on to nede 10	2	quality of har avidance and the way in which

And if we go over the page on to page 10

3 MR JUSTICE FRASER: Of? 4 MR GREEN: Harb, if we continue over the page {B9.5/28/10},

it savs:

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"Lord Grabiner has identified nine examples of what he says was Mrs Harb's evasiveness or lack of credibility."

And there are various examples. At the foot of subparagraph (iii):

"When questioned about that, her replies were rambling and confused and appeared to portray an unwillingness to deal with the question.

"(iv) When asked by the judge why she had chosen to omit that matter or any reference to the present proceedings (but little else), she could provide no satisfactory explanation and resorted to little more than bluster."

And then at (v) over the page {B9.5/28/11}, your Lordship may think significantly, given the submission being made to your Lordship about your Lordship's approach:

"There were occasions when Mrs Harb professed to being unable to remember matters set out in her witness statement, giving rise to doubt whether the statement

eveled at ecessary

r Lordship's is which e approach this case.

evidence respects. tail the ere to ed by ed to carry n order to ferred in Prince had nce on the ness hat it was nt."

aragraph.

of the quality of her evidence and the way in which she responded to questions."

Now, pausing there, so the criticisms that were made were accepted by the court as proper criticisms and that the judge had actually erred in failing to carry out the necessary evaluation of all of that evidence. So, my Lord, that illustrates -- I don't say completely or exhaustively -- the nature of the judicial assessment which it was your Lordship's duty to undertake of the case actually presented before you.

And that we get both from the underlying observations by Lord Justice Rix, but also the repetition of that and the approval of it at paragraph 51 of O'Neill that I have already shown your Lordship.

So the right approach to this is to look at the context, to look carefully at the way in which the parties' pleaded cases were put before the court, the evidence that the parties sought to adduce in support of the factual assertions that they had identified in their pleaded cases and the basis upon which the case was opened and closed by the parties.

We respectfully say it is quite wrong for your Lordship to be criticised for making findings on

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1	matters which had been put in issue by the parties	1	Otkritie.
2	before you unless they could not be relevant to the judicial assessment that your Lordship was undertaking.	2	MR GREEN: Yes, I think actually it is slightly elaborated on, I think, if I remember correctly.
4	· · · · · · · · · · · · · · · · · · ·	4	•
5	We respectfully say there are no findings of that sort to be found in the judgment anywhere.	5	MR JUSTICE FRASER: Paragraph?  MR GREEN: It is {B9.5/25/1}.
6	, ,	6	MR JUSTICE FRASER: Remind me where it is in the hard
7	Is that a convenient moment for a short break,	7	bundle.
8	my Lord?  MR JUSTICE FRASER: I think it probably is . How are you	8	MR GREEN: Sorry, it is tab 26. If we look at page 8
9		9	·
	doing in terms of		{B9.5/25/8} MD HICTICE EDACED. It is paragraph 19 ion't it?
10 11	MR GREEN: I will be done by 4 o'clock, or 5 past 4.	10 11	MR JUSTICE FRASER: It is paragraph 18, isn't it?
12	MR JUSTICE FRASER: I think Lord Grabiner needs time to come	12	MR GREEN: It is, it is paragraph 18. There are the two
13	back on points of law or other matters. We will have	13	observations by the Master of the Rolls, the first one,
14	a five minute break for the shorthand writers. We will	14	the one we just looked at, and the second one dealing
15	go from that clock. It will be 3.22, although I know	15	with interlocutory applications, which all go one way,
16	that sounds pedantic.	16	which is, I think, not actually directly in point here,
17	(3.17 pm) (Short break)	17	but gives some background to the role of a managing
	·		judge.
18	(3.23 pm)	18	Was there an aspect of Otkritie that my Lord wanted
19	MR GREEN: My Lord, before we broke a bit earlier on	19	assistance on from earlier, because I said I would come
20	I mentioned to your Lordship the right approach to the	20	back to it, or at least to hear our submissions?
21	informed observer.	21	MR JUSTICE FRASER: I wouldn't say necessarily assistance
22	MR JUSTICE FRASER: Yes.	22	because it is fairly clear, but at paragraphs 31 and
23	MR GREEN: Could I just show your Lordship the Hashim	23	32 because in that case the judge did recuse himself
24	authority at tab 6 in the bundle, which we find at	24	and he was it was sent back and he was told he ought
25	{B9.5/6/8}, just below A, the paragraph beginning, "The	25	not to have done.
	157		159
1	parties to this appeal were agreed":	1	MR GREEN: Precisely.
2	"The parties to this appeal were agreed that the	2	MR JUSTICE FRASER: But it was a relevant feature, wasn't
3	test to be applied in a case such as this was that	3	it, that he, the judge, in that case at first instance
4	stated by the QBD in Topping, namely would a reasonable	4	felt no personal embarrassment or discomfort in
5	and fair-minded person sitting in court and knowing all	5	continuing?
6	the relevant facts have a reasonable suspicion that	6	MR GREEN: Yes.
7	a fair trial for the applicant was not possible?"	7	MR JUSTICE FRASER: I thought he said in his judgment he wa
8	This was actually mid-trial, but the dictum is of	8	only recusing himself with extreme reluctance and he
9	general application:	9	interpreted the two challenges as being actual bias,
10	"Most, if not all, of the cases in which this test	10	which doesn't apply here.
11	has been discussed have been cases of modest dimensions.	11	MR GREEN: Quite.
12	We know of no case approaching the scale of this where	12	MR JUSTICE FRASER: At 32, I think first instance judges
13	a charge of apparent bias has been made. That makes it	13	or it is said it is important that they don't recuse
14	the more important to recognise, as we understand to be	14	themselves too readily in long and complex cases.
15	agreed, that the hypothetical observer is not one who	15	MR GREEN: Indeed.
16	makes his judgment after a brief visit to the court, but	16	MR JUSTICE FRASER: I suppose this would count as a long and
17	one who is familiar with the detailed history of the	17	complex case.
18	proceedings and the way in which cases of this kind are	18	MR GREEN: Indeed, precisely. And there is also a point of
19	tried ."	19	approach in fact in relation to the suggestion that an
20	So, my Lord, we say it is demonstrably right that	20	applicant should be given the benefit of the doubt,
21	the informed observer is assumed to know the detail of	21	which is one of the submissions that my learned friend
22	the history of the proceedings and the backdrop and	22	made. I think that needs to be thought about quite
23	context of group litigation and how cases of that type	23	carefully .
24	are	24	MR JUSTICE FRASER: He does have authority for that.
25	MR JUSTICE FRASER: I think that passage is quoted in	25	MR GREEN: Indeed, my Lord, and I think one needs to

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2	I think where the basis for doubt is properly
3	established, then it and what is in issue is not
4	de minimis, then one can ready see what the court means
5	about erring on the side of caution for the proper
6	purposes of the administration of justice and justice
7	being seen to be done. One quite understands that, but
8	in fact one sees in cases where the court is discussing
9	things like having a shareholding, for example, that may
LO	be small, but more than de minimis.
L1	MR JUSTICE FRASER: In a litigant?
L2	MR GREEN: In a litigant, something like that.
L3	MR JUSTICE FRASER: I see, yes.
L4	MR GREEN: Once that is established and it is not absolutely
L5	de minimis, then even though it may not naturally be
L6	thought to amount to apparent bias, one might give the
L7	benefit of the doubt to the applicant in that situation $\!.$
L8	Similarly, if it is established that what a judge
L9	has done has gone beyond the bounds of proper judicial
20	assessment, that it is not part and parcel of the
21	court's judicial assessment of the litigation as it was
22	presented to it.
23	As soon as you can say with confidence that the
24	court has materially and, one might say more than once
25	because of the point about repeatedly that we saw in the
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consider quite carefully what is being said, because

earlier authority, stepped outside the boundaries of a proper judicial assessment of the proceedings as they were before the court, then at that point, one then has to look at materiality, and say, well, maybe at that point the applicant should be given the benefit of the

But we respectfully submit that the anterior question of whether the court has or has not done that still falls to be objectively analysed in a sensible way. What you don't get to do is to disapply the objective test by a side-wind by complaining about things that you lost on or lost on very badly and then going, "Well, that must raise a doubt and I should get the benefit of the doubt".

Because if that were the right approach, none of these indications to judges not too lightly to recuse themselves, either in general or in long-running proceedings, we say a fortiori in group litigation , they would be meaningless and it would allow an applicant for recusal to completely circumvent the carefully considered and now really undisputed approach to apparent bias.

So I did want to make that point clear in relation to the suggestion of being given the benefit of the doubt, my Lord. Can I show your Lordship just briefly , in relation to the approach to the evidence, paragraph 114 of the closing submissions, which are at  $\{A/8/48\}$ .

MR JUSTICE FRASER: Whose closing submissions?

MR GREEN: This is the Post Office's closing submissions.

This is the sort of difficulty that I think certainly the claimants had with the approach that the Post Office adopted, because, of course, obviously some factual assertions were in in terms of relevance on the face of the pleading. Then they appeared to be out at the admissibility application and then they were in again for cross-examination and then out again for some purposes in argument, and then in again in the closing

arguments, in the closing submissions.

If we look at 114, we can see:

"It is important to bear in mind the kind of factual situation that is encompassed by this principle."

And this is Post Office relying on the principle of a fiduciary's breach of duty has led to an incomplete evidential picture and this is Post Office seeking to illustrate the point by reference to actual -- its version of the evidence that the court heard and putting in issue examples of this in the lead claims:

"For illustration only, Mr Abdulla admitted in interview that he had inflated the cash declared in his

branch to disguise shortfalls ."

That is the Post Office's case:

"Mrs Stockdale relied on the privilege against self-incrimination when asked how she had got her accounts to zero despite having shortfalls and without making them good or settling centrally, and Mrs Dar had the misfortune to engage an assistant who falsified cash declarations and seemingly lost or stole large amounts of foreign currency."

And so forth.

So we go over the page  $\{A/8/49\}$ , then there is reliance on the evidence of Mrs Van Den Bogerd about the necessarily and reliance by Post Office on honest and accurate accounting, Mr Howarth, and then:

"It is appropriate that the evidential difficulty created by false accounting worked to the detriment of the dishonest agent."

So what Post Office sought to do was, in some cases absolutely directly, as we had, for example, in the closing about issues 8 and 9 and Angela Van Der Bogerd's evidence, but in other cases by a sort of side-wind, inviting the court to accept criticisms of the lead claimants or their evidence as illustrations of a problem upon which they relied authority certain purposes in their arguments.

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So it was replete with those sort of contradictions in the sense that when evidence was helpful for the Post Office, it was in, and when their witnesses performed badly, that is out. And your Lordship shouldn't really say anything about it because if you do, it is frightfully unfair and you have made harsh criticisms. And we respectfully say that in a sense, that is what all of this is about.

They have adopted internally inconsistent positions in relation to the relevance of evidence and essentially tried to ride two horses going off in completely different directions, and your Lordship has had to try and manage the consequence of that, and clarify it, where possible, on credibility, still leaving an extremely unsatisfactory position, make findings in the light of the litigation as it was presented before court, and then be accused of apparent bias for having done so.

We respectfully suggest that is a flawed basis for an application of this sort, having in mind its seriousness and gravamen.

My learned friend wants me to read paragraph 112, so we will go back a page and read that  $\{A/8/48\}$ :

"In considering these factual issues, the court should not lose sight of the prior and more important

point that what happened in practice (including what individual C's knew from time to time and what Post Office's internal views may have been) are irrelevant and inadmissible as to the question of whether the contracts exclude or modify the accounting principles. That is a question of contractual interpretation."

Now, pausing there, that illustrates a number of points which are unsatisfactory about the way that Post Office ran its case. Again, that is out, but in. So we get in, out, in, out, all the way through, even on the same page. But it is also wrong, because what is in fact important, as your Lordship has already heard argument on this in the admissibility application, it wasn't just contractual principles that were in issue, there were also questions of agency.

And the authorities, which we do have in the bundle if we need to go to them, make it absolutely clear that there may be agency even when the parties by contract disclaim that there is. It's not dependent on a contract at all; it is dependent on what, in practice, the parties have consented to do for each other. And that was one of key concessions which fed into your Lordship's admissibility decision in judgment number 2 and it is a factor which complexifies to

a great degree, we respectfully say an unsatisfactory degree, the submissions which Post Office adopted before the court in opening, which said that the contract had to be construed in the light of the agency relationship, because the agency relationship, as Garmac and Branwhite both show, is that subsequent evidence of what the parties actually do in practice will be relevant, but may be less important.

The question is -- those cases also make clear that an express agency set out in a contract is not determinative of the scope and nature of the agency that in fact exists. So it is hopeless to say: ah, well, the contract said this about the agency.

The court is required, by completely uncontroversial cases that are trite, to look carefully at what in fact happened, to look at the nature and scope of the agency and the extent to which and how that was operated in practice.

19 It was in relation to agency accounting principles 20 that the branch trading statement loomed so large, 21 my Lord, so it is wrong to say that.

MR JUSTICE FRASER: Do you have a reference? You don't have to take me to it now, but a reference for the
Post Office's opening to which you referred then about construing the contractual relationship --

MR GREEN: Yes, if your Lordship looks at - MR JUSTICE FRASER: -- in the light of the agency
 relationship.
 MR GREEN: Yes, if your Lordship looks at the Post Office's

opening at opening submissions at page 8, and the opening submissions are {A/2/8}. I am grateful to Ms Donnelly.

8 MR JUSTICE FRASER: A/2/8. I think that is the wrong A2. 9 MR GREEN: Sorry, A/2/8. May we just start at  $\{A/2/7\}$  to 10 give it context.

MR JUSTICE FRASER: It was just to give me a reference, you
 don't have to ...
 MR GREEN: I will show your Lordship. I am not going to go

MR GREEN: I will show your Lordship. I am not going to go through all the paragraphs, but 15 to 17 is context autonomy and so forth. 17 is reliance on SPMs to accurately record and transact and so forth. And then over the page {A/2/8}, the reliance referred to in 18 is the reliance is paragraph 17. We have just seen and it provides crucial context. This is totally consonant with their pleaded case, to which I have already referred the court.

Then if we look at their third point at 21:
"Third and most importantly, SPMs act as
Post Office's agents when transacting Post Office
business, with all the ordinary obligation and

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1	liabilities that agency entails. Ultimately,	1	and those things.
2	Post Office cannot and does thought seek to supervise	2	Then the second CMC order, 2 February, 22 February
3	and prescribe in detail everything that SPMs do in	3	and then the third ${\rm CMC}$ order. So I am not going to take
4	operating the agency business, but the basic fact is	4	your Lordship to those, but it is wrong to proceed on
5	that SPMs are transacting Post Office business on its	5	a footing that there had not been disclosure given in
6	behalf."	6	relation to issues like helpline and those sorts of
7	Then over the page, crucially $\{A/2/9\}$ :	7	things.
8	"The express and implied terms of the SPMC and the	8	My Lord, finally , what Post Office , we respectfully
9	NTC need to be viewed through the prism of an expressly	9	say, was seeking before the court was a trial at which
10	created agency relationship, and so the express	10	evidence of what happened on the ground, which is
11	contractual terms sit atop the body of the law	11	advanced, if accepted, would be relevant to
12	regulating the duties of agents to their principals.	12	construction, but if rejected and contrary findings
13	The common law principles of agency are important	13	made, could then be characterised by Post Office as
14	background to the contracts and any implied terms need	14	relevant to breach and, therefore, your Lordship
15	to be considered (and shown to be necessary) against	15	couldn't have regard to them.
16	that agency background."	16	We say that that was a false dichotomy and an
17	And then 22:	17	approach that your Lordship was entitled to meet by just
18	"As such, SPMs are obliged to account to Post Office	18	making findings on the challenges as made on the
19	as its agent. They are acting on Post Office's behalf	19	evidence before the court.
20	and the Post Office relies on them to do so."	20	In fact, there is an irony in that Post Office's
21	The final line of paragraph 22:	21	position was effectively to seek a trial that was
22	"This core fact suffuses the contractual	22	one-sided, when it didn't get it, to then complain on
23	relationship ."	23	the footing of apparent bias about that and then to
24	So your Lordship was being invited to consider the	24	invite the court effectively to consider the recusal
25	nature of the agency in the course of construing and	25	application as if the trial had been one-sided, which it
	169		171
1	determining what the contractual relationship was, so we	1	plainly wasn't. We respectfully say that is not the
2	respectfully say that when you do that in accordance	2	right approach either.
3	with the authorities, identifying the nature and scope	3	My Lord, as to the NFSP, can I just deal with that.
4	and effect of the agency, it requires you to look at the	4	Much has been made of the significance of the NFSP.
5	reality on the ground of who was in fact doing what.	5	MR JUSTICE FRASER: The NFSP are actually mentioned in terms
6	And the evidence I showed you from	6	within the NTC.
7	Mrs Van Den Bogerd was not correct in that respect.	7	MR GREEN: Precisely, they are mentioned in the contract and
8	Transactions were not the transactions that entered	8	they are mentioned in the opening, and they are
9	the Subpostmaster's account were not in their sole	9	mentioned in the evidence of two witnesses,
10	control. The fact there was no dispute button and that	10	Mrs Van Den Bogerd and Mr Beal. And we have dealt with
11	they had to settle centrally or accept in the way that	11	this in annex 2 at page 93 onwards, which is
12	the court heard evidence about, showed that was not	12	{B9.4/2/93}.
13	a proper starting point for the court to understand how	13	MR JUSTICE FRASER: Paragraph 235, I think.
14	the branch trading statement came about and to	14	MR GREEN: Exactly. We have just traced through there. For
15	understand the evidence in respect of which	15	convenience, the witness statement of Mr Beal at
16	Angela Van Den Bogerd gave and directed those paragraphs	16	paragraph 36, 40 to 41, and emphasising the NFSP's
17	of her witness statement.	17	independence at 45; the witness statement of
18	My Lord, there is a background point. Your Lordship	18	Mrs Van Den Bogerd at 98:
19	may remember it from the admissibility hearing, which	19	"The NFSP has publicly supported Post Office's view
20	was that there is a suggestion that there was not	20	that Horizon is robust."
21	sufficient disclosure in relation to some of these	21	And your Lordship will remember that was supposed to
22	issues . Your Lordship may remember it is recorded in	22	play in by way of relevant background to the burden of
23	your Lordship's judgment, in judgment number 2.	23	proof in an argument that, I think, was not that easy
24	I directed your Lordship's attention to the disclosure	24	for us to follow about the background likelihood of

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orders that did address things like helpline, training

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 $\operatorname{Horizon}$  being robust and, therefore, not being the cause

1	of errors.	1	that much of the evidence that we were put to the
2	And then 235.3, in respect of litigation,	2	trouble of challenging was all irrelevant. We find that
3	Post Office's written opening at paragraph 13:	3	out now in a trial that happened last year.
4	"Furthermore, it should be noted that the NFSP,	4	And furthermore, the application proceeds on
5	which is the organisation which represents SPMs and	5	a misunderstanding of the right approach in cases of
6	their interests nationwide, does not [underlined]	6	this sort, we say a fortiori where there is a designated
7	support this action and does not endorse the factual	7	judge and a fortiori further where it is a managing
8	premises of the claims."	8	judge in group litigation .
9	So clearly put in issue. And then we have got the	9	For all of those reasons, my Lord, we say this is
10	relevant email which was disclosed during the trial ,	10	misconceived and without merit.
11	with the reference to:	11	Are there any points I can assist my Lord with?
12	"Please note a signed agreement with the blood of	12	MR JUSTICE FRASER: Yes, there is two questions that I would
13	both myself and Paula is necessary on the future of the	13	like you to address, please, or two points.
14	NFSP before any agreement is granted on either NT or	14	One is the same as a point I asked Lord Grabiner
15	other points."	15	about. The Horizon Issues trial is well underway, and
16	And that is the Post Office's own document, agreed	16	there is, I think, half a day of factual evidence left.
17	it was only disclosed very, very late indeed, but it was	17	What do you have to say about that? Were I minded to
18	disclosed and I was able to put that to the witness in	18	recuse myself, what happens to that? Does it start
19	any event.	19	again in front of somebody else?
20	Also, the challenge my learned friend is	20	MR GREEN: I think it might have to start again. The
21	essentially looking back at whether Mr Beal was telling	21	parties might be able to seek to agree whether the
22	the truth about the publication of the grant framework	22	evidence of particular witnesses was to be taken to be
23	agreement in re-examination. And we have got the	23	their evidence.
24	reference to the transcript there at Day 6.	24	MR JUSTICE FRASER: Absent an agreement, which, expressing
25	Then in closing, the assertion about the NFSP not	25	myself neutrally, can't necessarily be assumed in this
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1	supporting the action or endorsing the factual premise	1	trial, all those witnesses would have to be called
2	is repeated. It is now pitched a little less high:	2	again, wouldn't they?
3	"Whatever the organisation's precise degree of	3	MR GREEN: Indeed.
4	independence"	4	MR JUSTICE FRASER: And then the draft judgment number 3,
5	Implicitly recognising the NFSP didn't look as	5	which is the focus of today, was distributed to the
6	independent as they had started with saying it was, but	6	parties on 8 March.
7	notwithstanding that qualification, Post Office still	7	MR GREEN: Yes.
8	relied on the involvement of the NFSP as a relevant	8	MR JUSTICE FRASER: I don't think this application was
9	control mechanism for the purpose of its position on	9	issued until the 21st. Have I got those dates correct?
10	implied terms, and that is set out, as your Lordship	10	MR GREEN: Yes.
11	sees, at paragraphs 345 to 346, which we have identified	11	MR JUSTICE FRASER: And there are different references in
12	there.	12	your skeleton, and the authorities about waiver and
13	So it is quite wrong for the court to be criticised	13	delay.
14	in making a proper judicial assessment on the basis of	14	MR GREEN: Precisely.
15	the evidence before the court, particularly in	15	MR JUSTICE FRASER: Is there anything that you want to say
16	circumstances where the disclosure was given to us	16	about that?
17	extremely late.	17	MR GREEN: We say it is extremely unsatisfactory that having
18	So in result, my Lord, we respectfully say that this	18	had the draft judgment for that period of time, this was
19	is an application which is wrongly premised on	19	not raised with the court before the Horizon Issues
20	a misunderstanding of the correct approach, does not pay	20	trial began.
21	due heed to the context, either within the judgment,	21	We are not in a position necessarily to say that
22	immediate context of the actual text criticised or the	22	amounts to a waiver, I don't think. But, in a sense,
23	judgment as a whole, fails to have regard to how the	23	having had the draft judgment for that period of time,
	J. G. Serrer S. Serrer S. Marc Togara to Morr the		-o Jo jo

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proceedings were in fact conducted and relies on the

court and the claimants now being told at this stage

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it was open to Post Office to tell the court in advance

of the Horizon trial that it would be making this

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_	application.		faced precisely the same approach from rost office in
2	MR JUSTICE FRASER: When was the first you learned of the	2	relation to that application as we did to this.
3	application?	3	MR JUSTICE FRASER: By "that application", you mean?
4	MR GREEN: My Lord, that day. I was as surprised as	4	MR GREEN: The strike-out application, which is a serious
5	your Lordship. I think I learnt in court just before	5	application, especially the timing of it when we were
6	lunch.	6	trying to prepare for trial .
7	MR JUSTICE FRASER: Because it was Thursday, the 21st.	7	There were no particulars given of the parts of
8	MR GREEN: It was Thursday, and I was cross-examining	8	evidence that were said to be objectionable, so I think
9	Mr Godeseth, and I think at some point before lunch,	9	it was 5 September and I think my learned friend
10	I was told this had been done. I had not seen it and	10	Mr Warwick attended in order to obtain from the court
11	then my clerks printed it for us in chambers so I could	11	a direction, which the court gave in an order, that they
12	actually see it . I came with a bundle to court and	12	provided particulars .
13	I think your Lordship got it at 5 to 2.	13	So we have had the same modus operandi on two fairly
14	MR JUSTICE FRASER: I got it at 5 to 2, but then I was	14	serious matters, and I leave the matter there, my Lord.
15	sitting dealing with the trial, so	15	MR JUSTICE FRASER: All right. Unless there is anything
16	MR GREEN: The only observation on that is El Faraghy does	16	that you want to add.
17	say that the correct approach is initially to write	17	MR GREEN: My Lord, no.
18	a letter to the court to say, you know, "I think the	18	MR JUSTICE FRASER: Thank you very much.
19	court should consider whether it is right that the court	19	Lord Grabiner, just on that point, so I don't
20	continues to sit ", and that very notably was not done.	20	disrupt the flow, I assume you don't have any objection
21	There was an unheralded application at the end of week	21	to me looking at the 9th witness statement of Mr Parsons
22	two.	22	again in due course.
23	I think whether that amounts to a waiver or not is	23	LORD GRABINER: Certainly not, I am only too pleased if
24	probably a question for the court.	24	your Lordship looks back at whatever you want to look
25	MR JUSTICE FRASER: Yes, all right.	25	at.
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Okay, the final point, and it might be that I don't

2 necessarily need to look at it, but I think the 3 strike-out application which led to judgment number 2 4 was supported by a witness statement of Mr Parsons, 5 which was his 9th. 6 MR GREEN: Indeed. 7 MR JUSTICE FRASER: Do you have a reference for that? 8 MR GREEN: My Lord, we absolutely do. I can tell you 9 exactly where it is because it is one of things that 10 I might have taken your Lordship to. It is 11 {B9.3/0.1/1}. 12 MR JUSTICE FRASER: Then beginning at page 1. 13 MR GREEN: It begins there. There is a passage there that 14 is relevant to one of the objections that my learned 15 friend made this morning, which is Mr Parsons' reference 16 to adverse publicity, which was the basis for 17 your Lordship's observations in the admissibility 18 judgment, which we respectfully say your Lordship didn't 19 completely forget when you were considering matters in 20 the Common Issues judgment. 21 MR JUSTICE FRASER: The only reason for asking for the 22 reference is in case I decide to read that again, but 23 you wouldn't discourage me from reading it again. 24 MR GREEN: Absolutely not, my Lord. And in fact, there is

an additional point to make on that, which is that we

MR JUSTICE FRASER: Thank you very much.

faced precisely the same approach from Post Office in

(3.55 pm) 2. 3 Reply submissions by LORD GRABINER 4 LORD GRABINER: Can I deal with the point raised at the end 5 in relation to the delay point, if I can call it the 6 delay point. My understanding is that we received the 7 draft judgment on the Friday immediately prior to 8 commencement of the Horizon trial on the Monday. 9 I am afraid, standing here now, I don't know what 10 the dates are. MR JUSTICE FRASER: It is the 8th. It was sent out on 11 12 Friday, the 8th. Monday, the 11th, was oral openings. 13 LORD GRABINER: There was a passage of time between then and 14 the decision that was communicated to make this 15 application. I need hardly point out that this has 16 been -- this is regarded as an extremely serious 17 application to be making. It was made at board level 18 within the client and it also involved the need for me 19 to be got up to speed from a standing start. 20 And I am not the only judicial figure or barrister 21 that has looked at this with a view to reaching that 22 conclusion. It has also been looked at by another very 23 senior person before the decision was taken to make this 24 application.

The delay, such as it is, is very, very tiny in the

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1	context of the seriousness of case that is being put	1	have dealt with today, in front of a different judge is
2	forward.	2	a little bit unlikely.
3	We had no control over the commencement of the	3	So there were all those circumstances to take into
4	Horizon case, obviously, because that was already	4	account. It would also have been open to your Lordship,
5	predetermined by the arrangements that were then in	5	had you been so minded, actually to refer the matter to
6	place.	6	another judge, if you had wished to do so.
7	MR JUSTICE FRASER: I suppose one might observe an	7	But for all of those and some of those reasons, the
8	adjournment could have been requested of a week or	8	procedure that we adopted is what we adopted. But so
9	something.	9	that your Lordship can be under no misunderstanding as
10	LORD GRABINER: It may be. I just don't know because	10	to how it came about that we are here in the way that w
11	I wasn't involved at that stage. I have only been	11	are here. And I do not accept, if it is being
12	involved just for a few days, literally .	12	suggested, that the Lord Justice Ward approach is the
13	MR JUSTICE FRASER: Understood.	13	only approach and that is the one that we should have
14	LORD GRABINER: The other point that my learned friend made	14	adopted. I don't accept that, and nor does
15	right at the end, but if I can deal with it now, is in	15	Lord Justice Ward say that.
16	relation to the El Faraghy case, which he said: well, it	16	So far as my learned friend's submissions are
17	would have been much more appropriate for us to have	17	concerned, apart from those closing observations, what
18	communicated by letter with the court rather than to do	18	has happened here is that my learned friend has simply
19	what we did. You will find that case, I think, in	19	looked broadly at the judgment and he has taken some of
20	tab 15.	20	the big picture questions, and he has sought to show
21	MR JUSTICE FRASER: Yes.	21	that those areas have been effectively traversed by
22	LORD GRABINER: Your Lordship may remember this one. This	22	Post Office's evidence and by cross-examination and so
23	is a postscript of Lord Justice Ward, paragraph 32, the	23	on.
24	very last paragraph of the judgment. Does your Lordship	24	Now, in my submission, that approach is wrong for
25	have that?	25	two reasons. First of all , Post Office made clear
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1	MR JUSTICE FRASER: Yes, the one that says recusal	1	throughout that it did not accept that this material wa
2	applications are much more frequent than they used to	2	relevant to the Common Issues trial. That has been said
3	be.	3	more times than I can recall . As everybody in this
4	LORD GRABINER: Yes, and he says:	4	court knows, that has been repeatedly stated all the wa

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5 "It is invidious for a judge to sit in judgment of 6 his own conduct in a case like this, but in many cases, 7 there will be no option but that the trial judge deal 8 with it himself or herself."

"If circumstances permit it [and I rely upon that as well], I would urge that, first, an informal approach should be made to the judge, for example by letter, making the complaint and inviting recusal."

Pausing there, I would obviously rely upon that:

I should say careful consideration was given to those observations before the decision was taken to do what was done, and one of the --

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17 MR JUSTICE FRASER: Issuing the application or asking me to 17 18 hear it? 18 19 19 LORD GRABINER: Going first to the court with a letter in 20 the form that is described there. And the decision was 20 21 taken not to adopt that approach simply because 21 22 22 your Lordship is the designated managing judge of the 23 23 litigation with an enormous knowledge and understanding 24 of the whole of the background history, and the idea 24 25 that one could have mounted and dealt with today, as we 25 through and we have never waived from that position.

Secondly, the fact that during the trial, Post Office felt that it had to deal in a limited way with matters which were not relevant to the Common Issues does not make those matters relevant to the Common Issues and, most importantly, it does not enlarge the definition of the Common Issues.

Whether a given finding was necessary to decide the Common Issues is a question which can only be answered by reference to the relevant paragraphs of the judgment, which is why I painstakingly -- and I apologise for having done it -- but I painstakingly went through those paragraphs because, in my submission, that is the only proper way to analyse the issue and the concern that my clients have.

And the point is that our detailed criticisms have really not even been met by the other side. They never went through those paragraphs and, indeed, that is unsurprising, because they couldn't.

For example, if I can just summarise the points on the submissions that we have been making, that none of

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the arguments put forward by my learned friends would justify findings on a whole range of matters. And I will just rattle off the paragraph numbers and the topics without going back to them, because we have already been there.

But, for example, findings on Post Office's knowledge of problems with Horizon: paragraphs 541, 543, 1115. Whether the Post Office sent threatening letters: paragraphs 222, 462, 7231. Or the general findings as to the inadequacy of the suspension processes: paragraphs 403, 514, 517. Or the poor quality of the training: paragraphs 193, 437, and 955.

And, of course, the reason my learned friend did not go to the paragraphs was because he would need to justify the findings and conclusions to which your Lordship arrived, and he knows that he can't. And he knows that he can't because he knows that they go well beyond the issues, which is why he simply cherrypicked his way through the argument throughout his submissions to your Lordship.

Now, can I just -- I hope in the order in which the points were made. I respectfully agree with an observation that fell from your Lordship at the opening of my learned friend's submissions when you simply said to him that the way to test the validity of the argument

presented to the court was for the observer to look at the judgment only, and in my respectful submission, that is exactly the correct approach. I am not suggesting that that person doesn't have full knowledge, they would have full knowledge.

MR JUSTICE FRASER: Of all the proceedings.

LORD GRABINER: Absolutely, and I accept all of that, but at the end of the day, what is involved here is the need to examine the judgment. That is what this is all about.

Now, next, my learned friend drew attention to paragraphs 93 and 94 of our generic defence. And the reason for doing that was because he used it as a basis for the proposition that thereby my clients had enlarged the Common Issues. And he did that, as I say, through reference to those pleadings, but he did not refer your Lordship to the voluntarily particulars of 26 September 2018, which are in -- I don't need to turn them up -- {B4/8/1}.

19 MR JUSTICE FRASER: They are also mentioned in judgment 2.0 number 2.1 think.

LORD GRABINER: I am sure they are, and your Lordship is inevitably ahead of me on that, but I am grateful.

But the point about those voluntary particulars is that they confine the matters in 93 and 94 to the contract issues, so that doesn't really help my learned

t doesn't really help my learned 25 proposition that becau

friend at all.

Then my learned friend referred to the post-trial note, which he put up on to the screen. That is document  $\{A/18/1\}$  and that document exactly states the case that I have sought to make today and reflects the submissions that I have been making to your Lordship.

If you look through that, you will see that really is a nutshell summary of the arguments that I have been seeking to make today to your Lordship.

Now, the peculiarity of this case -- step back. One of the points that my learned friend came perilously close to making was that because this is group litigation , the prospects of there being a successful complaint along the lines that we make would be just about zero because, effectively , a group litigation exercise with a judge in charge of the litigation would, somehow or other, secure a much broader permit to do and say the things that are said and that, somehow or other, the apparent bias concept would then fall away as being either marginal or unlikely ever to happen. Indeed, he repeatedly made the point that there was no case on the point and made some play of that.

Well, of course, the peculiarity of this case is the fact that there are successive trials which have been pre-arranged, and the reason why the apparent bias

argument might never have arisen in any other case, but whether it has or not is supremely irrelevant, but the reason why it is relevant here is because those successive cases are specifically geared to dealing with matters such as Horizon, breach of contract, damages and all the rest of it, limitation, I think, and so on.

So it is precisely the kind of context where somebody might be getting up to say: well, actually, in this kind of context, there is a real danger or real possibility that the apparent bias argument may succeed, simply because perhaps not enough care has been gone into the conclusions.

And I say that with great respect, because I'm not suggesting for a moment that this was a simple case to deal with or a simple series of cases to manage. It is a difficult exercise, no doubt about it, and I am entirely sympathetic. But I do respectfully submit that given that context, it is very, very important indeed that the matters that are made the subject of the first judgment do not trespass upon those matters that are yet to come.

That is the reason why this argument, whether or not there has been some previous case, is a perfectly good argument, and there is no force or validity in the proposition that because there is not any history of

1	similar cases that, somehow or other, this is an easy	1	is precisely what it says.
2	way in and the judge doesn't have this obligation to	2	MR JUSTICE FRASER: Understood.
3	deal with it .	3	LORD GRABINER: Then there is the separate matter which
4	MR JUSTICE FRASER: I think I have made it clear that the	4	I think engaged some discussion between my learned
5	fact that this may or may not have been the first time	5	friend and your Lordship. It was in relation to the
6	doesn't make any difference.	6	impropriety involved in relation to the witness
7	LORD GRABINER: Of course not. It was just a bad point from	7	statements. My learned friend is perfectly correct that
8	my learned friend, which I am sure he understands, and	8	there were those wonderful days where one stood up in
9	it does happen to all of us.	9	court and called the witness and neither the judge nor
10	The other point he made was by reference to his	10	probably often the barristers even knew what was going
11	paragraph 82, it is on page 82 of my learned friend's	11	to come out of the witness' mouth. There was something
12	skeleton argument. It is the quotation of	12	called a proof of evidence then, but you spent most of
13	paragraph 592, which is taken from our submissions.	13	your time striking it through as the witness failed to
14	Does your Lordship have that handy?	14	come up to proof. But all that world, regrettably in
15	MR JUSTICE FRASER: I do. Can you just give me the	15	some ways, has gone by.
16	paragraph number again?	16	That has given rise to the debate which
17	LORD GRABINER: Paragraph 592, but on page 82 of my learned	17	your Lordship referred to, quite rightly, as to the
18	friend's skeleton.	18	usefulness of these documents, first of all because they
19	MR JUSTICE FRASER: Yes, I do have that.	19	are overlong and, secondly, you know, they make
20	LORD GRABINER: The only point I want to make about it is	20	references to loads of documents and are replete with
21	that it obviously is referable only to the contract	21	tonnes of quotes from them. They are hundreds of pages
22	terms {B9.4/2/82}:	22	long in any meaningful commercial trial.
23	"The central fact about Mr Abdulla's evidence cannot	23	At the end of the day, they may not be actually the
24	be avoided: he lied frequently and brazenly. He began	24	evidence of the individual . I completely understand all
25	by denying that, as his interview records, his previous	25	of that, but that does not justify the insertion into
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1		1	
1 2	experience included tallying up figures . He then	1 2	this judgment of the suggestion that that is what
2	experience included tallying up figures . He then claimed that he read the first and second paragraphs of	2	this judgment of the suggestion that that is what happened in this case. I know it is a nice,
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18	experience included tallying up figures. He then claimed that he read the first and second paragraphs of a letter [and that of course is the contract provision] and then what appeared on its second page, but missed out"  Et cetera, et cetera. So the point about that passage is that it is concerned about the contract provision.  MR JUSTICE FRASER: That is, Lord Grabiner, but the first sentence after the struck through passage says:  "He said that he was given the impression in the interview held following the revelation of his wrongdoing that if he paid back the money, he would be reinstated; that was untrue."  So that is a point going purely to the truth of the evidence that he gave about post-contractual matters.  LORD GRABINER: Yes.  MR JUSTICE FRASER: Then the next two sentences follow.  LORD GRABINER: I take your Lordship's point, but again, it	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18	this judgment of the suggestion that that is what happened in this case. I know it is a nice, controversial subject, but it doesn't justify reaching a conclusion, expressly or impliedly, that that is what happened in this case.  It is a very serious criticism of professional people's behaviour, even more so in this case because my understanding is that the suggestion was never even put to any witness. In other words, it was never said to a witness, "That is not your evidence, that has been concocted for you by your solicitor or, worst still, your barrister", as the case may be.  So, in my submission, it was an entirely inappropriate passage or couple of passages actually to be inserted into the judgment.  Harb was interesting, only because I was in the case, but it is very difficult to imagine what relevance it had to the matters that your Lordship is presented with here.

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precisely what that post-trial written document was

about that I made reference to a few minutes ago. That

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might well impact upon key facts or key issues which

would inevitably arise in the later case.

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On the question of whether or not there was disclosure or evidence, my understanding is that there has been no disclosure and no evidence or if there has been any, it is only of a limited value at the moment on, for example, investigations, on accounting by individual postmasters, on transaction transactions. No doubt there will be associated witness statements as well, because these are matters yet to be determined in future trials.

The only other point that I want to mention, my final point, which will be a pleasing word for the listeners, is in relation to the National Federation. It is true, as I think your Lordship said, that the NFSP may have been referred in the contract, but that, with great respect, does not justify the conclusions that there was some kind of conspiracy going on as between the Federation and Post Office.

It doesn't justify making reference to that in the judgment or speculating about the possibility of the Federation changing its website in the course of the trial. The fact that there is a reference in the contract to the Federation simply means that insofar as that is relevant to the contract issues that arose in the first trial, that is the extent of it.

But to go on and make that explicit conclusion about

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the possible bad nature of the relationship between the Federation and Post Office is revealing, it is damaging. And my submission, my respectful submission, is that it might actually and would actually lead an independent objective observer to the conclusion that it would be very difficult, if not impossible, for your Lordship fairly to try these later cases.

So those are our submissions.

MR JUSTICE FRASER: Thank you very much indeed.

10 MR GREEN: Might I make one point of clarification, in case 11 my learned friend wants to address it? It is a very 12

small point.

13 MR JUSTICE FRASER: Go on.

MR GREEN: It is just the relevance of the group litigation 15 point, that one may expect greater judicial interest and 16 more judicial concern about the respective parties' 17 approach to litigation and observations of that type 18 from a managing judge in ongoing litigation than one 19 would from a judge trying a unitary claim, and that 20 chimes with the sort of thing that I referred 21 your Lordship to in the authority.

22 MR JUSTICE FRASER: I will hear what Lord Grabiner has to 23 say, and I'm not going to have endless back and forth, 24 because Lord Grabiner is entitled to have the right of

25 reply. MR GREEN: Of course.

2 LORD GRABINER: If I may respond to that, and I can do it by 3

showing your Lordship one paragraph in

4 Lord Justice Mummery's judgment in a case called 5 AWG Group v Morrison. It is in {B9.5/11/1}, I think.

6 MR JUSTICE FRASER: Yes.

7 LORD GRABINER: It is at paragraph 29 {B9.5/11/10}.

8 MR JUSTICE FRASER: This was the witness who was known to

9 the judge, I think.

10 LORD GRABINER: Yes, I think you are right.

11 MR JUSTICE FRASER: Paragraph 29, yes.

12 LORD GRABINER: My Lord, yes, Lord Justice Mummery. Does 13 your Lordship have that:

14 "While I fully understand the judge's concerns about 15 the prejudicial affect that his withdrawal from the 16 trial would have on the parties and on the 17 administration of justice, those concerns are totally 18 irrelevant to the crucial question of the real 19 possibility of bias and automatic disqualification of 20 the judge. In terms of time, cost and listing, it might

21 well be more efficient and convenient to proceed with 22 the trial, but efficiency and convenience are not the

23 determinative legal values: the paramount concern of the 24 legal system is to administer justice, which must be,

25 and must be seen by the litigants and fair -minded

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members of the public, to be fair and impartial.

Anything less is not worth having."

If my learned friend's submission comes to the proposition that because this is group litigation, the court has, so to speak, free range, although I am sure he wouldn't put it that widely, but the court has more flexibility to circumvent the problem that I am concerned with, then he is absolutely wrong, and the correct approach is summarised there by Lord Justice Mummery and your Lordship should bear that in mind.

I am grateful to my friend for reminding me of that passage. My Lord, those are my submissions.

MR JUSTICE FRASER: Thank you very much indeed. Bear with me one second.

This is an application that I recuse myself both from being the managing judge in group litigation and also that I bring the Horizon Issues trial, which is currently underway, to an end. The application is made in the midst of the Horizon Issues trial, which started on 11 March.

I am acutely conscious that parties need a rapid answer when applications are made in the course of an ongoing trial, but I am going to reserve my judgment on this application. I am going to produce a written

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1	reserved judgment, which will be judgment number 4.	1	INDEX	
2	I will endeavour to produce that written judgment as	2		PAGE
3	soon as possible. It's highly unlikely to be this week,	3	Housekeeping	1
4	so I am going to explain to the parties now that	4	Application by LORD GRABINER	2
5	judgment number 4 will not be handed down before	5		110
6	Tuesday, 9 April, which is next Tuesday at 2.00 pm. But	6	Reply submissions by LORD GRABINER	180
7	the parties will be notified by my clerk on Monday,	7		
8	8 April either confirming that time, either of	8		
9	a different time on that day or a different date and	9		
10	time, if that date is not going to be achievable. So	10		
11	there will be an update provided on Monday.	11		
12	Depending upon the outcome, different matters will	12		
13		13		
	need to be dealt with. That obviously depends whether			
14	I recuse myself or not. I am not going to go into what	14		
15	those other matters might be, but they can be dealt with	15		
16	on the day that the judgment is handed down.	16		
17	Thank you all very much for your attention. Thank	17		
18	you for your helpful submissions, to all the counsel	18		
19	involved, and also thank you to the electronic trial	19		
20	bundle provider for re-activating my access to the	20		
21	electronic trial bundle.	21		
22	Anything necessary?	22		
23	LORD GRABINER: Just to thank your Lordship for dealing with	23		
24	it in this way.	24		
25	MR JUSTICE FRASER: Pleasure. So until an indeterminate	25		
	197		199	
1	date and time, but hopefully the first part of next		200	
2	week.			
3	(4.20 pm)			
4	(The hearing was adjourned until a date to be fixed)			
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