

# OPUS 2

## INTERNATIONAL

Defendant's Recusal Application -

Alan Bates & Others v Post Office Limited

Day 1A

April 3, 2019

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1 Wednesday, 3 April 2019  
2 (10.30 am)  
3 Housekeeping  
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.  
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  
20 re-run.  
21 MR JUSTICE FRASER: The Common Issues trial?  
22 LORD GRABINER: Precisely. So if we are successful, we do  
23 not say that that trial will be have to be re-run, which  
24 I think is one of the concerns expressed by the other  
25 side. We do propose to appeal against your Lordship's

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1 judgment, and the view we take is that the matters we  
2 complain about can be rectified on appeal without the  
3 need for a retrial.  
4 Can I turn, then, to apparent bias.  
5 MR JUSTICE FRASER: Yes, just before you do, Lord Grabiner,  
6 in terms of logistics, we usually have a break sometime  
7 round about a quarter to 12 for five or ten minutes just  
8 for the shorthand writers, which I know you will know is  
9 entirely conventional.  
10 LORD GRABINER: Indeed.  
11 MR JUSTICE FRASER: Although the application is set down for  
12 the whole day, if you could aim to finish your  
13 submissions some time between 12.30 and 1 o'clock, or  
14 1.30 at the latest.

Application by LORD GRABINER

16 LORD GRABINER: Yes, my Lord.  
17 I can deal first of all with the law very shortly by  
18 reference to four cases. And I am not going to trouble  
19 your Lordship to turn them all up, but give you  
20 a reference because there are short quotes I can deal  
21 with.  
22 The first is the well-known legal test stated by  
23 Lord Hope in Porter v Magill, and the reference for the  
24 transcript is {B9.5/8/1} and it is just in  
25 paragraph 105, where Lord Hope says the test is, and

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1 I quote:  
2 "Whether the fair-minded and informed observer,  
3 having considered the facts, would conclude that there  
4 was a real possibility that the Tribunal was biased."  
5 So it is an objective test.  
6 The second case is the case of Otkritie v Urumov,  
7 and that is in bundle 9.5, tab 25, {B9.5/25/1} and it is  
8 at paragraph 1 of the judgment of Lord Justice Longmore,  
9 to the effect that bias includes conveying the  
10 impression of having prejudged any issue which remains  
11 to be decided. And Lord Justice Longmore's observation  
12 is this, and I quote:  
13 "The concept of bias extends further to any real  
14 possibility that a judge would approach a case with  
15 a closed mind or indeed with anything other than an  
16 objective view; a real possibility, in other words, that  
17 he might in some way have prejudged the case."  
18 The third case I want to show your Lordship, because  
19 you may not be familiar with it, and there are passages  
20 in it that I want to draw to the court's attention, and  
21 that is the case of Mengiste. It is in your Lordship's  
22 bundle {B9.5/23/1}.  
23 MR JUSTICE FRASER: I think it is tab 24, isn't it?  
24 LORD GRABINER: It is certainly tab 24 for me.  
25 MR JUSTICE FRASER: It is tab 24 for me as well.

3

1 LORD GRABINER: Very good. I wasn't sure if the electronics  
2 had caught up.  
3 MR JUSTICE FRASER: Tab 24 for me is the costs law report  
4 version, is that the one that you have?  
5 LORD GRABINER: Yes. That case, we say, is instructive.  
6 I can just tell your Lordship something about it first,  
7 it will save going through the headnote. There  
8 Mr Justice Peter Smith had criticised the evidence of an  
9 Ethiopian law expert witness. He is improbably called  
10 Mr Jones in the case, but that was to protect him  
11 against possible repercussions in Ethiopia, so Mr Jones  
12 is just a nom de plume.  
13 In his judgment, he went on to criticise the  
14 solicitors for the party who had relied on Mr Jones on  
15 the basis that the solicitors had failed to educate the  
16 expert as to his proper functions and duties.  
17 Encouraged by what the judge had said, the other side  
18 applied for a wasted costs order against the solicitors.  
19 The judge granted permission for that application to  
20 proceed, that was stage 1, but he refused to recuse  
21 himself from the substantive hearing, stage 2. The  
22 Court of Appeal held that the judge should have recused  
23 himself because of his concluded views as to the  
24 behaviour of the solicitors, as expressed in his  
25 judgment.

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1 If your Lordship would be kind enough to go  
 2 paragraph 59 of the judgment of Lady Justice Arden.  
 3 MR JUSTICE FRASER: Give me one second, my chair seems to be  
 4 broken, so I'm just swapping it for this one. (Pause)  
 5 LORD GRABINER: Paragraph 59, my Lord, the Lady Justice says  
 6 that she has reached the clear conclusion that this was  
 7 an exceptional case and that there was apparent bias  
 8 stemming from the facts of the case which meant that the  
 9 judge should have recused himself.  
 10 MR JUSTICE FRASER: Yes.  
 11 LORD GRABINER: Then under various headings, the  
 12 cross-heading is "No necessity to make the findings"  
 13 and, and I want to emphasise the words:  
 14 "The judge's criticisms were not, in my judgment,  
 15 necessary to enable the judge to evaluate Mr Jones'  
 16 evidence."  
 17 And a few lines below that:  
 18 "The question why his reports contained inadmissible  
 19 material or he performed poorly as a witness, which  
 20 I accept were likely to increase costs, were primarily  
 21 relevant when it came to costs. As it seems to me, the  
 22 judge in making criticisms against the solicitors over  
 23 their explanation to Mr Jones about his duties was  
 24 concerned to warn off an application for a wasted costs  
 25 order against Mr Jones."

1 And that was to anticipate an application that had  
 2 not yet been made, and your Lordship might want to  
 3 glance at the balance of that paragraph, but I am not  
 4 going to read it out. And then the next cross-heading  
 5 is "Criticisms expressed in absolute terms," and  
 6 your Lordship might like to read that paragraph through.  
 7 Then the other cross-heading is "Repetition, further  
 8 criticism and concern to meet criticisms of the judge's  
 9 conduct."  
 10 And the learned Lord Justice says:  
 11 "While I might not have reached the same conclusion  
 12 if a criticism had been made in absolute terms on  
 13 a single occasion, here the judge accepted that there  
 14 were six criticisms of the appellant's solicitors in the  
 15 stay judgment."  
 16 And I wasn't going read the balance of that, but if  
 17 your Lordship would be kind enough to go to  
 18 paragraph 63, about seven or eight lines down:  
 19 "The second principle is that a judge who is doing  
 20 no more than discharge his judicial function does not  
 21 create an impression of bias, which is  
 22 well-established."  
 23 MR JUSTICE FRASER: I'm sorry, I have reached 63, but ...  
 24 LORD GRABINER: 63, you will see it is split into the first  
 25 principle and then the second principle, about six lines

1 down.  
 2 MR JUSTICE FRASER: I see, yes.  
 3 LORD GRABINER: "A judge who is doing no more than his  
 4 discharge his judicial function does not create an  
 5 impression of bias, which is well-established. What  
 6 occurs in that situation is adjudication, not unsought  
 7 findings."  
 8 And I emphasise those words, "unsought findings".  
 9 And then about four or five lines below that:  
 10 "Where there is an issue of apparent bias, the test  
 11 in Porter v Magill must be fearlessly applied by this  
 12 court and the fourth and fifth principles overlook the  
 13 possibility that mere criticism expressed in absolute  
 14 terms may of itself be extreme and unbalanced because  
 15 the impression to even the fair-minded observer that the  
 16 door has not been left open for whatever explanation the  
 17 party or non-party, who has not yet had the chance of  
 18 providing that explanation, may have to say."  
 19 And I shall be submitting that your Lordship does  
 20 express himself in the judgment in very firm terms.  
 21 The fourth case, and it is probably helpful to --  
 22 I have got a hard copy, old school bundle with me, but  
 23 the fourth case perhaps we can also just briefly look  
 24 at, and this is the final case, is Stubbs v The Queen  
 25 {B9.5/29/1}.

1 MR JUSTICE FRASER: Yes, it is. I too am using an old  
 2 school bundle.  
 3 LORD GRABINER: Very wise. But again, I don't know if  
 4 your Lordship is familiar with this case, it is an  
 5 appeal to the Privy Council in a murder trial from the  
 6 Caribbean, and you can see in the sort of second line of  
 7 the headnote:  
 8 "In 2007 a second trial took place before  
 9 a different judge and jury, in the course of which the  
 10 judge made certain rulings relating to the admissibility  
 11 of evidence and dock identification and ruled against  
 12 the submission of no case to answer. Then that trial  
 13 was aborted."  
 14 When there was in due course, I think, a third trial  
 15 and the defendants were convicted, the Court of Appeal,  
 16 on hearing that appeal:  
 17 "It transpired that the judge who had sat in the  
 18 second trial was a member of the Court of Appeal in the  
 19 third trial and the Court of Appeal rejected the  
 20 defendant's objection --"  
 21 This is just above F:  
 22 "-- that the participation of the same judge in the  
 23 second trial and in the appeal would not give rise to a  
 24 reasonable apprehension of bias, since the aborted trial  
 25 had taken place some seven years earlier, the judge

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

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

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

12 If your Lordship would be kind enough to just flick  
13 to paragraph 16 in the judgment of Lord Lloyd-Jones in  
14 F, between F and G, a couple of lines below F:

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

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

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

9

1 And in paragraph 17:

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

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

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

22 MR JUSTICE FRASER: But there would never be disclosure of  
23 Subpostmasters who weren't claimants, would there?

24 LORD GRABINER: Well, in principle, that is quite correct,  
25 but there would be disclosure from those who were.

10

1 MR JUSTICE FRASER: Yes.

2 LORD GRABINER: And I suppose in theory, it might be  
3 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.

15 First of all, the danger of reaching premature  
16 conclusions is magnified because the incomplete  
17 evidential picture for the lead claimants is itself part  
18 of a larger unexplored evidential canvass, in my  
19 submission.

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

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

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

7 And then paragraph 1 of the order of the  
8 27 October 2017, just for the transcript, that is  
9 {B9.3/2/1}, gave an accurate and convenient precis of  
10 the Common Issues, and paragraph 1 simply says:

11 "Issues relating to the legal relationship between  
12 the parties."

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

17 We have comprehended every item there, and  
18 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  
22 they are correctly identified. Paragraph 18 of your  
23 skeleton?

24 LORD GRABINER: Paragraph 18 of our skeleton on page 7. It  
25 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

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

7 MR JUSTICE FRASER: I think it went to a number of  
8 Common Issues, due to onerous and unusual terms.

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

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

25 Prior to and during the Common Issues trial, the

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

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

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

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

1 submission, but I do make the submission firmly.

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

9 MR JUSTICE FRASER: They identify effectively pre-trial  
10 transcript passages and then in the 15th, the actual  
11 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.

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

1 matters, including technical characteristics of the  
 2 Horizon system and supposed breaches of contract and  
 3 duties on the part of Post Office, which are still to be  
 4 dealt with in the Horizon trial and the other future  
 5 trials.

6 Now, it would be helpful if your Lordship would be  
 7 kind enough to take up my learned friend's skeleton  
 8 argument. I just want to make a brief reference to  
 9 a couple of the paragraphs because my learned friend's  
 10 skeleton helpfully narrows the dispute. If,  
 11 your Lordship, you have got that skeleton handy, if  
 12 your Lordship would be kind enough to go to paragraph 8.

13 MR JUSTICE FRASER: This is Mr Green's skeleton?

14 LORD GRABINER: My Lord, yes.

15 MR JUSTICE FRASER: Yes.

16 LORD GRABINER: What he says in paragraph 8 is:

17 "In the judgment, the judge correctly resolved  
 18 matters that were put in issue before him. He did so in  
 19 the light of the evidence adduced, how it was challenged  
 20 and the case advanced by the parties before him.

21 A party can't be surprised when a judge makes findings  
 22 on a point when the same party has elected to adduce  
 23 evidence on that point or to cross-examine on it."

24 In paragraph 9:

25 "The judge rightly made his assessment of the above

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1 matters and resolved the Common Issues."

2 And I really emphasise those words:

3 "In the light of the parties' pleaded cases, in  
 4 particular Post Office's expressly pleaded case on  
 5 issues of construction and its procedural election not  
 6 to amend that case, this approach was a proper and  
 7 necessary part of his judicial assessment of the  
 8 proceedings before him."

9 And I emphasise those words as well. Then in  
 10 paragraph --

11 MR JUSTICE FRASER: There is no dispute that I had to  
 12 consider and resolve the Common Issues, I think.

13 LORD GRABINER: Indeed, that is common ground.

14 MR JUSTICE FRASER: And I had to do that in respect of the  
 15 six lead claimants as well.

16 LORD GRABINER: Indeed, absolutely.

17 MR JUSTICE FRASER: And insofar as there were issues of  
 18 fact, because there were issues of contract formation --

19 LORD GRABINER: Indeed.

20 MR JUSTICE FRASER: -- that went to each of the six.

21 LORD GRABINER: Indeed.

22 MR JUSTICE FRASER: So I assume your position on that is  
 23 that insofar as fact had to be resolved to identify the  
 24 contractual relations of each of those six, that was  
 25 a necessary part of the Common Issues trial.

18

1 LORD GRABINER: Absolutely, I respectfully agree.

2 MR JUSTICE FRASER: All right.

3 LORD GRABINER: If your Lordship would look at paragraph 12,  
 4 my learned friend says:

5 "In any event, these matters were not irrelevant.  
 6 In many cases, they were relevant because of  
 7 Post Office's expressly pleaded case as to how the  
 8 relevant contract should be construed or in the  
 9 resolution of issues directly arising from challenges  
 10 mounted before the court by Post Office's own  
 11 cross-examination of lead claimants."

12 You see how the point has now been elided away from  
 13 the contract terms into the cross-examination debate.

14 Then in 13:

15 "It does not lie in the Post Office mouth to  
 16 complain that the judge resolved matters that the  
 17 Post Office itself elected to put in issue and contested  
 18 before him or on which it expressly invited him to make  
 19 findings, still less as a basis upon which to seek to  
 20 derail the entire group litigation by alleged apparent  
 21 bias."

22 Then in paragraph 17:

23 "The court cannot be fairly criticised for making  
 24 a judicial assessment of both parties' cases, evidence  
 25 and witnesses in the usual way, particularly on the

19

1 basis of the parties' respective pleaded cases and the  
 2 way their cases were actually advanced at the  
 3 Common Issues trial."

4 So there is a clear departure away from the contract  
 5 terms, as your Lordship put it to me a few moments ago,  
 6 and into matters such as what was pleaded and what was  
 7 cross-examined and so on.

8 MR JUSTICE FRASER: But just pausing there just for  
 9 a moment, because your expression "the cross-examination  
 10 debate" I think as useful shorthand term for it. But if  
 11 the Post Office was challenging a particular lead  
 12 claimant's veracity and cross-examined on particular  
 13 material to demonstrate that that witness should not be  
 14 believed, and there is an issue of fact as to whether  
 15 that witness' contractual relations with the Post Office  
 16 were formed on X, Y, or Z, does that mean that the  
 17 material in respect of which cross-examination has been  
 18 performed remains irrelevant or does it become relevant?

19 LORD GRABINER: If the cross-examination was concerned to  
 20 deal with the Common Issues, entirely appropriate to  
 21 deal with -- to make findings in relation to that  
 22 cross-examination, yes.

23 MR JUSTICE FRASER: What if it was done to deal with the  
 24 credit of the witness, which is itself in issue in  
 25 respect of their contract formation?

20

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

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

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

1 In the event, when that application was made,  
 2 I think your Lordship said that would either be dealt  
 3 with by way of a strike out or by way of no  
 4 cross-examination. In the event, the strike-out  
 5 application was made, but was rejected by your Lordship.  
 6 But, of course, my side were then left in a quandary,  
 7 not knowing whether or not your Lordship would take  
 8 account of irrelevant material, irrelevant for the  
 9 purposes of the trial of the Common Issues. That,  
 10 I think, is the area for difference.

11 MR JUSTICE FRASER: The strike-out application was first, or  
 12 concerns about scope of evidence were first mentioned  
 13 before the witness statements had been served, so there  
 14 was a lot of debate about the scope of evidence that  
 15 might be served in the absence of seeing what that  
 16 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 GRABINER: Precisely. What would be very, very  
 25 unattractive, in the face of the events that had

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

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

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

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

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

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

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

19 MR JUSTICE FRASER: No, I do. That is very clear. But just  
 20 to take a worked example, for example, in respect of  
 21 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  
 25 conventional, its evidence of fact first and Mr Cavender

1 cross-examined Mr Abdulla quite extensively by reference  
2 to what I will call his suspension interview, which was  
3 the point at which the Post Office effectively sought  
4 his side of the story for explanations for shortfall in  
5 his branch accounts. In that interview, it was put to  
6 Mr Abdulla that he had admitted false accounting, which  
7 is a criminal offence, and that obviously went to his  
8 credit.

9 Now, I assume, pausing there at that point, it can't  
10 be said -- or maybe it can, but I would be grateful for  
11 your guidance or your submissions on it. Can it be said  
12 that that cross-examination of Mr Abdulla was irrelevant  
13 because it went to the circumstances in which he was  
14 suspended or --

15 LORD GRABINER: The answer to that is yes.

16 MR JUSTICE FRASER: You say it was irrelevant.

17 LORD GRABINER: Completely.

18 MR JUSTICE FRASER: When the Post Office made submissions in  
19 closing that Mr Abdulla had been lying, how can those  
20 submissions properly be considered without taking  
21 account of the fact that the Post Office had put to  
22 Mr Abdulla that he was guilty of a criminal offence?

23 LORD GRABINER: Would your Lordship bear with me?

24 I understand the point that you are putting to me.

25 I intend to come to the Mr Abdulla story in the judgment

25

1 and if I may, I will deal with it at that point.

2 MR JUSTICE FRASER: Yes, of course, yes.

3 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.

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 that the claimants say that those findings were  
12 necessary, that is their word in paragraph 9, to decide  
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 LORD GRABINER: Now, in support of their argument that  
18 your Lordship had to decide these matters, they make  
19 some play of the way that Post Office conducted the  
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 to that point.

24 First, as explained in Parsons 14 and our skeleton,  
25 this is irrelevant, ie the way that Post Office

26

1 conducted the trial. At all times, both before and  
2 during the trial, Post Office made clear its position as  
3 to the proper scope and limits of the Common Issues  
4 trial. We never, ever altered that position, and  
5 nothing that we did or said can fairly be said to have  
6 amounted to some kind of waiver or enlargement of the  
7 definition of those issues.

8 Secondly, the fact that Post Office was reluctant to  
9 allow irrelevant evidence to go unchallenged cannot make  
10 that evidence suddenly relevant.

11 The other side's proposition, if they do make  
12 a proposition to that effect, is simply a non sequitur.  
13 The conclusions that your Lordship reached either were  
14 or were not necessary to decide the matters that were  
15 before you.

16 Now, I would like to turn next to the judgment.  
17 There are really seven matters in respect of which we  
18 submit that your Lordship reached premature concluded  
19 findings. If I can just give you the seven items first  
20 and then I am going to deal with each of them through  
21 the paragraphs in the judgment. I am sorry, it is  
22 a tedious process, but it is the only way to do this  
23 exercise.

24 So the seven matters are as follows: first of all,  
25 Subpostmasters' experiences of using Horizon and its

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1 functionality, including Subpostmasters' ability to  
2 identify the causes of shortfalls; secondly,  
3 Post Office's alleged knowledge of problems with  
4 Horizon; thirdly, the quality and operation of the  
5 helpline, in particular as an adjunct to the accounting  
6 system; fourthly, the quality of Post Office's  
7 investigations into shortfalls; fifthly, demands for  
8 payment and threats of legal action allegedly made by  
9 Post Office; sixthly, the circumstances in which  
10 Subpostmasters' contracts were suspended or terminated;  
11 and seventhly, the adequacy of training.

12 We need, as I indicated, to look at the relevant  
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 of shortfalls, so the way I propose to do this, and  
18 I hope it accords with what would be convenient for  
19 your Lordship, is if you have a copy of the judgment  
20 handy --

21 MR JUSTICE FRASER: I do.

22 LORD GRABINER: -- then I will just go to the paragraphs,  
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  
25 172 {B7/29/64}.

28



1 MR JUSTICE FRASER: Is this numbered the first of your seven  
 2 categories?  
 3 LORD GRABINER: Yes.  
 4 MR JUSTICE FRASER: Yes, all right.  
 5 LORD GRABINER: So when I have just gone to the relevant  
 6 paragraphs, I am going to make a very brief submission,  
 7 invariably I will make a brief submission in relation to  
 8 the bit that we just emphasised.  
 9 MR JUSTICE FRASER: Yes.  
 10 LORD GRABINER: So in 172, the emphasised passage is:  
 11 "Mrs Stubbs is a careful and honest witness. She  
 12 did her best at the time to try and work out what was  
 13 happening, the reasons for it, and also notified the  
 14 helpline on numerous occasions, as well as keeping her  
 15 own separate paper records in an attempt, or more  
 16 accurately numerous and concerted attempts, to work out  
 17 precisely how these shortfalls could have arisen. None  
 18 of the Post Office personnel involved at the time with  
 19 Mrs Stubbs, who attempted to obtain some input or  
 20 explanation from Fujitsu were called as witnesses."  
 21 Then several lines below there:  
 22 "Mrs Stubbs ran the branch perfectly satisfactorily  
 23 for many years."  
 24 And a couple of lines below that:  
 25 "On the evidence before me in this trial, and upon

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1 my assessment of Mrs Stubbs as a witness, I consider  
 2 that she is reliable, thorough and honest."  
 3 And honest."  
 4 For completeness, there you say:  
 5 "I accept her account of contract formation and the  
 6 fact that she never received, nor did she have any  
 7 knowledge of, the SPMC."  
 8 Your Lordship has come to a clear, concluded view in  
 9 that paragraph as to her evidence and credibility.  
 10 Those views went far beyond what was necessary to reach  
 11 a conclusion about the contractual documents she  
 12 received. If, at a subsequent trial, her credibility is  
 13 challenged, the claimants will obviously rely upon that  
 14 passage in your Lordship's judgment as showing that  
 15 your Lordship should and indeed would be bound to accept  
 16 the correctness of her evidence.  
 17 So in other words, it would have been perfectly  
 18 possible for your Lordship to have accepted her evidence  
 19 about the contract formation, but without making all the  
 20 observations that you have made, particularly in  
 21 relation to helpline and the satisfactory running of the  
 22 branch that she had undertaken over the period of the  
 23 contract, ie post-contractually.  
 24 MR JUSTICE FRASER: You have rather missed out the two  
 25 sentences in the middle of that paragraph that say:

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1 "I make it quite clear that I do not speculate on  
 2 any of that, nor is it possible to know what the outcome  
 3 of the trial of the Horizon Issues will be later this  
 4 year."  
 5 LORD GRABINER: No, you do say that, and I am going to come  
 6 to that point towards the end of these submissions --  
 7 MR JUSTICE FRASER: I understand.  
 8 LORD GRABINER: -- because your Lordship does make that kind  
 9 of point, not always, but fairly regularly, during the  
 10 judgment.  
 11 MR JUSTICE FRASER: Yes, all right.  
 12 LORD GRABINER: I am going to say something about that, if  
 13 I may, at the appropriate moment.  
 14 Then 217, paragraph 217, this deals with the  
 15 position of Mr Sabir. And there are, just for context  
 16 your Lordship will glance down -- you must be, I am  
 17 afraid, very familiar with this judgment, of course --  
 18 but if you go down to 217, subparagraph 8, you say:  
 19 "Post Office's case is that Mr Sabir falsified his  
 20 accounts and misstated his stock by completing the  
 21 branch trading statements from the period he discovered  
 22 the mistake."  
 23 Then in 218:  
 24 "Mr Sabir's account is substantiated by the audit  
 25 report itself, prepared by the auditors two days after

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1 the audit."  
 2 And then on to 219, five or six line down:  
 3 "Any findings as to specific breach or breaches must  
 4 await a later trial. I do, however, take this evidence  
 5 into account in reaching my conclusions on the category  
 6 two facts that are disputed by the Post Office. I deal  
 7 with that at the end of my review."  
 8 Now, an important issue in the Horizon trial is how  
 9 easy or difficult it was for Subpostmasters to work out  
 10 from Horizon what the accounting position was. In this  
 11 passage, your Lordship has reached firm conclusions on  
 12 the facts and also on the credibility of Mr Sabir.  
 13 Your Lordship also says here that you are not making any  
 14 findings on breach. As I say, I will come back to that  
 15 and similar sentences in the course of these  
 16 submissions.  
 17 302, paragraph 302. This is in relation to  
 18 Mrs Stockdale, and it is the third sentence.  
 19 "There were no explanations for these [this is  
 20 experience of running the branch, not a happy one,  
 21 unexplained shortfalls and so on] and there was no way  
 22 available for her to get to the bottom of them either."  
 23 At 309, a few paragraphs on:  
 24 "Mrs Stockdale was obviously in an extremely  
 25 difficult position. She did not know what product had

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1 caused her loss .”  
 2 And at 310:  
 3 “She felt that she had no choice but to agree.  
 4 I find that on the options presented to her at the time,  
 5 she indeed had no choice but to agree.”  
 6 And in 311:  
 7 “Mrs Stockdale then took very sensible and extremely  
 8 thorough measures ...”  
 9 Then your Lordship describes the measures, and then  
 10 several lines down in the same paragraph:  
 11 “She explained that she spent hours with the  
 12 records, including her own paper records, trying to  
 13 investigate . These shortfalls simply kept occurring and  
 14 she could not work out why.”  
 15 In these passages, your Lordship reached conclusions  
 16 as to how easy or difficult it was for Subpostmasters to  
 17 use Horizon to get to the bottom of shortfalls , and  
 18 alongside that, your Lordship made broad findings as to  
 19 the claimant witnesses’ credibility . So again, in my  
 20 respectful submission, this has nothing to do with  
 21 contract formation issues which that trial should have  
 22 been concerned with, but everything to do with matters  
 23 yet to be the subject of future trials .  
 24 In 824 --  
 25 MR JUSTICE FRASER: Before we go to 824, though,

1 Mrs Stockdale was also accused of a criminal offence in  
 2 her cross-examination.  
 3 LORD GRABINER: Right.  
 4 MR JUSTICE FRASER: There was a dispute of fact about what  
 5 was said to her at an interview before she was  
 6 appointed. So in terms of resolving the dispute of fact  
 7 at the interview, do you say I should have made  
 8 a finding as to her -- or I was entitled to make  
 9 a finding as to her credit, but in doing so, shouldn't  
 10 have taken account of anything to do with her departure  
 11 from the Post Office?  
 12 LORD GRABINER: I do say that, yes.  
 13 MR JUSTICE FRASER: You do?  
 14 LORD GRABINER: Yes.  
 15 MR JUSTICE FRASER: Thank you very much.  
 16 LORD GRABINER: Then in 824, this is in relation to  
 17 Mr Bates.  
 18 MR JUSTICE FRASER: Yes.  
 19 LORD GRABINER: The last couple of sentences:  
 20 “He realised that the information for him to do so  
 21 was simply not available to him or to any Subpostmaster  
 22 in a branch. The Horizon system did not allow him to do  
 23 this.”  
 24 Now, that is a conclusion of fact, but it is wholly  
 25 irrelevant for the purposes of the Common Issues, in my

1 submission.  
 2 That is all of piece with your Lordship's findings  
 3 in paragraphs 819 and 852. If we go to 819:  
 4 “The whole issue with the information available to  
 5 an SPM on Horizon is that they could not identify  
 6 discrepancies or shortfalls or understand the basis on  
 7 which transaction corrections [TCs] with which they  
 8 disagreed were issued.”  
 9 Then in 852, roughly in the middle of the  
 10 paragraph --  
 11 MR JUSTICE FRASER: 852?  
 12 LORD GRABINER: My Lord, yes.  
 13 MR JUSTICE FRASER: Just give me a second. Yes.  
 14 LORD GRABINER: “Unexplained shortfalls or discrepancies  
 15 became apparent at the end of a branch trading period.  
 16 It was simply not possible, on the information available  
 17 to an SPM, on the Horizon system, for them to identify  
 18 the day, product, and still less the time of day that  
 19 was responsible for this.”  
 20 In my submission, that is classically a Horizon  
 21 Issue, but your Lordship has reached, on that point,  
 22 a concluded view.  
 23 Paragraph 569, that is the famous paragraph. It has  
 24 got lots of factual matrix points annexed to it.  
 25 Your Lordship will recall that paragraph. It is the

1 paragraph with lots of subparagraphs.  
 2 MR JUSTICE FRASER: Where I go through category 2 and  
 3 category 3 and make findings as to the factual matrix,  
 4 yes.  
 5 LORD GRABINER: And there are just a few of them that I want  
 6 to make reference to.  
 7 MR JUSTICE FRASER: I think it might break a record as being  
 8 the longest paragraph in the judgment, which is probably  
 9 not a particularly good record to break.  
 10 LORD GRABINER: You will be relieved to know that I am not  
 11 going to go through all the paragraphs.  
 12 MR JUSTICE FRASER: It runs on for a number of pages.  
 13 LORD GRABINER: Yes. The ones that I want to pick on are  
 14 51, and your Lordship says:  
 15 “The introduction of Horizon limited the claimants’  
 16 ability to investigate apparent shortfalls, particularly  
 17 as to the underlying cause thereof. Both this and 50  
 18 immediately preceding it are obvious on the evidence and  
 19 could readily have been agreed. It can't sensibly be  
 20 argued to the contrary, in my judgment.”  
 21 So that is an Horizon conclusion, paragraph 61:  
 22 “The Post Office has, on occasion, detected that  
 23 Horizon generated errors, caused the appearance of  
 24 shortfalls and errors which the claimants themselves had  
 25 not been able to identify as the cause of those apparent

1 shortfalls ."  
 2 Now, these are all matters for the Horizon trial .  
 3 These findings are made in general and unqualified  
 4 terms. They have a wide-ranging impact and are not  
 5 realistically going to be challengeable in later trials  
 6 in the light of further evidence and disclosure , because  
 7 what will be said when there is a debate about this in  
 8 a future trial , as inevitably there will be, is that the  
 9 other side will point to this analysis of your Lordship  
 10 and it is going to be impossible, in my respectful  
 11 submission, and unrealistic to expect your Lordship to  
 12 depart from those conclusions.

13 In 54 to 57, which I think you aggregate, the  
 14 passage there:

15 "I cannot make detailed findings about Fujitsu 's  
 16 role on the basis of the evidence before me. However,  
 17 it is clear that Fujitsu were able to obtain greater  
 18 information about a particular branch's transactions  
 19 than either the Post Office or the Subpostmaster."

20 Then you say:

21 "How this was done and whether it included providing  
 22 a data transfer service between the central data centres  
 23 and clients of Post Office must await the Horizon  
 24 trial ."

25 Notwithstanding that final caveat, this passage also

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1 contains a clear finding on a Horizon Issue. The same  
 2 is true of the passage at 569, factual matrix point 59.

3 MR JUSTICE FRASER: Which Horizon Issue does that make  
 4 a finding on?

5 LORD GRABINER: Which one, my Lord, 59?

6 MR JUSTICE FRASER: No, before that, I think you said 54 to  
 7 57 makes a clear finding on a Horizon Issue.

8 LORD GRABINER: Yes.

9 MR JUSTICE FRASER: Which Horizon Issue? Maybe we can come  
 10 back to it if you want to.

11 LORD GRABINER: I think the point being here that the  
 12 information that should have been provided by the  
 13 Post Office or should have been available to the  
 14 Subpostmaster was not available, but it was apparently  
 15 available to Fujitsu , so it is a breach issue.

16 MR JUSTICE FRASER: Understood.

17 LORD GRABINER: Then matrix point 59, your Lordship says:

18 "I find in some instances there was discussion  
 19 internally at the Post Office about the altering of  
 20 branch transaction data directly and also of the  
 21 Post Office and of Fujitsu carrying out changes to  
 22 Horizon and/or transaction data which could affect  
 23 branch accounts. Mrs Van Den Bogerd accepted this could  
 24 be done. Further detailed findings on this will be  
 25 dealt with in a later trial ."

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1 So the implication from that is that you have made  
 2 some findings there and that more detailed ones would,  
 3 in fact , be dealt at the later trial , but for some  
 4 reason, your Lordship thought it was appropriate in that  
 5 trial to make those conclusions which I have just  
 6 identified .

7 Can I go to the next heading, which is "Post  
 8 Office 's alleged knowledge of problems with Horizon".

9 MR JUSTICE FRASER: Yes.

10 LORD GRABINER: This is starting with paragraph 541. There  
 11 your Lordship says:

12 "Secondly, a number of contemporaneous documents  
 13 internal to the Post Office show that there has been, at  
 14 least to some degree, an awareness of Horizon problems  
 15 within the Post Office itself over a number of years."

16 Then in 543, in about the second or third lines , you  
 17 say:

18 "Behind the scenes, there were at least a number of  
 19 people within the Post Office who realised that there  
 20 were difficulties with the Horizon system."

21 Then in paragraph 1115, so you have to jump forward,  
 22 your Lordship says:

23 "Horizon was introduced in 2000 and from then  
 24 onwards, unexplained discrepancies and losses began to  
 25 be reported by SPMs. Internal documents obtained in

39

1 this litigation show that some personnel within the  
 2 Post Office believed at the time that at least some of  
 3 these were caused by Horizon."

4 And then the passages that I have been emphasising  
 5 in those paragraphs express a view on Post Office 's  
 6 internal knowledge of the alleged problems with Horizon.

7 Now, those findings are going to be relied upon by  
 8 the other side in support of their allegations that  
 9 there was here deliberate concealment and deceit on the  
 10 part of Post Office .

11 Now, those are matters which are to be dealt with in  
 12 later trials . They are very, very important findings  
 13 and holdings and they are not provisional , they are  
 14 concluded views. And they are undoubtedly matters which  
 15 will going to arise in the later trials .

16 MR JUSTICE FRASER: But on that point, because it is ,  
 17 I think, notable that you say those findings are going  
 18 to be relied upon to found deceit, if one goes back to  
 19 the extracts from the documents and look at 542, which  
 20 is where the reasons that underpin what I have said in  
 21 541 are identified , and have a look at 541.

22 At 542, for example, just looking at the first  
 23 extract of the contemporaneous document which is an  
 24 email:

25 "Both Frank Manning and Sue Lock work for

40

1 Post Office.”  
 2 Ignore the underlining because that is my  
 3 underlining, but if you look over the page, this is in  
 4 relation to Mrs Stubbs, who was having certain problems  
 5 with Horizon, the phrase, “It is Horizon related”, which  
 6 the sender of that email chose to put in bold. It then  
 7 goes on to say:

8 “The problems have only arisen since install and the  
 9 postmistress is now barking, and rightly so in my view.  
 10 Help, please.”

11 Do you say that the conclusion of what that document  
 12 shows, which I have summarised in 543, is something that  
 13 I shouldn’t have done?

14 LORD GRABINER: Definitely.

15 MR JUSTICE FRASER: So I shouldn’t have given the summary of  
 16 the document.

17 LORD GRABINER: Definitely. Whether you did or not, you  
 18 certainly should not have expressed a view about it,  
 19 knowing that this will be a key issue at a future trial.

20 MR JUSTICE FRASER: Thank you very much. What about the  
 21 extract of the document itself which was relied on both  
 22 in evidence and in opening?

23 LORD GRABINER: I mean, I have no particular view about  
 24 that. What I am much more concerned about is what you  
 25 have said in the judgment and whether, through the eyes

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1 of a fair-minded observer, it can be said that it is  
 2 possible for your Lordship to keep an open mind.

3 MR JUSTICE FRASER: Understood. Thank you very much.

4 LORD GRABINER: Could I go next to helpline.

5 MR JUSTICE FRASER: Yes.

6 LORD GRABINER: So paragraph 248, and this deals with  
 7 Mr Abdulla to whom we had a reference to a little  
 8 earlier:

9 “Turning to Mr Abdulla’s operation of the branch,  
 10 I have already identified his account of how even  
 11 disputed transaction corrections had to be dealt with at  
 12 some stage prior to the next branch trading period by  
 13 clicking the ‘accept now’ button. He would contact  
 14 helpline six or seven times a month and was shocked at  
 15 the inadequate support.”

16 Just below there, or next:

17 “He would often experience apparent shortfalls on  
 18 the days when he would perform balances, but could  
 19 rarely get through to the helplines on these occasions.  
 20 He thought the advisers were ill-informed and would  
 21 often give the impression of reading off a script.”

22 In 249:

23 “He could not resolve these through the helpline.”

24 So here your Lordship was accepting Mr Abdulla’s  
 25 evidence both as to his subjective impression of the

42

1 service that he received and as to the points of fact,  
 2 such as whether he could get through to the helpline.  
 3 And I am sorry that I am beginning to sound like  
 4 a broken record, but these were not matters for the  
 5 first trial and, specifically, they are matters for  
 6 subsequent trials.

7 Now, these, 303:

8 “These shortfalls continued. On 15 October 2014,  
 9 there were unexplained shortfalls of over £3,500. When  
 10 she [and I think this is Mrs Stockdale] phoned the  
 11 helpline, she was told this was only £3,000 and it is  
 12 a drop in the ocean compared to some people’s problems.  
 13 This contradicted an earlier statement from the helpline  
 14 when she had been told that she was the only SPM  
 15 experiencing these problems, which just made her feel  
 16 inadequate. I will track this particular shortfall  
 17 through in terms of her evidence.”

18 And your Lordship does that, and at the end of that  
 19 paragraph or further on in it, your Lordship says:

20 “I accept this evidence by Mrs Stockdale. There can  
 21 be no doubt that the shortfall was clearly in dispute,  
 22 even on the Post Office’s understanding of how disputes  
 23 were to be raised.”

24 MR JUSTICE FRASER: I am sorry, I have lost where you are.

25 LORD GRABINER: I am sorry, it is the end of paragraph 303.

43

1 Yes.

2 MR JUSTICE FRASER: Yes, thank you.

3 LORD GRABINER: “I accept that evidence.”

4 MR JUSTICE FRASER: Yes, thank you.

5 LORD GRABINER: So in my submission, this is a good example  
 6 of your Lordship undertaking a detailed analysis of the  
 7 evidence, in this case, that of Mrs Stockdale, and her  
 8 evidence is expressly accepted by your Lordship as  
 9 accurate. This was not a matter for determination in  
 10 the first trial and when this issue does arise at  
 11 a future trial, a fair-minded observer of this story  
 12 would say that your Lordship had reached a concluded  
 13 view as to the accuracy and reliability of  
 14 Mrs Stockdale’s testimony.

15 Your Lordship’s concluded view about her evidence  
 16 was then reinforced in your summary of her evidence and  
 17 for that purpose, if we go forward to paragraph 328.  
 18 Your Lordship says there:

19 “I found Mrs Stockdale to be a careful and accurate  
 20 witness and I consider she was telling me the truth.”

21 Then you say at the end of that paragraph:

22 “I’m making no findings in respect of breach,  
 23 causation or loss.”

24 As I say, I will come back to that mantra later on  
 25 in these submissions.

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1 And at 357, in relation to Mrs Dar, your Lordship  
 2 says:  
 3 "Her experience with the helpline was not a positive  
 4 one. She contacted them two to three times a month,  
 5 often in relation to apparent shortfalls or balances.  
 6 Most of the time, she was told to recount and if there  
 7 was still a shortfall, she had to make this good, which  
 8 means pay it herself. Once she was told how to get  
 9 around the problem by altering the stock figures to  
 10 balance, which shocked her, and she considered there was  
 11 some kind of fault within the system."

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

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

18 "The helpline does not seem to have operated in that  
 19 way and on the evidence before me for the issues in this  
 20 trial, the matters in dispute reported to the helpline  
 21 were not treated differently even when they were  
 22 reported. The lead claimants' evidence made it clear  
 23 that just getting through to the helpline was an  
 24 achievement in itself. When this was finally  
 25 accomplished, the experience would be variable at best

1 and does not seem to have come close to resolving any of  
 2 the disputes."

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

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

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

23 At 558, at the beginning of the paragraph:

24 "It is therefore the case that, on the evidence  
 25 before me, the helpline did not operate for the lead

1 claimants in the manner that the Post Office contended  
 2 for."

3 Then you say at the end of that paragraph:  
 4 "Detailed findings of fact as to this must however  
 5 wait for a later trial."

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

19 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

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".

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

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.

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

1 took some weeks to get there.  
 2 And so far as that point is concerned, is your  
 3 submission that it would have been necessary or  
 4 acceptable to decide what "settled centrally" meant, but  
 5 I shouldn't have then gone on to consider the mechanism  
 6 of dealing with the helpline, is that right?

7 LORD GRABINER: Absolutely.

8 MR JUSTICE FRASER: All right.

9 LORD GRABINER: Because by definition, by definition, by  
 10 engaging in that investigation and indeed reaching some  
 11 conclusions in relation to the functioning and operation  
 12 of the helpline, what is happening is that there is  
 13 a trespassing into later matters which are not relevant  
 14 to the immediate question.

15 For example, the question of the meaning of "settled  
 16 centrally" would have been a classic example of  
 17 something that needed to be determined in the  
 18 Common Issues trial. Construction questions were open  
 19 for debate, absolutely.

20 MR JUSTICE FRASER: Yes, but what then do you say about the  
 21 Post Office evidence that had been contained in the  
 22 Post Office's witness statements about the operation of  
 23 the helpline, because there was evidence on it from  
 24 both parties?

25 LORD GRABINER: Well, all I can say about that is that the

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1 key point in this debate is the relationship between the  
 2 functioning of the helpline and the account statement --

3 MR JUSTICE FRASER: Right.

4 LORD GRABINER: -- and in what circumstances the account  
 5 statement could be relied upon or would or would not be  
 6 binding? And that is classically a contract question,  
 7 if I can put it in a very concerted way. But to  
 8 investigate events which are really breach events and  
 9 then to make findings about them after the event was, in  
 10 my submission, a false step.

11 MR JUSTICE FRASER: I understand, thank you very much.

12 LORD GRABINER: And it is trite law, of course, but the fact  
 13 is that what was not legitimate was to participate in  
 14 a post-contractual factual investigation, is what it  
 15 comes to. The factual investigation of that kind is  
 16 entirely distinct from matters which should have been  
 17 investigated at the Common Issues trial. The  
 18 contractual position as to the trading statement and the  
 19 helpline falls to be analysed at the time of  
 20 contracting. Classic law.

21 For this purpose, the factual matrix must be  
 22 examined at that point in time, but what happened here  
 23 was that there is then an investigation of, by  
 24 definition, post-contractual events and conclusions in  
 25 relation to matters such as alleged breaches of

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1 contract, for example as to the effectiveness of the  
 2 helpline after the event to improve or clarify the  
 3 factual matrix, which is absolutely impermissible.

4 Now, the next topic of the seven is how good or bad  
 5 Post Office's investigations of shortfalls were, and  
 6 whether Post Office disclosed what it knew about  
 7 shortfalls to Subpostmasters.

8 MR JUSTICE FRASER: Can I just check, before you move on to  
 9 that. The third of your seven categories, I think we  
 10 went to 248, 303, 357, 556 and 558, is that right?

11 LORD GRABINER: That is exactly right.

12 MR JUSTICE FRASER: Now we are going on to the fourth of the  
 13 seven.

14 LORD GRABINER: Yes. I haven't gone back to count, but  
 15 I think it is the fourth.

16 MR JUSTICE FRASER: Yes.

17 LORD GRABINER: The first paragraph that I want to refer to  
 18 is 115.

19 MR JUSTICE FRASER: 115, yes.

20 LORD GRABINER: Your Lordship says:

21 "Putting entirely to one side the fact that it has  
 22 taken Post Office 15 months to finalise how it was to  
 23 resolve this matter and Mr Bates was given only 16 days  
 24 to reply."

25 And your Lordship says:

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1 "Which attitude appears to me to be symptomatic of  
 2 how Post Office regularly treated at least some of its  
 3 SPMs."

4 That is a very strong statement, my Lord, and that  
 5 is exactly the kind of statement -- and I appreciate  
 6 that was and is your Lordship's view, but it is not  
 7 necessary for the purposes of the judgment that you were  
 8 dealing with, or that you were giving. And also, it is  
 9 obviously going to be relied upon by the other side. If  
 10 I were on the other side, I would be banging the drum on  
 11 a sentence like that. I would be accusing Post Office  
 12 of being a disgraceful bunch and, "That is already  
 13 your Lordship's view: see your judgment in the  
 14 Common Issues case", that is obvious.

15 MR JUSTICE FRASER: When you say, "That is already  
 16 your Lordship's view", do you mean that you are  
 17 summarising what Mr Green would be saying, relying on?  
 18 You are not telling me -- I don't assume you are  
 19 expressing that as that is a view that I, the judge,  
 20 currently hold.

21 LORD GRABINER: What I am submitting is that having, so to  
 22 speak, committed yourself in print on that point, a  
 23 fair-minded -- I don't care what Mr Green will say or  
 24 won't say or indeed what I think or say. It is all  
 25 irrelevant, and in a sense, what your Lordship thinks or

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1 says is irrelevant for this purpose because it is an  
2 objective test. The fair-minded observer will look at  
3 this along with all the other material that we are going  
4 through at the moment and will have to come to  
5 a judgment as to whether your Lordship can fairly  
6 approach the future trials given the conclusive  
7 expression of opinion that you have given there.

8 MR JUSTICE FRASER: Yes.

9 LORD GRABINER: It is just another example. And then in  
10 subparagraph 1 of 115, you say in the first line:

11 "It suggests that Mr Bates' experience was not an  
12 isolated one."

13 Then we can leave over 1 and go straight to 2,  
14 sub-2, the second sentence:

15 "I'm satisfied that if he had simply paid the amount  
16 to the Post Office as demanded in the Post Office letter  
17 of 16 July 2001, which sought as matter of some urgency  
18 that he 'advise me of your proposals to now make good  
19 the loss', in other words, how he would pay the  
20 Post Office that money which was at that stage demanded,  
21 this would not have occurred.

22 "3. No explanation was provided to Mr Bates as to  
23 how the shortfall had occurred.

24 "5. The consistent policy, if indeed there was one,  
25 seems to have been that the Post Office would simply

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1 claim all such sums from the SPMs in question."

2 These are all findings to the effect that  
3 Post Office's investigation was, in your Lordship's  
4 view, inadequate and that Post Office demanded payment  
5 without a proper basis. Now, in my respectful  
6 submission, those findings had no place in the  
7 Common Issues trial. They trespass into matters which  
8 we all know fall to be determined in a later case or  
9 cases.

10 165 deals with the evidence of Mrs Stubbs, and if we  
11 go 15 or 20 lines down, maybe fewer than 20,  
12 your Lordship says:

13 "It might be thought that if there were any proper  
14 investigation which actually reported on this, it could  
15 and should have been put to Mrs Stubbs, but if what was  
16 put to Mrs Stubbs in this trial is said by the  
17 Post Office to amount to such an investigation, then  
18 it is telling. The investigation appears, on the  
19 material deployed in this Common Issues trial, to have  
20 consisted of nothing more than Fujitsu asserting that  
21 there was nothing wrong with the kit. That is not, in  
22 my judgment, an investigation under any normal  
23 understanding or meaning of that word in society  
24 generally."

25 That is really the same point that we just saw for

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1 Mr Bates. Your Lordship is saying that Post Office's  
2 investigation was inadequate and that Post Office  
3 demanded payment without a proper basis. Again, in my  
4 submission, those findings had no place in the  
5 Common Issues trial.

6 In 208, and your Lordship can glance at the  
7 paragraph for context, and there was a sort of help  
8 issue that is identified there, this is in relation to  
9 Mr Sabir, but your Lordship concludes in the last  
10 sentence of 208:

11 "That help simply never came."

12 MR JUSTICE FRASER: I am sorry.

13 LORD GRABINER: 208.

14 MR JUSTICE FRASER: I am in 208.

15 LORD GRABINER: The last sentence. {B7/29/74}

16 MR JUSTICE FRASER: "This was counted against him at the  
17 time and used as a --"

18 LORD GRABINER: "That help simply never came."

19 MR JUSTICE FRASER: That is in the middle.

20 LORD GRABINER: I am sorry. I don't have the whole  
21 paragraph in front of me.

22 MR JUSTICE FRASER: That is in the middle.

23 LORD GRABINER: Very good. That is also a finding as to how  
24 co-operative or unco-operative Post Office was in trying  
25 to establish the cause of the shortfall. In my

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1 submission, it is a breach question.

2 MR JUSTICE FRASER: Yes.

3 LORD GRABINER: 217, sub-2:

4 "Mr Sabir had no separate record and no access on  
5 Horizon to the number of scratchcards he should have  
6 had."

7 And then your Lordship says:

8 "He requested this information from the Post Office,  
9 who did have it. It was not provided. He used the  
10 helpline to notify Post Office of a problem. This is  
11 the way that the Post Office maintained disputes should  
12 be notified."

13 Then in 223:

14 "In my judgment, the attack on Mr Sabir's credit,  
15 which I have identified above, fundamentally ignores the  
16 reality. The fact that he had contacted the helpline  
17 and sought assistance and the fact that the vital piece  
18 of information he needed, the number of scratchcards the  
19 system was showing that he should have, was so readily  
20 accessible to the Post Office auditors, but never  
21 provided to him."

22 So again, those are findings that Post Office did  
23 not supply Mr Sabir with information, which he could not  
24 obtain himself through Horizon and which could have  
25 enabled him to establish the extent of the shortfall.

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1 Again, those are findings on Horizon and on breach.  
 2 MR JUSTICE FRASER: I did have to make a finding on his  
 3 credit, though, did I not?  
 4 LORD GRABINER: That may be. You mean because of challenge  
 5 in relation to the contract formation?  
 6 MR JUSTICE FRASER: There were various challenges to  
 7 Mr Sabir's credit, but not least -- I think it is  
 8 a point that has been --  
 9 LORD GRABINER: I am told by Mr Cavender that we never  
 10 relied on any of this material.  
 11 MR JUSTICE FRASER: Mr Cavender -- well, the transcript  
 12 shows the way that Mr Sabir was cross-examined, but  
 13 let's not waste time on that at the moment. So that is  
 14 223.  
 15 LORD GRABINER: 557, still under the same heading, 557:  
 16 "Mrs Stockdale telephoned the helpline. She then  
 17 assumed the debt recovery letter she received meant an  
 18 investigation had been done and resolved against her.  
 19 That assumption was not correct. Mrs Stubbs had been  
 20 pressing for many years to find out the outcome of  
 21 whatever investigation was in fact performed in her  
 22 case. In both cases, the helpline had been notified by  
 23 each of these lead claimants. In neither case  
 24 [your Lordship says] could the Post Office produce and  
 25 put to each of these lead claimants or show the court

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1 the end product of any such investigation."  
 2 So here your Lordship found that Post Office had not  
 3 conducted an investigation into Mrs Stockdale's  
 4 shortfalls and your Lordship also criticised Post Office  
 5 for not adducing what would have been inadmissible  
 6 breach of contract evidence. So if they had produced  
 7 this material at that trial, it would actually not have  
 8 been relevant to the issues in that trial, but obviously  
 9 it would have been relevant material for the purposes of  
 10 a breach trial or a trial about Horizon and its  
 11 effectiveness or otherwise.  
 12 MR JUSTICE FRASER: Mr Cavender did put to Mrs Stubbs at  
 13 least that there had been an investigation on the basis  
 14 that -- I mean, it is the same point perhaps as the one  
 15 that I explored with you earlier about Mr Sabir, but if  
 16 a positive point is put to a witness, for example, that  
 17 an investigation has happened, do you say I should weigh  
 18 that up in respect of the credit of the witness so far  
 19 as contract formation is concerned but then stop there,  
 20 effectively?  
 21 LORD GRABINER: Yes, because it would have been ex hypothesi  
 22 cross-examination on irrelevant material. I mean,  
 23 I think what is revealed by just our exchanges here this  
 24 morning, my Lord, is the absolute difficulty of keeping  
 25 a clear bright line between the matters which were the

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1 subject of that trial, bearing in mind the fact that  
 2 under the case management arrangement, there were going  
 3 to be future trials where these matters would be  
 4 investigated. It is a very -- it is a difficult task,  
 5 I absolutely respect that and I accept that, but we do  
 6 respectfully submit that you went over the line.  
 7 MR JUSTICE FRASER: I understand.  
 8 LORD GRABINER: Mr Cavender draws to my attention the  
 9 closing transcript on {Day 14/46}.  
 10 MR JUSTICE FRASER: Do you want me to pull that up on the  
 11 screen?  
 12 LORD GRABINER: I can just read it into the transcript.  
 13 Your Lordship's question was:  
 14 "So far as the claimants' evidence is concerned,  
 15 therefore, you say treat it all with caution for all the  
 16 reasons that you have gone through, but you are inviting  
 17 me not to make any findings on their credibility."  
 18 "MR CAVENDER: Indeed.  
 19 "MR JUSTICE FRASER: Any adverse findings on their  
 20 credibility, is that right?  
 21 "MR CAVENDER: Yes, because to do so you would have  
 22 to make findings as to the accounting system, to the  
 23 TCs, what happened in fact, and you haven't had full  
 24 evidence on that by any means."  
 25 Then on the following page of the transcript,

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1 {Day 14/51}, line 12, Mr Green:  
 2 "I'm sorry to interrupt, but I have let this run  
 3 since {Day14/38:14}, what my learned friend is saying.  
 4 He said someone in his position might say Mr Abdulla  
 5 lied. Well, that is exactly what he does say at  
 6 paragraph 592 of his closing submissions. So I don't  
 7 understand --"  
 8 Then your Lordship interrupted and said:  
 9 "MR JUSTICE FRASER: All right.  
 10 "MR GREEN: -- where he is on it.  
 11 "MR CAVENDER: But I don't ask for findings on it.  
 12 "MR JUSTICE FRASER: Mr Green, as a rule, I am not  
 13 saying you can't make these points, but you might want  
 14 to store them up.  
 15 "MR GREEN: I am grateful."  
 16 MR JUSTICE FRASER: The position on finding so far as credit  
 17 were concerned, I gave the Post Office an opportunity to  
 18 consider their position on that after the oral  
 19 submissions were over, because I had difficulty  
 20 following it. And there was a written explanation  
 21 provided by the Post Office which explained to me what  
 22 the Post Office said I should do in terms of findings as  
 23 to credit, because as the exchange that you have just  
 24 read out demonstrates, on the one hand, the closing  
 25 submissions accuse some of the lead claimants of lying,

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1 but orally, Mr Cavender said, "Don't make findings on  
2 credit". I am sure the dichotomy in those two positions  
3 needed to be resolved.  
4 So I think the correct place to start or finish in  
5 terms of findings as to credit is probably what the  
6 Post Office said in their written submissions after the  
7 hearing.  
8 LORD GRABINER: I --  
9 MR JUSTICE FRASER: I understand your submission.  
10 LORD GRABINER: What I would respectfully submit is that  
11 bearing in mind the fact that there was yet to be  
12 a breach trial --  
13 MR JUSTICE FRASER: I understand.  
14 LORD GRABINER: -- enormous care was required --  
15 MR JUSTICE FRASER: I understand.  
16 LORD GRABINER: -- in order to ensure that the concerns that  
17 we are now expressing would not arise.  
18 MR JUSTICE FRASER: I entirely understand.  
19 LORD GRABINER: Now, my Lord, I don't know if that is a good  
20 moment to break? I could, because I am just going to  
21 a new topic.  
22 MR JUSTICE FRASER: If you have finished number four of your  
23 seven ...  
24 LORD GRABINER: Would you bear with me a moment.  
25 MR JUSTICE FRASER: The last paragraph before I distracted

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1 you I think was 557.  
2 LORD GRABINER: You did not distract me. Yes, that is  
3 convenient. That would be a convenient moment. I have  
4 got quite a lot still to get through, but I will go as  
5 fast as I can.  
6 MR JUSTICE FRASER: Understood. Shall we say five minutes?  
7 LORD GRABINER: My Lord, yes, I am grateful.  
8 MR JUSTICE FRASER: We will have a five minute break. I am  
9 going to see if I can turn the temperature down a bit.  
10 It seems to be quite hot. I don't know if I am alone.  
11 LORD GRABINER: You are quite right, it is.  
12 MR JUSTICE FRASER: I will see if I can do something about  
13 that. Five minutes.  
14 (11.50 am)  
15 (Short break)  
16 (11.55 am)  
17 LORD GRABINER: My Lord, there just one point from this  
18 morning. Your Lordship wanted to know which Horizon  
19 Issues. This was in the context of my referring to  
20 paragraph 569 --  
21 MR JUSTICE FRASER: Yes.  
22 LORD GRABINER: -- and those points 54 to 57.  
23 MR JUSTICE FRASER: Yes.  
24 LORD GRABINER: And the Horizon Issues referred to were  
25 issues 7 to 9 --

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1 MR JUSTICE FRASER: Thank you very much.  
2 LORD GRABINER: -- which are in B7/14/4.  
3 MR JUSTICE FRASER: Thank you very much.  
4 LORD GRABINER: Turning then to the next topic, and I am  
5 going to try to speed up if I may, because there is  
6 going to be a time issue.  
7 So the next topic is whether Post Office sent  
8 unjustified demands for payment and/or threats of legal  
9 action to SPMs. Paragraph 222:  
10 "There can be no excuse, in my judgment, for an  
11 entity such as Post Office to misstate in such clearly  
12 express terms in letters that threaten legal action and  
13 the extent of the contractual obligation upon an SPM for  
14 losses. The only reason for doing so in my judgment  
15 must have been to lead recipients to believe that they  
16 had absolutely no option but to pay the sums demanded.  
17 It is oppressive behaviour."  
18 In 327, towards the end of it:  
19 "The documents available in this litigation show  
20 that this simply was not true and she had expressly done  
21 both of those things."  
22 This is in relation to Mrs Stockdale. At 462, after  
23 a few lines:  
24 "This conclusion means that the Post Office fraud  
25 prevention and debt recovery procedures will be used

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1 against SPMs in this position unless an SPM can show  
2 that the shortfall or discrepancy was not their fault."  
3 Then your Lordship says:  
4 "This judgment does not contain findings on breach,  
5 loss or causation."  
6 So in the same vein, your Lordship made a number of  
7 findings in your section of the factual matrix at  
8 paragraph 569, which go to show how transaction  
9 corrections were treated. So for example, factual  
10 matrix point 35:  
11 "However, even amounts that were disputed in this  
12 way were treated by Post Office as debts owed by the  
13 SPM."  
14 And factual matrix point 40:  
15 "The defendant sought recovery from the claimants  
16 for apparent shortfalls, and I would add also on the  
17 evidence that the Post Office did this regardless of  
18 whether disputes had been reported to the helpline or  
19 not."  
20 And then factual matrix point 42:  
21 "The Post Office required claimants to accept  
22 changes to records of branch transactions unless the  
23 claimant was effectively able to prove that the  
24 transaction correction was not correct."  
25 And factual matrix point 43:

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1 "The Post Office did sometimes issue transaction  
2 corrections after the end of the branch trading period  
3 in which the transaction had taken place."  
4 So, in my submission, none of this was relevant  
5 matrix for the Common Issues trial.  
6 Then at 7231:  
7 "Even though Post Office's own case on the relevant  
8 provision in the SPMC [that is one of the contracts]  
9 dealing with liability for losses requires negligence or  
10 fault on the part of an SPMC, this was routinely and  
11 comprehensively ignored by Post Office, who sent letters  
12 of demand for disputed sums in express terms as though  
13 SPM had strict liability for losses. These letters  
14 entirely misstate the legal basis of SPMs' liability  
15 even where they had been appointed under the SPMC."  
16 723, subparagraph 4:  
17 "The approach of the Post Office is to brook no  
18 dissent. It will adopt whatever measures are necessary  
19 to achieve this."  
20 And then after the reference to section 15,  
21 clause 19 of the SPMC, your Lordship says:  
22 "Other parts of section 15 deals with the  
23 requirement for caution, but I find it somewhat unusual  
24 and potentially oppressive that the Post Office should  
25 seek to use the Official Secrets Acts in this way.

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1 I don't see how in a routine case these Acts could  
2 possibly apply in the way suggested by a Post Office in  
3 this contract."  
4 So again, in my submission, all of this was  
5 irrelevant to the Common Issues trial.  
6 The next topic is whether Post Office acted properly  
7 in suspending and/or terminating SPMs' contract. The  
8 relevant paragraph in the judgment is paragraph 20  
9 {B7/29/8}. Perhaps your Lordship would just look at  
10 this to remind your Lordship of it for context. This is  
11 all about termination, sometimes abrupt termination, and  
12 you are looking at Mr Bates' position and Mrs Stubbs'  
13 position.  
14 Then, in my submission, this again shows  
15 your Lordship's hand in a concluded way. The reasonable  
16 onlooker would think that your Lordship's mind is at  
17 least or may be closed as to the proprietary of  
18 Post Office's actions in effecting these suspension and  
19 terminations. Again, this is wholly irrelevant to the  
20 Common Issues.  
21 Paragraph 263, {B7/29/90} just for context, this is  
22 in relation to the letter sent to Mr Abdulla dismissing  
23 his internal appeal. Your Lordship will recall all of  
24 this, and then 263 sets out the letter. 264,  
25 your Lordship says:

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1 "It's not clear if 'my investigation' included any  
2 further information from or investigation of the  
3 situation regarding Camelot either by Mrs Ridge or  
4 Mr Mylchreest. Given the timescale, this appears  
5 unlikely. Certainly no documents were produced in this  
6 trial that suggested it was."  
7 And so on. If your Lordship would look at the rest  
8 of that paragraph and 402 for context. Then after the  
9 reference to the statement and the appeals process in  
10 the rehearing, there is a reference to Mrs Ridge, and  
11 then about halfway through that paragraph:  
12 "It is more than an academic nicety. Terminating  
13 without notice is a severe step. A right of appeal was  
14 supposed to be present under the SPMC. The Post  
15 Office's own witnesses do not know what that appeal  
16 consisted of and what the test was. This is deeply  
17 unsatisfactory."  
18 403:  
19 "I do not know why risk to the Post Office  
20 reputation should be a relevant factor in such an  
21 appeal, which is what I find Mr Breeden's evidence to  
22 consist of, or why SPM's entitlement to be heard on  
23 appeal would differ from case to case."  
24 Further down:  
25 "Unjustified suspension ought to be a factor in

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1 favour of an appeal succeeding on any sensible view."  
2 At the end of that paragraph:  
3 "The reputation of the Post Office would best be  
4 served by appeals that were justified, succeeding, and  
5 those that were not, failing, should not have formed any  
6 part of the criteria."  
7 479 {B7/29/147} a long way into it:  
8 "Given the odd combination of various items all for  
9 £1,092 - which she accepted 'was a bit odd' - this  
10 information would evidently have been very useful."  
11 Then a couple of lines on:  
12 "I found he was giving her an account concerning  
13 £1,092 which she would have been more willing to  
14 consider was truthful had she had the Excel spreadsheet  
15 at the interview."  
16 And so on. Your Lordship can read to the end of  
17 that paragraph:  
18 480 {B7/29/148}:  
19 "The hearing process in respect of Mr Abdulla's  
20 suspension and eventual termination therefore proceeded  
21 with incomplete information being provided to the person  
22 tasked with conducting the hearing, making this  
23 important decision, and still less information being  
24 given to Mr Abdulla by the Post Office."  
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  
18 then after going through summarising and setting out the  
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

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1 suspension, even though on his evidence he found out on  
2 the day. That does not seem to have had any effect on  
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 statements, namely she had not contacted the NBSC or  
7 asked Post Office for assistance. I find that she had."

8 517:

9 "It must be understood with crystal clarity."

10 I think your Lordship will recall this paragraph.

11 And then a few lines down:

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

25 519, a few lines down:

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

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

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

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

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

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1 "Regardless of whether this is justified or not  
2 [ie the fact that you can't have representation], the  
3 specific grounds and proper particulars of why they face  
4 potential termination are not even clearly identified in  
5 advance to the SPM in question. Additionally,  
6 information directly relevant to the grounds or at least  
7 what the Post Office is concerned about, in the absence  
8 of properly identified grounds, is not provided to the  
9 SPM either, or at least not in the case of lead  
10 claimants who face such procedures.

11 "Mr Abdulla tried at his interview to explain the  
12 situation regarding TCs and of the lottery. He was  
13 disbelieved. The documents available in the trial show  
14 that whatever else he had done, he was telling the truth  
15 about the existence of these TCs. Neither he nor the  
16 interviewer had this information available to him at the  
17 time."

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

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

25 "There was no explanation for how to identify the

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1 cause of any shortfalls or discrepancies or how to  
2 dispute them.”

3 105 is part of that, but there is no specific piece  
4 that I want to make reference to. But again, in my  
5 submission, this is all irrelevant post-contractual  
6 evidence.

7 Your Lordship made similar findings or comments in  
8 relation to Mrs Stubbs in paragraph 142, where  
9 your Lordship says in the middle of the paragraph:  
10 “The training did include balancing, but did not  
11 include shortfalls, how to get to the root cause of them  
12 or how they should be disputed.”

13 Then looking at Mr Sabir, this is paragraph 193:  
14 “Thereafter, Mr Sabir accepted the appointment and  
15 received training.”

16 Then a long way into that paragraph:  
17 “Mr Sabir’s evidence on this, which I accept,  
18 matches the other evidence from other lead claimants  
19 about in branch training. It is characterised by the  
20 trainers observing rather than training and also by  
21 early departures from the branch itself by the trainers.  
22 I do, however, make these comments without making  
23 findings on anything to do with breach, causation or  
24 loss.”

25 And I will come back to that mantra, if I may.

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1 MR JUSTICE FRASER: Is that at the end of 193? Is that the  
2 part that you have just read?

3 LORD GRABINER: Yes, exactly right. Yes, precisely.

4 And:  
5 “Mrs Stockdale [at 297] was accepted as an SPM and  
6 had some training. She attended the classroom training  
7 with her son. She did not have all the training she was  
8 told she would receive.”

9 And then there is some explanation of that factual  
10 context.

11 So in that paragraph, Mrs Stockdale’s evidence is  
12 summarised about her allegations of deficiencies in the  
13 training process, and the third sentence is at least  
14 a partial acceptance of her evidence on a topic that was  
15 not before the court in that trial.

16 Then for Mr Abdulla, paragraph 246, the second  
17 sentence or third sentence:  
18 “This did not include balancing in any detail, if at  
19 all.”

20 This is in relation to the training he was supposed  
21 to have got.

22 Then in 247, I think this is in relation to  
23 Mr Sabir, the last couple of sentences:  
24 “This included conducting a balance. He was told  
25 that he had to make good any losses and he was not told

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1 how to investigate or resolve discrepancies or apparent  
2 shortfalls. He was simply told to contact the  
3 helpline.”

4 And finally Mrs Dar:  
5 “Mrs Dar considered [on the fourth or fifth line]  
6 the training was inadequate.”

7 MR JUSTICE FRASER: Which paragraph?  
8 LORD GRABINER: Paragraph 346. So that is in about the sort  
9 of third or fourth line:  
10 “Mrs Dar considered the training inadequate.”  
11 And at the end of the paragraph:  
12 “Mrs Guthrie spent some of her time trying to fix  
13 problems with Horizon rather than doing the induction  
14 training that Mrs Dar was expecting.”

15 So here your Lordship was accepting Mrs Dar’s  
16 evidence at face value both as to what she believed  
17 about the quality of the training and as to what  
18 happened, notwithstanding the fact that the training  
19 issue is for a later trial.

20 In paragraph 352, I think we are still with  
21 Mrs Guthrie and Mrs Dar, and at the end of that  
22 paragraph, that is 352:  
23 “Mrs Guthrie did not attend on Mrs Dar’s first  
24 balance day as she was supposed to. Mrs Guthrie also  
25 said she would come back to give further training and

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1 support. In fact she did not, at least not until some  
2 months later on 15 July 2015, when she came back to  
3 carry out an audit.”

4 Paragraph 569, factual matrix point 70:  
5 “On the evidence of six lead claimants, even when  
6 further training was specifically questioned, it was not  
7 provided.”

8 437:  
9 “Nowhere in the training or the interview or  
10 anywhere else is there any recognition of how to deal  
11 with a shortage, discrepancy of disputed TC of any order  
12 of magnitude, still less those of the six lead  
13 claimants.”

14 Then this paragraph expresses, in my submission,  
15 a concluded view on the content and quality of the  
16 training.  
17 955:  
18 “One feature which seemed to be wholly absent from  
19 the training courses run by the Post Office for the lead  
20 claimants was any sort of assessment or test of  
21 competence at the end of the training.”

22 Then further down the paragraph:  
23 “This situation is in no one’s interest. In my  
24 judgment, I would go further and say it is contrary to  
25 business logic. Although there was some in-branch

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1 training, the approach to that did not appear to be  
 2 uniform either. It can be seen [a couple of lines down]  
 3 that inadequate training is not likely to be readily  
 4 discernible to the Post Office."

5 MR JUSTICE FRASER: That rather skips over the introductory  
 6 sentence to 954, though, doesn't it:  
 7 "I have certain non-binding observations on the  
 8 evidence given before me by both sides in terms of  
 9 training."

10 LORD GRABINER: Your Lordship's point is the non-binding  
 11 point.

12 MR JUSTICE FRASER: And that it was evidence from both  
 13 sides.

14 LORD GRABINER: Okay.

15 MR JUSTICE FRASER: But I think, if I understand your  
 16 submissions correctly, I should have resisted the  
 17 temptation to do that.

18 LORD GRABINER: Precisely.

19 MR JUSTICE FRASER: Right. Thank you very much.

20 LORD GRABINER: So the paragraphs that I have been drawing  
 21 to your Lordship's attention in this context reveal, in  
 22 my submission, concluded views and observations on  
 23 matters arising for determination in subsequent trials.  
 24 We have done a separate exercise. Actually, I have done  
 25 this separate exercise, but I hope it is nonetheless

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1 accurate. So these paragraphs appear in the course of  
 2 very extensive recitation by your Lordship and analysis  
 3 of the evidence of each of the lead claimants.

4 So it is interesting. For the record, Mr Bates,  
 5 your Lordship deals with his evidence between  
 6 paragraphs 69 and 124, 55 paragraphs. Mrs Stubbs,  
 7 paragraphs 125 to 172, 47 paragraphs. Mr Sabir,  
 8 paragraphs 173 to 223, 50 paragraphs, Mr Abdulla,  
 9 paragraphs 224 to 274, 50 paragraphs. Mrs Stockdale,  
 10 paragraphs 275 to 328, 53 paragraphs. Mrs Dar,  
 11 paragraphs 329 to 364, 35 paragraphs.

12 The point I want to make is that the individual  
 13 paragraphs I have been drawing to your Lordship's  
 14 attention were not observations by the way. In each  
 15 case, they came out of a very, very detailed scrutiny of  
 16 the witnesses' testimony. And it is obvious that in  
 17 a future case when these points are litigated, breach,  
 18 Horizon and so on, there is at least a real possibility  
 19 that your Lordship will simply not be able to revisit  
 20 your own conclusions with an open mind.

21 The other side will say you could not have done  
 22 a more thorough analysis of the evidence that you  
 23 received from each of these witnesses, and when you were  
 24 expressing concluded views about them, they were what  
 25 they are; concluded views which are now immovable

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1 regardless of the evidence which might subsequently be  
 2 given in one or other of those later trials.

3 So, in my submission, the fair-minded observer of  
 4 this story would perceive that as a real and concerning  
 5 risk.

6 If I can turn away now from the individual seven  
 7 items that I have been addressing. So in addition to  
 8 all the points I have been making, there is a separate  
 9 category of examples of what we call negative findings  
 10 or comments as to Post Office's integrity and behaviour.  
 11 And the passages to which I now refer, taken together  
 12 with the matters that I have already dealt with,  
 13 reinforce our concern that your Lordship's mind is  
 14 closed against Post Office.

15 That concern, we submit, would be shared by  
 16 a reasonable observer possessed of the facts.

17 MR JUSTICE FRASER: I think you mean gives the appearance of  
 18 being closed.

19 LORD GRABINER: Yes.

20 MR JUSTICE FRASER: Because if it were your case that it  
 21 were closed, it would be an application based on actual,  
 22 not apparent, bias.

23 LORD GRABINER: I apologise for having misspoken.

24 MR JUSTICE FRASER: It is a question of my being clear.

25 LORD GRABINER: No, you should be absolutely clear, there is

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1 no such allegation being made.

2 So under the particular headings that we have  
 3 devised, first of all, Post Office's alleged  
 4 mistreatment of Subpostmasters, or indeed mistresses.  
 5 Paragraph 117:

6 "The full subsequent trial of Mr Bates' claim will  
 7 show what if any consideration was given at the  
 8 Post Office internally not only to this shortfall but  
 9 others, if there were others, in the period December  
 10 2000 to March 2002. If the Post Office did in reality  
 11 do what Mr Bates suggested they did, namely bury their  
 12 heads in the hand, press on regardless and press  
 13 numerous SPMs for shortfalls and discrepancies caused by  
 14 the Horizon system, that would be behaviour of an  
 15 extraordinary kind, and given the criminal implications  
 16 for some SPMs may be extraordinarily serious."

17 Then you say at the end of that paragraph:  
 18 "I make no findings either way at this stage of the  
 19 proceedings in this judgment."

20 Here your Lordship specifically does not make any  
 21 finding, but you were prepared to speculate as to the  
 22 possibility of extraordinarily serious misbehaviour on  
 23 the part of Post Office.

24 MR JUSTICE FRASER: Lord Grabiner, that is the claimants'  
 25 case, and you have skipped over the passage that says:

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1 "On the other hand, his shortfall may, upon  
2 investigation ..."  
3 Et cetera, et cetera.  
4 LORD GRABINER: Fine. When you say skipped over, I am just  
5 trying to do this at speed, and I apologise.  
6 MR JUSTICE FRASER: I understand.  
7 LORD GRABINER: And I accept your Lordship's point, but I do  
8 emphasise the point that the expression "extraordinarily  
9 serious behaviour" is a strong expression. It is an  
10 eye-catching expression. And in the context of this  
11 debate, there was no warrant for it and, in my  
12 submission, it is extremely prejudicial and certainly  
13 wasn't necessary for the purposes of the Common Issues.  
14 523, you say:  
15 "For the reasons I have expressed above, I have  
16 considerable misgivings about Post Office's motivation  
17 for the treatment of Mrs Stockdale during this  
18 litigation and for the treatment itself in terms of  
19 refusal to provide obviously relevant documents. The  
20 evidence of Mr Carpenter, far from satisfying these  
21 concerns, actually increases them. The Post Office  
22 appears, at least at times, to conduct itself as though  
23 it is answerable only to itself."  
24 And then missing a couple of lines:  
25 "This would be a worrying position were it to be

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1 adopted by any litigant. The Post Office is an  
2 organisation responsible for providing a public service  
3 which, in my judgment, makes it even worse."  
4 In 724, in the closing sentence:  
5 "It appears to wield that power with a degree of  
6 impunity."  
7 That, of course, is the Post Office.  
8 And 1059, at the end of that paragraph:  
9 "It would be perhaps too cynical for even the most  
10 hardened Post Office watcher to suggest that the  
11 problems with Horizon led to changes to and extension of  
12 the contractual liability of SPMs for losses that were  
13 adopted in the NTC. However, that option can't be  
14 entirely discounted."  
15 In my submission, this is an unnecessary and  
16 speculative and offensive observation about Post Office,  
17 and there was simply no justification for the  
18 incorporation of that passage and it reveals a mindset  
19 impacting upon the future cases.  
20 MR JUSTICE FRASER: Lord Grabiner, that passage at 1059  
21 arises in the following circumstances. The clause that  
22 deals with liability for losses in the SPMC expressly  
23 requires negligence, carelessness or fault on the part  
24 of an SPM. The NTC clause that deals with liability for  
25 losses does not have that limitation, and the

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1 Post Office witness who explained the evolution of one  
2 contract form to the other told me that the intention  
3 was that there would be no difference in scope for  
4 liability. In other words, the NTC, on his evidence,  
5 was intended also to require fault, and the finding that  
6 I made on the clauses themselves is that that plainly  
7 wasn't the case on the actual words, and I rejected his  
8 evidence.

9 In those circumstances, there was no explanation for  
10 the change in extent of liability from the SPMC into the  
11 NTC, and any comments I have made in 1059 have to be  
12 read in the context of the fact that I had rejected  
13 Mr Beal's evidence and what Mr Beal's evidence in fact  
14 was.

15 But do I understand the submission to be effectively  
16 that I should simply have made the findings on the  
17 contractual effect of the two different contract forms  
18 and not dealt with Mr Beal's evidence about them at all.  
19 LORD GRABINER: Absolutely, because what you have actually  
20 done is to lay the ground for a very strong attack on  
21 the basis that the contract amendments were specially  
22 designed in order to make life much tougher for  
23 Subpostmasters in the future, and this would have been  
24 obviously a matter for breach debate or for a more  
25 general view about the conduct of Post Office in the

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1 whole of this litigation.  
2 MR JUSTICE FRASER: I understand.  
3 LORD GRABINER: But to say it at that stage, in my  
4 submission, is unnecessary and prejudicial.  
5 MR JUSTICE FRASER: I understand.  
6 LORD GRABINER: In paragraph 1111, your Lordship says:  
7 "The Post Office describes itself as the nation's  
8 most trusted brand."  
9 You say:  
10 "So far as these claimants and the subject matter of  
11 this group litigation are concerned, this might be  
12 thought to be wholly wishful thinking."  
13 Then at the end of the paragraph:  
14 "The Post Office asserts that its brand is trusted  
15 by the nation. The SPMs who are claimants do not trust  
16 it very far, based on their individual and collective  
17 experience of Horizon."  
18 Well, I mean, your Lordship can imagine what I would  
19 be saying about that, but my submission is that the  
20 passage speaks for itself.  
21 Criticisms under a new rubric, criticisms of  
22 Post Office's behaviour in this litigation,  
23 paragraph 34. Your Lordship describes the evidence that  
24 you received, and at the end of that paragraph,  
25 your Lordship says:

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1 "The Post Office seemed to adopt an extraordinarily  
2 narrow approach to relevance, generally along the lines  
3 that any evidence that is unfavourable to Post Office is  
4 not relevant."

5 Obviously that is a serious criticism of the way  
6 that the Post Office conducted the litigation.

7 Then paragraph 21, you begin with the words:

8 "Nothing in the judgment should be taken as my  
9 expressing any concluded view on the functionality of  
10 Horizon systems."

11 So your Lordship is obviously aware of the concern  
12 that we are now focused upon. And I will not go through  
13 the whole of that paragraph, but towards the end,  
14 your Lordship says:

15 "However, Post Office seemed to want findings on  
16 that only if they were in the Post Office's favour.  
17 This is a peculiarly one-way approach by any litigant."

18 Then I think what I want to do is to show  
19 your Lordship the closing submissions. Could you look  
20 at transcript Day 14/36, lines 17 to 25, which are in  
21 {B9.3/2/682}.

22 MR JUSTICE FRASER: I am afraid it has not come up yet.

23 LORD GRABINER: Day 14, page 36, lines 17 to 25. It is in  
24 the bottom right-hand corner there. So it is line 17.  
25 So the closing submission is:

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1 "On credibility, we have a problem here."

2 Does your Lordship have it? Line 17, page 36, if  
3 you are on the four on a page, right-hand corner.

4 MR JUSTICE FRASER: Yes, I do, sorry.

5 LORD GRABINER: "On credibility we have a problem here  
6 because, of course, someone in my position would like to  
7 rely on the answers of these individuals and how they  
8 accounted, some of which, in my submission, was  
9 dishonest or at least not credible. The trouble with  
10 that submission is that would require your Lordship to  
11 make findings as to that which, given the nature of this  
12 trial, I am not in a position to do, because at least  
13 there has not been full disclosure of the accounting  
14 relationship."

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

23 Then paragraph 28 you say:

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

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1 'challenge to the court' "

2 Then just at the end of that paragraph:

3 "The Post Office may have made these submissions  
4 because, on an objective analysis, it fears objective  
5 scrutiny of its behaviour, or it may have made them for  
6 other reasons."

7 This, with respect, is a common theme in the  
8 judgment. Your Lordship is speculating on all the bad  
9 things Post Office might have done. Even though  
10 your Lordship doesn't reach a concluded view, the  
11 fair-minded observer would still be struck by the  
12 one-sided and, in my submission, prejudicial speculation  
13 contained in that observation.

14 Paragraph 30 at the end, when your Lordship is  
15 summarising another approach adopted by the Post Office,  
16 and you say at the end:

17 "This seemed to me to be an attempt to put the court  
18 in terrorem."

19 And then at paragraph 123, your Lordship can look at  
20 that for context, but the bit I am interested in is  
21 towards the end of the paragraph, the last 15 lines or  
22 so:

23 "The Post Office must have decided to attack him  
24 [that, I think, is Mr Bates] ..."

25 MR JUSTICE FRASER: Where are we? I am sorry.

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1 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:

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

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

20 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,  
 2 which I described as a sustained attack, and terms used  
 3 by the Post Office to describe his evidence included the  
 4 following words: risible, meaningless, nonsensical and  
 5 weak, and the Post Office's case also was that he had  
 6 convinced himself of the truth of his own account  
 7 because he had been campaigning against them for years.  
 8 So in terms of putting the findings at the end of --  
 9 I beg your pardon, not the findings, the criticisms at  
 10 the end of 121 in context, they have to be read with  
 11 123, don't they?  
 12 LORD GRABINER: That is fair enough, and I apologise. That  
 13 is perfectly fair, but my submission nevertheless is  
 14 that what is at the end of 123 does involve some  
 15 conclusions, and revealing your Lordship's thinking.  
 16 But the real point is that regardless of what the  
 17 evidence was or the cross-examination was, this has  
 18 nothing to do with the contract issues, but it has  
 19 everything to do with other matters yet to be tried.  
 20 Of course, the last sentence is particularly  
 21 revealing:  
 22 "If it were otherwise, the Post Office edifice would  
 23 run the risk of collapse."  
 24 So it looks like a fanciful construct. It does  
 25 reveal a view, in my submission.

1 MR JUSTICE FRASER: Understood.  
 2 LORD GRABINER: 295 {B7/29/100}, this is in relation to  
 3 Mrs Stockdale, and her interview. The last few lines:  
 4 "If that replacement took place after April 2016,  
 5 and if it is because of the replacement that this  
 6 recording is not available, then that means that  
 7 Post Office has failed properly to deal with an  
 8 important record directly relevant to the litigation  
 9 during the proceedings themselves."  
 10 So the implication from that is that Post Office has  
 11 failed to preserve evidence or may have destroyed  
 12 evidence, but it is all left up in the air and it is  
 13 a speculative observation.  
 14 In 393 {B7/29/129}, again, if your Lordship would be  
 15 kind enough just to look at that for context.  
 16 MR JUSTICE FRASER: 393.  
 17 LORD GRABINER: The passage that I am going to go is to 394,  
 18 a few lines down, after reference to Mrs Rimmer's team:  
 19 "It may well not have been drafted by Mrs Rimmer at  
 20 all, as some litigants' solicitors are often responsible  
 21 for the content of witness statements. This was not  
 22 pursued in cross-examination, so it is neither necessary  
 23 nor desirable to make any finding about it. I certainly  
 24 don't criticise Mrs Rimmer for it, although if it were  
 25 not written by her, it should not have been in her

1 statement."  
 2 So this is an implied allegation of professional  
 3 impropriety against Post Office's legal advisers. We  
 4 are all familiar with the context, but your Lordship is  
 5 speculating about something which is actually very  
 6 serious and it was entirely inappropriate, in my  
 7 submission, to incorporate that into the judgment.  
 8 Then in 532, you wholly:  
 9 "I wholly reject this evidence by Mr Trotter."  
 10 Then at the end of that paragraph, 532:  
 11 "This next point was not put to him. It appeared as  
 12 though his witness statement had been written by someone  
 13 else and not by Mr Trotter."  
 14 A similar point, 476, 10 or 12 lines down, reference  
 15 to Mr Abdulla:  
 16 "This part of her written evidence [this must be  
 17 Mrs Dar's evidence] sought to give the impression,  
 18 through careful wording of her witness statement, that  
 19 she had covered the same ground in the interview as  
 20 contained in these much later checklists."  
 21 Several lines down on, but towards the end of the  
 22 paragraph --  
 23 MR JUSTICE FRASER: I think it is Mrs Ridge's evidence.  
 24 LORD GRABINER: You may well be right and I apologise, yes,  
 25 that is right, and then just further on, towards the end

1 of the paragraph:  
 2 "This passage of her evidence appears to have been  
 3 written for her, but again the point was not put so  
 4 I make no findings about it."  
 5 This is another example of an implicit allegation of  
 6 what would be professional impropriety. Why speculate  
 7 about it? It is quite unnecessary but very, very  
 8 damaging to the view of the observer looking at this  
 9 bearing in mind the expectation of the future trials.  
 10 483 is the next paragraph. It is again for context.  
 11 If your Lordship could be kind enough to look at the  
 12 paragraph. But at the end of the paragraph:  
 13 "Given by early 2017 this litigation was well under  
 14 way it may be an example of internal suppression of  
 15 material, but I make no specific findings on that as the  
 16 point wasn't raised. I can think of no rational  
 17 explanation for this however."  
 18 This is, in my submission, wholly inappropriate, not  
 19 least the conclusion that apart from the suggested  
 20 impropriety your Lordship could think of no other  
 21 rational explanation for Post Office's behaviour. That  
 22 is a conclusory statement and it is an incredibly  
 23 damaging statement. And it is a highly prejudicial  
 24 statement.  
 25 MR JUSTICE FRASER: This was a Post Office auditor asking



1 for internal documents from the Post Office .  
 2 LORD GRABINER: It doesn't matter, my Lord, because these  
 3 were matters which everybody knows were going to be  
 4 subsequently dealt with.  
 5 Paragraph 560, in subparagraph 5, even the identity  
 6 of both the sender and the recipients of internal emails  
 7 have been redacted from disclosed correspondence.  
 8 MR JUSTICE FRASER: Where are we now?  
 9 LORD GRABINER: Sorry, it is paragraph 560, subparagraph 5.  
 10 Your Lordship may recall this. This is where the  
 11 disclosed correspondence was redacted.  
 12 MR JUSTICE FRASER: Yes.  
 13 LORD GRABINER: Then in later submissions on typographical  
 14 corrections:  
 15 "... maintain this was done for data protection  
 16 reasons. The contents of the emails heavily redacted  
 17 ... the court will not go behind an assertion of  
 18 privilege."  
 19 Your Lordship says:  
 20 "However, given that part of the emails are accepted  
 21 as not being privileged and have not been redacted  
 22 I can't see any sensible basis for maintaining any  
 23 redaction of the identity of the sender and recipients."  
 24 That is a serious criticism of the disclosure  
 25 process adopted by Post Office. It proceeds actually on

1 a false basis. Post Office did not redact those  
 2 documents for the purposes of these proceedings. They  
 3 had been disclosed in these proceedings in exactly the  
 4 same form that they were in when originally provided to  
 5 Mr Bates. The original versions had been redacted for  
 6 data protection reasons.  
 7 MR JUSTICE FRASER: But the contents were redacted as well  
 8 as the senders and the recipients .  
 9 So, Lord Grabiner, if you look at line 5 of 560,  
 10 subparagraph 5 {B7/29/175}, the contents of the emails  
 11 were themselves heavily redacted. So if the sender and  
 12 the recipient's identity were redacted at the time for  
 13 data protection I entirely accepted the correction  
 14 Mr Cavender I think submitted.  
 15 LORD GRABINER: I understand your Lordship's point.  
 16 If we may, we may come back to you.  
 17 MR JUSTICE FRASER: Yes, of course.  
 18 LORD GRABINER: All the redactions I am told were related to  
 19 third party data. All the redactions.  
 20 MR JUSTICE FRASER: Does that, therefore, mean that the  
 21 redactions within the contents of the emails need to be  
 22 reviewed again?  
 23 LORD GRABINER: No. Those redactions within the content are  
 24 there because they reflected data protection redactions  
 25 in the originals .

1 My understanding is that that was explained to  
 2 your Lordship during the trial . But I am not going to  
 3 invite him to deal with it now, but it may be that  
 4 Mr Cavender can deal with it .  
 5 MR JUSTICE FRASER: No. Of course.  
 6 LORD GRABINER: Then in 561 your Lordship says:  
 7 "These are examples in my judgment of a culture of  
 8 excessive secrecy at the Post Office about the whole  
 9 subject matter of this litigation . They are directly  
 10 contrary to how the Post Office should be conducting  
 11 itself . I do not consider that there can be a sensible  
 12 or rational explanation for any of them."  
 13 The criticism I would make speaks for itself .  
 14 Then turning to another heading: "Criticism of  
 15 Post Office witnesses". 375:  
 16 "Mr Beal's way of giving evidence was very much the  
 17 house Post Office style, certainly for the more senior  
 18 of its management personnel who gave evidence. This was  
 19 to glide away from pertinent questions or questions to  
 20 which the witness realised a frank answer would not be  
 21 helpful to Post Office's cause."  
 22 Then just below that:  
 23 "He sought to give me evidence highly favourable to  
 24 Post Office which I consider was slanted more towards  
 25 public relations consumption rather than factual

1 accuracy."  
 2 Then in 400, the sentence:  
 3 "That is simply not correct. I do not accept that  
 4 Mr Breeden could believe it was."  
 5 In 425 in relation to Mrs Van Den Bogerd your  
 6 Lordship said:  
 7 "This, therefore, must mean that Mrs Van Den Bogerd  
 8 is an extremely poor judge of relevance."  
 9 In 544:  
 10 "I have no reason to think that any of Post Office  
 11 witnesses were doing anything other than stating their  
 12 genuine belief as at 2018 based on their recollection ,  
 13 with two exceptions. The first is some of Mr Beal's  
 14 more extreme claims that the drafting of the NTC was  
 15 designed to replicate a SPM's responsibility for losses  
 16 under the SPMC. It was also intended by Post Office  
 17 that the contract with NFSP would be made public.  
 18 Neither of those claims bear analysis when compared with  
 19 the detailed drafting of each of those documents, both  
 20 of which have been carefully drafted, no doubt with the  
 21 assistance of sophisticated legal advisers.  
 22 "The second is Mrs Van Den Bogerd. She tried to  
 23 give the impression that the detailed cross-examination  
 24 about Mr Abdulla was something she couldn't really deal  
 25 with because she had no detailed knowledge in the

1 witness-box. That is simply not correct. She had  
2 signed a very detailed witness statement just a few days  
3 before for the Horizon Issues trial which dealt with the  
4 matters being put to her about Mr Abdulla in  
5 considerable detail. I find that she was simply trying  
6 to mislead me."

7 Further on your Lordship described an answer from  
8 her was "simply disingenuous". Then further on in the  
9 emboldened part:

10 "Mrs Van Den Bogerd did not provide any reference in  
11 his witness statement to matters unfavourable to the  
12 Post Office case."

13 So two things are especially striking, in my  
14 submission, about these extracts.

15 First your Lordship makes a very general statement  
16 about Post Office's house-style of giving evidence.  
17 That shows that from now on you are likely to disbelieve  
18 Post Office's evidence because it comes from  
19 Post Office. In my submission that is how it would be  
20 viewed by an objective observer.

21 Secondly, those criticisms of Post Office witnesses  
22 are founded on what they said or did not say about  
23 evidence which was irrelevant. Ie irrelevant for that  
24 trial.

25 Mr Beal is criticised for his understanding of how

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1 the liability provisions in the NTC should be construed.  
2 But his subjective understanding is quite irrelevant to  
3 their proper interpretation or construction. That is  
4 always a matter for the court.

5 He is also criticised for his evidence on the NFSP.  
6 This too was irrelevant. Mrs Van Den Bogerd was  
7 criticised for not giving evidence on Horizon. Her  
8 evidence on Horizon belongs properly to the Horizon  
9 trial.

10 So we say that your Lordship's conclusions as to the  
11 credibility of these witnesses are unfair, not least  
12 because the evidence they were giving was supposed to be  
13 confined to the Common Issues, which is what their  
14 witness statements were directed to.

15 The other point about these conclusions is that they  
16 will inevitably colour your Lordship's view of these  
17 witnesses as and when they come before you in one or  
18 other of the later trials.

19 Then I think with a bit of luck I will get done by  
20 the short adjournment, my Lord.

21 The next topic heading is "Attacks on the NFSP and  
22 Post Office's relationship with NFSP".

23 So there were attacks on Post Office's relationship  
24 with the National Federation of Subpostmasters. It was  
25 not represented in court and had no opportunity to

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1 comment on your Lordship's judgment.

2 So in 368 you say:

3 "It is obvious, in my judgment, that the NFSP is not  
4 remotely independent of Post Office, nor does it appear  
5 to put its members' interests above its own separate  
6 commercial interests."

7 In 369 just for context, 370, the second sentence:

8 "Such matters plainly should not be linked in the  
9 way that NFSP and the Post Office link them in this  
10 instance. I don't consider that NFSP can, in these  
11 circumstances, properly be considered to be independent  
12 or to be acting in the interests of SPMs, given the way  
13 it involved its own commercial interests as a condition  
14 in the way explained in Part F of the judgment."

15 Then if your Lordship would just be kind enough to  
16 look for context at 576 and 577, and then I want just to  
17 pick up on a emboldened passage at the end of 577. This  
18 is in relation to Paula Vennells, the chief executive of  
19 the Post Office. Then at the end of 577 your Lordship  
20 says:

21 "Rather curiously, therefore, the email above  
22 demonstrates that the NFSP was only prepared to agree  
23 what amounted to an increase in its members' potential  
24 compensation if its own future was assured by the  
25 payment of substantial sums to it. I find that this

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1 shows that the NFSP put its own members' interests well  
2 below its own. I also find that NFSP is not fully  
3 independent."

4 So your Lordship has there embarked on a lengthy  
5 discussion of the circumstances in which Post Office  
6 disclosed a copy of its grant agreement with NFSP in  
7 response to a freedom of information request.

8 Your Lordship was especially interested in the fact  
9 that NFSP's website had been altered in the course of  
10 the trial. You will probably remember that. This is in  
11 your Lordship's 589. Then towards the end of 589  
12 your Lordship said:

13 "I was given no evidence by anyone from Post Office  
14 about why this was done and done in terms that suited  
15 the Post Office's case on this point. I find this  
16 behaviour highly suspicious. It also undermines yet  
17 further the claim by Post Office that NFSP is  
18 independent."

19 So here your Lordship seems to be adopting the  
20 conspiracy theory approach to the evidence. That would  
21 be matter of grave concern to the fair-minded observer  
22 aware of the context. And, of course, a party to that  
23 conspiracy apparently was the Post Office, but there was  
24 no detailed evidence on any of this because it simply  
25 wasn't relevant to the Common Issues trial.

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1 Then earlier in these submissions and from time to  
2 time by reference to various paragraphs of the judgment  
3 I drew attention to observations of your Lordship to the  
4 effect that you were specifically going out of your way  
5 to make it clear that you were not making any findings  
6 on Horizon or breach.

7 So if we can go back now to paragraph 517, which  
8 I think is the classic example in the judgment,  
9 your Lordship will be familiar with this paragraph and  
10 I will not re-read it, but 517. It is the "crystal  
11 clarity" paragraph.

12 MR JUSTICE FRASER: Just give me a moment.

13 LORD GRABINER: 517.

14 MR JUSTICE FRASER: Yes, thank you. Yes.

15 LORD GRABINER: Your Lordship will obviously recall what you  
16 said there.

17 That form of words, in my respectful submission,  
18 would appear to the fair-minded observer to be aimed at  
19 pre-empting the substantive criticisms that I have been  
20 making throughout. It is just a mantra which would not  
21 convince the observer that your Lordship had not  
22 prejudged the issues which still fall to be tried by  
23 your Lordship.

24 Unsurprisingly there is some learning on this  
25 subject. The authority is the case of Steadman-Byrne.

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1 Could I invite your Lordship's attention to it.  
2 MR JUSTICE FRASER: Yes. Is this the one where the parties  
3 were called in over the short adjournment, having heard  
4 the claimant's evidence, and the district judge said he  
5 believed them and he made various other comments. There  
6 are about maybe 16 comments in the judgment of  
7 Lord Justice Sedley that set out exactly what he said,  
8 I think.

9 LORD GRABINER: Yes, there was a dispute about what was said  
10 but Lord Justice Sedley thought that that was  
11 irrelevant. It is {B9.5/14/1} I think it should be.

12 MR JUSTICE FRASER: Is it tab 14?

13 LORD GRABINER: It is genuinely 14, yes.

14 MR JUSTICE FRASER: That is the practice note. I have  
15 actually been looking at it in the judgment itself. But  
16 the judgment is in the practice note so ...

17 LORD GRABINER: Yes, it is. Yes, it is, you are quite  
18 right.

19 MR JUSTICE FRASER: So I think paragraph 4 sets out what the  
20 district judge said to them over lunch.

21 LORD GRABINER: There was a dispute about what was said but  
22 Lord Justice Sedley didn't think that was terribly  
23 important.

24 If we go to paragraph 5:

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

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1 what he said, went well beyond giving counsel an initial  
2 indication of his thinking and expressed firm views  
3 adverse to a defendant whose evidence he had not yet  
4 heard. When, therefore, in his judgment the next day he  
5 found against the defendant, a reasonable observer,  
6 knowing what we have recounted, would infer that he  
7 might well have done so because of a prior prejudice in  
8 favour of the claimants and against the defendant."

9 I cite that merely to make it clear beyond argument  
10 that it was a case of apparent bias and not actual bias,  
11 because the learned Lord Justice is using the formula  
12 applicable to the apparent bias cases. Then at  
13 paragraph 12 Lord Justice Sedley says:

14 "The claimants rely strongly on the remark recorded  
15 by their counsel but not recalled by the defendant's  
16 counsel; namely that the judge wanted to give both  
17 counsel an indication of his thoughts. We are entirely  
18 content to accept that whether the district judge said  
19 it or not it is what he was seeking to do. The question  
20 remains whether the thoughts he communicated were  
21 nevertheless such as to suggest to a reasonable observer  
22 that his mind was all but closed against the defendant."

23 Then in paragraph 16 the learned Lord Justice says:

24 "Both the common law and the convention for the  
25 protection of human rights and the fundamental freedoms

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1 recognise the fundamentality of every litigant's right  
2 to a Tribunal free both of bias and of the objective  
3 appearance of bias. The appearance of bias includes  
4 a clear indication of a prematurely closed mind. In our  
5 respectful view the district judge, albeit acting out of  
6 the best of motives, gave the parties an inescapable  
7 impression that he had formed a view not only favourable  
8 to the claimants, but that the defendants were not going  
9 to be believed if he contradicted them."

10 Now the reasonable observer would certainly not be  
11 convinced by the formulation of words which are belied  
12 by the substance of the judgment, because in every case  
13 you can't just point to the words. What will matter is  
14 the impression gained by the observer of the substance  
15 of the language used by the judge in the case; in this  
16 case your Lordship.

17 What Amjad shows, in my submission, is that the  
18 court will and can look through the mantra and be  
19 prepared rigorously to test the reality.

20 The real question is whether in the eyes of the  
21 reasonable observer that is a real possibility that  
22 your Lordship has prejudged matters which are still due  
23 to be tried by you. That is the key question.

24 As your Lordship knows, I am sure, from the Locabail  
25 case -- that is the only other case that I want to make

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1 reference to --that the benefit of any real doubt should  
2 be resolved in favour of recusal.

3 Perhaps we can just look at that. This is  
4 Lord Justice Bingham's judgment {B9.5/7/480} at the foot  
5 of the page between G and H.

6 Lord Justice Bingham says, do you see that, between  
7 G and H:

8 "In most cases we think the answer, one way or the  
9 other, will be obvious, but if in any case there is real  
10 ground for doubt that doubt should be resolved in favour  
11 of recusal."

12 Your Lordship's use of what I have called, I hope  
13 not disrespectfully, the mantra, demonstrates your  
14 understanding that you should not have made findings for  
15 example about Horizon or breaches of contract or  
16 breaches of duty.

17 Our case is that your Lordship nevertheless went  
18 ahead and made those findings. Many of your conclusions  
19 and observations are strongly expressed.

20 So in a nutshell my submission is that in the eyes  
21 of the fair-minded observer this is a very plain case  
22 where there is a risk of an appearance of bias infecting  
23 the current Horizon trial and the future trials between  
24 these parties.

25 For that reason I respectfully invite your Lordship

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1 to recuse yourself from these proceedings and also  
2 either to stay or adjourn the Horizon trial.

3 My Lord, those are my submissions. I am sorry they  
4 were undertaken at great speed, but they are my  
5 submissions.

6 If there is anything you would like to ask me about  
7 I am very happy to try and help you.

8 MR JUSTICE FRASER: I just had a couple of questions.

9 LORD GRABINER: My Lord, yes.

10 MR JUSTICE FRASER: So far as relief on the application,  
11 I think the application itself said adjourn the Horizon  
12 trial, which obviously is underway at the moment, and  
13 today you have said adjourn or stay.

14 LORD GRABINER: My Lord, yes.

15 MR JUSTICE FRASER: Can I just be clear what in fact is  
16 meant by either or each of those terms.

17 The evidence of fact is almost finished. If I were  
18 to recuse myself from being the managing judge of the  
19 group litigation that would obviously include recusing  
20 myself from any further involvement in the Horizon  
21 Issues trial.

22 LORD GRABINER: My Lord, yes.

23 MR JUSTICE FRASER: That would then have to start again in  
24 front of another judge. Is that correct?

25 LORD GRABINER: Yes, is the answer. How long has this trial

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1 been going on for?

2 MR JUSTICE FRASER: Two weeks.

3 LORD GRABINER: Would your Lordship bear with me for  
4 a moment.

5 MR JUSTICE FRASER: Yes. (Pause)

6 LORD GRABINER: Yes, I think that would be the consequence.  
7 Yes.

8 MR JUSTICE FRASER: It is really abandon or stop the Horizon  
9 trial.

10 LORD GRABINER: Yes.

11 MR JUSTICE FRASER: So it can be reheard from scratch.

12 LORD GRABINER: Precisely.

13 MR JUSTICE FRASER: Yes. Right, thank you very much. That  
14 is the first question.

15 The second question is slightly mundane in terms of  
16 the observations and submissions that you have made  
17 already in respect of Mr Beal, but just to ask  
18 a specific question about Mr Beal with particularity.

19 At page 94 of today's transcript when you were  
20 taking me through the passages in respect of my  
21 observations on the relationship with the NFSP you said  
22 that I had criticised Mr Beal for giving irrelevant  
23 evidence, or I had criticised him in respect of  
24 irrelevant evidence. Do you recall those submissions?

25 LORD GRABINER: Let me just look at my --

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1 MR JUSTICE FRASER: 544 is the paragraph of the judgment  
2 where I deal with an observation on Mr Beal and an  
3 observation on Mrs Van Den Bogerd.

4 LORD GRABINER: What I said was Mr Beal is criticised for  
5 his understanding of how the liability provisions in the  
6 NTC should be construed.

7 MR JUSTICE FRASER: Yes, that is correct, you did say that.

8 If we can just call up on the common screen for the  
9 Common Issues trial, please, {C2/2/6}.

10 That is Mr Beal's witness statement where he gives  
11 evidence about a point which you and I have already  
12 debated a little bit, which was the difference in fault  
13 or no fault liability under each of the two contract  
14 forms.

15 Now on the basis that he had given that evidence in  
16 his witness statement I assume the Post Office's  
17 position is that that was relevant evidence and Mr Green  
18 could cross-examine on it. But if I have misunderstood  
19 that would you tell me.

20 LORD GRABINER: My response to that is first of all it  
21 obviously was in the witness statement but it was  
22 irrelevant to the matters in the trial.

23 MR JUSTICE FRASER: Understood.

24 LORD GRABINER: And whatever came out of the  
25 cross-examination was similarly irrelevant.

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1 MR JUSTICE FRASER: Yes.  
 2 LORD GRABINER: It goes back to a point that I sought to  
 3 make at the beginning of these submissions, which is the  
 4 fact that irrelevant material was incorporated into any  
 5 of the witness statements and/or was cross-examined is  
 6 supremely irrelevant because it doesn't thereby enlarge  
 7 the Common Issues that were the subject of the trial .  
 8 MR JUSTICE FRASER: I understand. That is very helpful,  
 9 thank you.  
 10 Then the final point -- and it may be that you are  
 11 not able to give me an answer immediately, in which case  
 12 you can just give me the brief answer at the beginning  
 13 of your reply -- am I entitled or not, would  
 14 a fair-minded hypothetical observer take account of the  
 15 result in the Common Issues judgment in terms of how  
 16 many issues were resolved in the Post Office's favour  
 17 and how many were resolved in the claimants' favour or  
 18 not?  
 19 LORD GRABINER: Absolutely not.  
 20 MR JUSTICE FRASER: Wouldn't take note. Thank you very  
 21 much. That is very helpful .  
 22 LORD GRABINER: Absolutely not. It would be irrelevant .  
 23 The only matters that are relevant is whether it can  
 24 fairly be said that there are passages in the judgment  
 25 which give rise to the concern I have been describing.

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1 MR JUSTICE FRASER: Thank you very much.  
 2 LORD GRABINER: The fact that at the end of the day the  
 3 weight of the findings was in favour of one side or the  
 4 other would, in my submission, be irrelevant .  
 5 MR JUSTICE FRASER: Thank you very much indeed. That is  
 6 almost perfectly timed on your part, if I may say so,  
 7 and we will come back at 5 past 2 and I will hear from  
 8 Mr Green.  
 9 (1.00 pm  
 10 (The short adjournment)  
 11 (2.05 pm)  
 12 Submissions by MR GREEN  
 13 MR JUSTICE FRASER: Mr Green.  
 14 MR GREEN: May it please your Lordship. The claimants'  
 15 submission is that this is an application without merit  
 16 and without foundation. There are effectively three  
 17 strands to that submission.  
 18 The first is that it wholly ignores the proper role  
 19 of context. The second is that it appears to proceed on  
 20 a misapprehension as to the correct approach to  
 21 analysing apparent bias. The third is that it proceeds  
 22 specifically on a misapprehension as to the proper  
 23 judicial assessment of the proceedings as they actually  
 24 were before your Lordship during the Common Issues  
 25 trial .

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1 There is a preliminary point to make about the  
 2 informed observer test . The informed observer is  
 3 someone who is presumed to actually have been at the  
 4 trial and know what happened, not commenting on it from  
 5 afar and not island-hopping between different findings  
 6 and observations to make assertions about those without  
 7 having regard to the judgment as a whole.  
 8 Taking the points in stages --  
 9 MR JUSTICE FRASER: Is that right, though? Is it not  
 10 sufficient for the reasonable well-informed observer  
 11 just to read judgment number 3?  
 12 MR GREEN: My Lord, no, the law is clear that the  
 13 reasonably -- well, the informed observer test is (a) an  
 14 objective one and (b) an informed one. So the informed  
 15 observer knows about the trial as it was presented to  
 16 your Lordship.  
 17 In one case, there is even a point about knowing  
 18 things that perhaps even weren't in the public domain  
 19 about the trial . So "informed" I would underline in  
 20 relation to the approach of the informed observer test .  
 21 A couple of short points in relation to context, and  
 22 those points are these, and I think your Lordship will  
 23 have apprehended what these submissions would be anyway.  
 24 The first point is that specific findings or  
 25 observations in a judgment should not be taken out of

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1 their immediate context. That is, either lines which  
 2 are within the same paragraph but have been omitted from  
 3 mention, which either directly contraindicate what is  
 4 being said of the other lines that are mentioned or put  
 5 those lines into a context which is explanatory, or  
 6 adjacent paragraphs which give the overall context  
 7 within which the particular paragraph falls . I refer to  
 8 that as the immediate context.  
 9 The second point of context is that those passages  
 10 should not be considered without regard to the judgment  
 11 as a whole and read as a whole, including  
 12 your Lordship's findings in favour of some of  
 13 Post Office's witnesses, for example, and having due  
 14 regard to the presence or absence of a careful and  
 15 meticulous approach to analysing with precision what  
 16 evidence was and was not given, how it was challenged  
 17 and what submissions were made about it.  
 18 The third matter of context is to look at the  
 19 proceedings themselves and the issues that your Lordship  
 20 had directed to be tried and how the parties had in fact  
 21 presented their cases before the court.  
 22 The fourth matter of background, but important  
 23 context, is the fact that this is group litigation where  
 24 frequently the managing judges are put in a position  
 25 where parts of trials have to be separated off, as

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1 sensibly as they can be, never perfectly hermetically  
2 sealed from other aspects, and tried and tried fairly  
3 and sensibly.

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

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

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

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

25 The Common Issues were agreed between the parties

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

6 Your Lordship will know that, for example, some of  
7 the more famous paragraphs in the generic defence, like  
8 93 and 94 about the approach to construction and where  
9 the burden of proof should lie, were identified in that  
10 Common Issues document.

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

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

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

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

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

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

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

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

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

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

11 MR JUSTICE FRASER: I don't think on an application such as  
12 this, given its subject matter, it is necessary to go  
13 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.

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

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1 MR GREEN: Indeed.  
 2 MR JUSTICE FRASER: Where do you want me to go?  
 3 MR GREEN: Maybe the most convenient place to look, my Lord,  
 4 is in judgment number 2, in the admissibility judgment,  
 5 which I think your Lordship may have in a separate hard  
 6 copy folder. {B7/27/1} on Opus.  
 7 If we look at paragraph 40 {B7/27/14} of that, this  
 8 is your Lordship's judgment on the admissibility  
 9 application, and so this highlighted the relevance of  
 10 these paragraphs, if it was ever in doubt, which I will  
 11 submit it wasn't to Post Office:  
 12 "This paragraph is pleaded to by the defendant in  
 13 paragraphs 93 and 94 of the generic defence. These  
 14 state as quoted below."  
 15 Another relevant passages precedes these in  
 16 paragraph 76. 76 sets out some subparagraphs and in  
 17 particular, if we look at (4) onwards:  
 18 "Post Office was unable to monitor at first hand the  
 19 transactions undertaken in branches on ..."  
 20 MR JUSTICE FRASER: Pause for a moment. I think we need to  
 21 go on to page 15.  
 22 MR GREEN: It is on the next page, if we can. {B7/27/15}  
 23 MR JUSTICE FRASER: Yes.  
 24 MR GREEN: There we go:  
 25 "Post Office was unable to monitor at first hand the

1 transactions undertaken in branches on its behalf, in  
 2 relation to which it was liable to Post Office clients.  
 3 These transactions and the manner in which they were  
 4 carried out were the responsibility of the relevant  
 5 Subpostmasters."  
 6 Then the same point about custody of property, and  
 7 then (6):  
 8 "Post Office relies on the accurate reporting by  
 9 Subpostmasters of accounts, transactions and the cash  
 10 and stock held at the branch."  
 11 And then at 93, paragraph 93, which is just below:  
 12 "Post Office notes the claimants' case set out in  
 13 paragraph 55 applies only to section 12, clause 12  
 14 [which is the burden of proof point]. More generally,  
 15 as regards shortfalls disclosed in a Subpostmaster's  
 16 accounts, the Post Office notes the following  
 17 principles, each of which applies to Subpostmasters."  
 18 And then the subparagraph (1):  
 19 "Where a Subpostmaster asserts that he or she is not  
 20 responsible or liable for a shortfall, the legal and/or  
 21 evidential burden of proof is on him or her to establish  
 22 the factual basis for such assertion in that:  
 23 "(a) In the absence of evidence from a Subpostmaster  
 24 to suggest that a shortfall arose from losses for which  
 25 he or she was responsible, it is appropriate to infer

1 and/or presume that the shortfall arose from losses for  
 2 which he or she was responsible. Such an inference  
 3 and/or presumption is appropriate because (1) branches  
 4 are under the management of Subpostmasters or their  
 5 assistants, (2) losses do not arise in the ordinary  
 6 course of things without fault or error on the part of  
 7 Subpostmasters or their Assistants and (3) it would not  
 8 be right to infer or presume that a shortfall or loss  
 9 was caused instead by a bug or error in Horizon."  
 10 Then it goes on:  
 11 "Subpostmasters bear the legal burden of proof that  
 12 a shortfall did not result from the losses for which  
 13 they were responsible. This is because (1) the truth of  
 14 the matter lies peculiarly within the knowledge of  
 15 Subpostmasters as the persons with responsibility for  
 16 branch operations and the conduct of transactions in  
 17 branches, (2) it would be unjust for Post Office to be  
 18 required to prove allegations relating to matters that  
 19 fall peculiarly within the knowledge of Subpostmasters,  
 20 and/or (3) where a person is subject to fiduciary  
 21 obligations as regards his or her dealing with assets  
 22 the burden is on that person ..."  
 23 And so forth.  
 24 So if your Lordship looks at the foot of that page,  
 25 94 as to section 12, clause 12 of the SPMC:

1 "That should construed in accordance with the  
 2 principles set out in paragraph 93 above."  
 3 So that is all from the generic defence, not recited  
 4 there, but from paragraph 85 of the generic defence,  
 5 which is -- page 39 of the generic defence is:  
 6 "The written Subpostmasters' contracts are to be  
 7 construed as a whole and in light of the relevant  
 8 factual matrix pleaded in paragraph 76 above."  
 9 Which is the paragraph to which I have already  
 10 referred the court.  
 11 So the starting point was that your Lordship had  
 12 regard to the positive case being advanced by the  
 13 Post Office when considering the relevance of the  
 14 evidence that was sought to be struck out by the  
 15 Post Office.  
 16 That is essential context, and I note my noble and  
 17 my learned friend Lord Grabiner did not actually I refer  
 18 to the basis upon which the Post Office itself invited  
 19 this court to construe the contracts at all in his  
 20 submissions.  
 21 We respectfully say that is an impermissible  
 22 omission because it seeks to advance a criticism of the  
 23 judgment which is unfounded when you go back to look at  
 24 the case that your Lordship was considering as advanced  
 25 by Post Office and the case in support of which the

1 relevant evidence was adduced by Post Office through its  
2 witness statements.

3 Now, the evidence of Mrs Van Den Bogerd was  
4 considered in some detail and your Lordship made  
5 findings in relation to her evidence. And the reading  
6 note which Post Office submitted to the court explaining  
7 the relevance of different aspects of their evidence --

8 MR JUSTICE FRASER: Bear with me one moment, Mr Green, just  
9 one moment. (Pause)

10 Yes, sorry. I mislaid a file. Reading note.

11 MR GREEN: The reading note is at {C2/0/1} on Opus.

12 MR JUSTICE FRASER: I think I mentioned the reading note in  
13 the judgment.

14 MR GREEN: Indeed.

15 MR JUSTICE FRASER: Do you have a reference for where I did  
16 that?

17 MR GREEN: I don't, my Lord, but I can find one. And the  
18 reading note identified, if we go over the page  
19 {C2/0/2}, there is Mrs Van Den Bogerd's evidence.

20 MR JUSTICE FRASER: Paragraph 365, I described it as  
21 a helpful reading note, I think.

22 MR GREEN: Indeed, and your Lordship will see at page 2 of  
23 that reading note under "Subpostmasters and their  
24 branches" there are, for example, Horizon, training and  
25 support, causes of shortfalls, see also Helen Dickinson,

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1 Post Office's reliance on Subpostmasters and  
2 responsibility for shortfalls.

3 MR JUSTICE FRASER: Yes.

4 MR GREEN: Then Helen Dickinson we can see at the bottom  
5 gives evidence about fraud in branches and concealing  
6 shortfalls and so forth.

7 What is striking in Mrs Van Den Bogerd's statement  
8 was the extent to which she covered matters which did in  
9 fact or purport to support the case that Post Office --  
10 Post Office's pleaded case in those pleaded paragraphs  
11 to which I have just referred. If we look at {C2/1/1}  
12 --

13 MR JUSTICE FRASER: That is her witness statement.

14 MR GREEN: That is her witness statement. And at the foot  
15 of that, there is an index, but just above that, she  
16 says:

17 "I also provide some commentary on what the  
18 real-world effects of the Claimants' alleged  
19 interpretation of the Subpostmasters contracts."

20 I think it should say "are" or "would be" and  
21 I think that is suggesting relevance because it may  
22 assist the court to test the commercial sense of  
23 different constructions contended for.

24 But it is clearly, as we can see in a moment,  
25 designed to show that the Subpostmasters' contention,

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1 the claimants' contention, was unworkable. I am not  
2 going to take your Lordship through the statement.

3 MR JUSTICE FRASER: I don't think, on the basis of how  
4 Lord Grabiner puts the application, you need to or ought  
5 to, because it is put fairly squarely on the contents of  
6 judgment number 3.

7 MR GREEN: My Lord, indeed. The only problem is that I was  
8 going to briefly identify a couple of points, if I may,  
9 and then explain why I say it is relevant to how the  
10 application is put.

11 Just by way of a couple of points, page 23 of that  
12 document at paragraph 78 {C2/1/23}, does your Lordship  
13 have the bottom three lines from the middle:

14 "This means that the Subpostmaster has complete  
15 control over the branch accounts and transactions only  
16 enter the branch accounts with the Subpostmaster's (or  
17 his assistant's) knowledge."

18 And that rather teases out the point that  
19 your Lordship asked my learned friend about in relation  
20 to transaction corrections entering the accounts and how  
21 the branch trading statement would come about.

22 On page 37 at page 135 at the end of that paragraph  
23 {C2/1/37}, it says:

24 "It would be unlikely that a Subpostmaster, having  
25 kept his accounts diligently, still had no idea where

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1 a material problem was arising from."

2 MR JUSTICE FRASER: Where have you just read from?

3 MR GREEN: It is the foot of paragraph 135.

4 MR JUSTICE FRASER: Yes.

5 MR GREEN: These are just examples, my Lord, but page 39,  
6 paragraph 145 {C2/1/39}, says:

7 "In any event, for the reasons set out above, the  
8 Subpostmaster is best placed to investigate shortfalls  
9 and Post Office generally cannot find the root cause of  
10 a shortfall without the Subpostmaster's cooperation.  
11 A reversal of the burden for determining the root cause  
12 of shortfalls would also create the perverse situation  
13 whereby the greater the scale and sophistication of the  
14 false accounting by a Subpostmaster, the less likely  
15 Post Office will be able to find the root cause of  
16 a shortfall."

17 Et cetera. And that refers back up to evidence or  
18 argument about the fact in branch, for example 142, no  
19 transaction enters their accounts without their consent.  
20 This includes transaction corrections, which must be  
21 accepted by the Subpostmasters before they form part of  
22 the branch accounts, and causation in 143.

23 Now, it is right -- I am sorry to just to have  
24 pressed on to that, because I wanted to show  
25 your Lordship why I say those passages are relevant, and

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1 they are relevant because the correct approach on an  
2 application such as this is to consider and the informed  
3 observer is taken to know what the issues were and how  
4 they were presented before the court.

5 And it was their positive case pleaded case, which  
6 they repeatedly refused to abandon, notwithstanding  
7 being instructed do it at least two CMCs, as we have  
8 explained in our skeleton argument.

9 MR JUSTICE FRASER: Not invited to abandon by me.

10 MR GREEN: No, by the claimants.

11 MR JUSTICE FRASER: But the fact that they were invited to  
12 abandon it by the other side is neither here nor there.

13 It was their pleaded case.

14 MR GREEN: It was their pleaded case. It might sharpen any  
15 argument on election, having elected to persist with it,  
16 but I take your Lordship's point. It was their pleaded  
17 case, and all this evidence, which is the flip-side of  
18 many of the findings that my learned friend  
19 Lord Grabiner has been referring to, were positively  
20 asserted by Post Office. So they were positively in  
21 issue as to whether or not Post Office was entitled to  
22 take succour from Mrs Van Den Bogerd's evidence in  
23 support of its pleaded case before the court.

24 So we say it is extremely surprising that neither  
25 the application nor the submissions that your Lordship

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

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

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

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

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

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1 persuasion.

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

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

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

22 Now, it is right too to identify that, as  
23 your Lordship will have seen from the conclusion to our  
24 skeleton argument at page 51, which is at {B9.4/2/51} --

25 MR JUSTICE FRASER: Did you say your page 51 of your

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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.

7 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:

12 "Issues 8 and 9 concern the proper approach to  
13 responsibility for losses. They should be considered  
14 against the factual background of how accounting works  
15 in a Post Office branch as described by  
16 Angela Van Den Bogerd at paragraphs 73 to 82 and 126 to  
17 140 ..."

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

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

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

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

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

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

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

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

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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  
7 claimants' evidence.

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

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

19 MR JUSTICE FRASER: It also goes to credit too, though,  
20 doesn't it?

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

23 MR JUSTICE FRASER: Say, for example, Mr Abdulla, if  
24 Mr Abdulla had not been accused of lying and had not  
25 been accused of a criminal offence and had not in fact

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1 been asked at all about his suspension and termination,  
2 then, for example, Mrs Ridge's suspension interview with  
3 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.

10 MR JUSTICE FRASER: Once, for example, he was cross-examined  
11 on the transcript of his suspension interview, then you  
12 became entitled to ask questions. The way that  
13 Lord Grabiner explained it this morning, though, is that  
14 that attack on Mr Abdulla's credit should only have been  
15 considered insofar as it went to pre-contractual --  
16 well, to contractual formation matters and that  
17 I crossed the line by going wider than that and dealing  
18 with the other matters that Mr Cavender had put to  
19 Mr Abdulla. What do you have to say about that?

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

22 MR JUSTICE FRASER: All right.

23 MR GREEN: If a challenge is adduced as to credit, and  
24 I would say a fortiori where someone is accused of  
25 a criminal offence or dishonesty --

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1 MR JUSTICE FRASER: That is why I chose Mr Abdulla as an  
 2 example. There were two lead claimants accused of  
 3 criminal offences, and I think Mrs Stockdale was the  
 4 other one.  
 5 MR GREEN: Yes.  
 6 MR JUSTICE FRASER: All right.  
 7 MR GREEN: There is a powerful argument that ex debito  
 8 justitiae they're entitled to a finding openly in the  
 9 judgment if the court does not agree with what has been  
 10 put openly to them. And even if that is not right, if  
 11 there is no entitlement, it is certainly permissible.  
 12 MR JUSTICE FRASER: I didn't make any findings in respect of  
 13 either of those points.  
 14 MR GREEN: No, my Lord. That is my point, and I am saying  
 15 what your Lordship did fell well below that.  
 16 Your Lordship took a view about credibility in the light  
 17 of the matters that were put and the answers that were  
 18 given.  
 19 And the extraordinary contortions that the  
 20 Post Office found themselves in are reflected at  
 21 paragraphs 80 to 82 in our skeleton argument.  
 22 MR JUSTICE FRASER: Let me have a look.  
 23 MR GREEN: I know that my learned friend Lord Grabiner read  
 24 out the passage in the transcript where I interrupted my  
 25 learned friend Mr Cavender, who was saying: well,

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

1 happens is that the matter is effectively sought to be  
 2 cleared up by the document that we have at {A/18/1}  
 3 because the court was not clear precisely where this  
 4 dividing line was drawn.  
 5 This is the note at A/18/1, and the Post Office's  
 6 position by that stage, after closing, was that:  
 7 "The court should refrain from making any findings  
 8 of fact on matters going to issues outside the scope of  
 9 the Common Issues trial, specifically matters going to  
 10 issues of breach and causation. It follows, for example  
 11 that no findings should be made on whether various  
 12 claimants were guilty of false accounting, nor, by  
 13 parity of reasoning, should findings be made as to how  
 14 Post Office investigated losses or issues associated  
 15 with false accounting.  
 16 "Conversely, findings of fact will need to be made  
 17 on matters going, or arguably going, to the  
 18 Common Issues, in particular, on whether the various  
 19 claimants did or did not receive various contractual  
 20 documents and other documents relevant to the  
 21 Common Issues at or before the time of contracting.  
 22 Those findings will necessarily require the court to  
 23 take a view as to the credibility of the claimant and  
 24 the Post Office witnesses in their evidence on those  
 25 matters.

1 "Post Office's position is that in making those  
 2 findings and in taking that view on credibility, the  
 3 court should:  
 4 "(a) Take account of evidence given by witnesses on  
 5 matters within the scope of the Common Issues trial.  
 6 So, for example, the court's findings on whether  
 7 Mr Bates received a copy ... will presumably take into  
 8 account the evidence he gave on that issue, and on  
 9 associated issues raised in cross-examination, (for  
 10 example, whether he is careful generally or whether he  
 11 had a copy of the SPMC when writing to the  
 12 Post Office ..."  
 13 And so on:  
 14 "(b) Take account of evidence on matters which go to  
 15 the witnesses' credibility, but do not risk trespassing  
 16 on any future trial, because they do not go to issues of  
 17 breach or causation. For example, Mr Abdulla's evidence  
 18 on whether Christine Adams and Christine Stephens were  
 19 the same person can be taken into account in assessing  
 20 his credibility.  
 21 "(c) Not take account of evidence which, while it  
 22 may go to the witness's credibility risks trespassing on  
 23 a future trial or trials. For example, the Court should  
 24 not make any findings on whether Mr Abdulla falsely  
 25 accounted, even though such matters might be relevant to

1 his credibility . Nor (staying with this example) should  
2 the court base any findings on Mr Abdulla's credibility  
3 which are necessary to decide the Common Issues on his  
4 evidence as to the allegations of false accounting made  
5 against him."

6 Pausing there, they then go on to say that:

7 "To facilitate drawing that line as cleanly as  
8 a possible in the circumstances, the Post Office  
9 withdraws the submissions made in the seventh and eighth  
10 sentences of paragraph 592 of its closing submissions."

11 We have reproduced that at page 81 and page 82 of  
12 our skeleton argument {B9.4/2/82}.

13 MR JUSTICE FRASER: Is that the strike through in  
14 paragraph 200?

15 MR GREEN: Exactly, and what it leaves in place is:

16 "The central fact about Mr Abdulla's evidence can't  
17 be avoided. He lied frequently and brazenly."

18 MR JUSTICE FRASER: That specifically wasn't withdrawn.

19 MR GREEN: Precisely, and that is left in play and  
20 specifically not withdrawn.

21 And moreover, if your Lordship looks at the bottom  
22 of that paragraph:

23 "He said that he was given the impression in the  
24 interview held following the revelation of his  
25 wrongdoing that if he paid back the money he would be

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1 reinstated; that was untrue, as the transcript showed.  
2 He claimed to have called the helpline very frequently,  
3 then, when the call logs were put to him, said that in  
4 fact he gave up and stopped calling . And he claimed to  
5 believe this was all a conspiracy to eject him from his  
6 branch."

7 Pausing there, not only was the very carefully  
8 parsed approach to bright line relevance and irrelevance  
9 such as to leave in the allegation that he lied  
10 frequently and brazenly, but it was also specifically to  
11 leave in all these post-contractual matters, including  
12 helpline and all these other things and the impression  
13 in the interview with Mrs Ridge.

14 MR JUSTICE FRASER: That is the suspension interview, isn't  
15 it?

16 MR GREEN: Indeed. All of these later matters were left in  
17 for your Lordship to consider, and your Lordship is now  
18 saying there's an appearance of bias because you did.

19 MR JUSTICE FRASER: I am not, Lord Grabiner is saying.

20 MR GREEN: Lord Grabiner is saying there is an appearance of  
21 bias because your Lordship did what you were asked to,  
22 which is just bizarre. I have certainly never come  
23 across a recusal application of this type, it must be  
24 pretty unique.

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

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1 MR GREEN: It is a trailblazer , if we can put it in those  
2 terms, because it is difficult to find an example of  
3 a recusal -- and I will show your Lordship why I say  
4 this very carefully in a moment -- it is difficult to  
5 find any example in the authorities of a judge carrying  
6 out the judicial assessment that he is required to carry  
7 out and giving judgment and the losing party then  
8 alleging bias against him on a proper foundation.

9 MR JUSTICE FRASER: I think there is -- well, the case in  
10 the bundle which seems closest is possibly Otkritie , but  
11 I don't want to knock you off your course. I assume we  
12 will get to the law at some point.

13 MR GREEN: My Lord let's do it now. Otkritie is at tab 26,  
14 it is {B9.5/25/1}.

15 MR JUSTICE FRASER: But I do remain of the view, Mr Green,  
16 that whether it is unique or not is not relevant.

17 MR GREEN: It is not dispositive , I agree. I am just trying  
18 to identify where we are in the pantheon of types of  
19 apparent bias that have been recognised by the courts  
20 and I respectfully say on a proper analysis nowhere.

21 If we look at Otkritie , the -- can I just make one  
22 final point in relation to those passages I was looking  
23 at?

24 MR JUSTICE FRASER: Yes.

25 MR GREEN: I respectfully say that when a witness is accused

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1 of dishonesty, the court will assess the witness'  
2 honesty in the round in the light of the atmosphere in  
3 court, the witness' demeanour and all the answers and  
4 all the questions that the witness was asked. It is  
5 quite wrong to urge upon the court a contrary approach.

6 For example, a witness who might have had difficulty  
7 answering a question which was directly related to  
8 a Common Issue, but gave answers which suggested he was  
9 compellingly honest on a matter that one would now be  
10 urged to leave out of account, we say is that  
11 a completely wrong approach and not justified , and  
12 I have not found any authority to support it .

13 MR JUSTICE FRASER: However I assess the credit of any of  
14 the witnesses, that is contained on the face of judgment  
15 number 3.

16 MR GREEN: Precisely.

17 MR JUSTICE FRASER: So any amplification or an argument  
18 about it or analysis doesn't much matter, really .

19 MR GREEN: No. No, my Lord. The only point we are  
20 respectfully saying is that the basis of the application  
21 criticising your Lordship's judgment is wrong.

22 MR JUSTICE FRASER: Yes, all right .

23 MR GREEN: There is a second facet to that, which is this .  
24 That what is said is that not only has your Lordship  
25 fallen into the error of considering irrelevant

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1 material, because that is present in all three  
2 categories, but studiously avoided is any suggestion  
3 that such findings would not have been otherwise  
4 available to you.

5 So there is no suggestion that the impugned findings  
6 were without proper foundation in the evidence you did  
7 hear at all. What is said is they are irrelevant and  
8 your Lordship should not have made those findings for  
9 a number of reasons.

10 In the category of -- in the second two categories,  
11 what is said about -- or the third category, perhaps,  
12 the witnesses, my learned friend said this morning at  
13 page 94 of the transcript between lines 14 and 19 that  
14 your Lordship's findings against witnesses would  
15 effectively create apparent bias in relation to  
16 your Lordship entertaining their evidence in future  
17 trials. That is effectively the submission that is  
18 made.

19 My Lord, that is wrong in law, and demonstrably so,  
20 and I will explain why. If we go to paragraph 40 of  
21 Otkritie --

22 MR JUSTICE FRASER: 14.

23 MR GREEN: 40, which is on page 14 {B9.5/25/14}. One can  
24 see in the second line of paragraph 4:

25 "The authorities to which I have referred make it

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1 clear that the mere fact that the judge has made adverse  
2 findings against a defendant (or any party to an action)  
3 does not mean that a fair-minded and informed observer  
4 would think the judge was biased."

5 And your Lordship will have seen our treatment of  
6 the Ablyazov decision in the skeleton, and the point  
7 about the Ablyazov decision was the prior consideration  
8 by the court in that case of matters going directly to  
9 credibility in the context of contempt.

10 MR JUSTICE FRASER: Mr Justice Teare sentenced Mr Ablyazov  
11 to 22 months, I think.

12 MR GREEN: Precisely, and you could not get a more extreme  
13 context for the Ablyazov decision than that. And if  
14 I could take your Lordship to Ablyazov for a moment,  
15 please, which is at {B9.5/21/27}.

16 MR JUSTICE FRASER: Are we going away from Otkritie or are  
17 we coming back?

18 MR GREEN: I was going to come back to that in a minute, if  
19 I may.

20 MR JUSTICE FRASER: Where is Ablyazov?

21 MR GREEN: It is hard copy tab 22.

22 MR JUSTICE FRASER: Okay.

23 MR GREEN: {B9.5/21/27}.

24 MR JUSTICE FRASER: Yes.

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

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1 on page 25 just go back to the discussion on apparent  
2 bias and where it begins.

3 MR JUSTICE FRASER: Page 25.

4 MR GREEN: Page 25 at paragraph 65 {B9.5/21/25}.

5 MR JUSTICE FRASER: Yes.

6 MR GREEN: At the foot of that page, your Lordship will see:

7 "Although the principles of apparent bias are now  
8 well-established and have not been in dispute in this  
9 case, the application of them is wholly fact-sensitive."

10 So the submission I made earlier about context is  
11 underpinned throughout the authorities.

12 MR JUSTICE FRASER: Yes.

13 MR GREEN: At 66, just above 66, there is a qualification to  
14 the normal rule that findings against a party won't be  
15 a ground for a bias in a future trial. It says here:

16 "A case for recusal may always arise, however, where  
17 a judge has previously expressed himself in vituperative  
18 or intemperate terms. That however, has not been  
19 alleged in this case."

20 And just above that your Lordship will see --

21 MR JUSTICE FRASER: It is alleged in the instant  
22 application, though.

23 MR GREEN: Not quite in those words, but critical invective.

24 MR JUSTICE FRASER: It's critical invective. I interpreted  
25 that as meaning nonjudicial language.

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1 MR GREEN: Indeed.

2 And just above, your Lordship will note just below  
3 D:

4 "Fifthly no example of a designated judge being  
5 required to recuse himself or herself has been found."

6 That is in the context of a designated judge in the  
7 Commercial Court, we say a fortiori the case of  
8 a managing judge in group litigation, and that is  
9 relevant context and it goes to that fourth point on  
10 context by way of background that I identified in  
11 opening.

12 At 68 the court is looking at {B9.5.21/27} where  
13 a judge has heard pre-trial evidence and may have come  
14 to conclusions.

15 MR JUSTICE FRASER: Where are we looking now?

16 MR GREEN: On page 27, paragraph 68:

17 "Special considerations may arise in such cases.  
18 Where a judge has had to form and express a view as to  
19 the credibility of a party or an important witness as  
20 a result of such cross-examination, should that require  
21 the recusal of that judge from further involvement in  
22 the litigation, even where he does so, as in this case,  
23 in moderate terms? Committal applications have to be  
24 judged on the criminal standard of proof, so that, where  
25 such an application has resulted in a finding of

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1 contempt of court, the judge has applied a standard of  
 2 proof higher than that of a civil trial .  
 3 "On the other hand, in any event, the findings of  
 4 the judge are part of the res gestae of the proceedings.  
 5 They are, as it were, writings on the wall and would  
 6 need to be considered (subject to appeal of course), for  
 7 any relevance in any subsequent proceedings and at trial  
 8 by the same judge or by any other judge. They may not  
 9 even be appealed or, as in this case, this may be  
 10 appealed and upheld so that in either event, it is not  
 11 possible to say that the judge was in error. In this  
 12 connection, certain findings might give rise to issue  
 13 estoppels, which would not only have to be taken into  
 14 consideration by any judge at trial but would be binding  
 15 on him, as Mr Béar accepts. What then is the difference  
 16 between the judge who bears in mind his own findings and  
 17 observations and another judge who reads what the first  
 18 judge has written, as he must be entitled to do?  
 19 Mr Béar submits that in the case of the first judge who  
 20 has heard and written, the impact of what he has learned  
 21 is more direct, immediate and powerful, and is that the  
 22 critical distinction . However, it seems to me that,  
 23 unless the first judge has shown by some judicial error,  
 24 such as the use of intemperate, let me say unjudicial ,  
 25 language, or some misjudgment, might set up a complaint

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

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

16 But what is said is that, even though the  
 17 paragraphs, the two parts of paragraph 25 in Mr Parsons'  
 18 14th witness statement which deal with the second and  
 19 third categories, specifically say that there is an  
 20 appearance that your Lordship has not acted impartially  
 21 in the past in the Common Issues judgment, it is said  
 22 that that is not going to mean that the Common Issues  
 23 judgment has to be undone on that footing.

24 Now, in reality, I think that is an extremely  
 25 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.

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

10 So it is a difficult position for them to adopt.

11 MR JUSTICE FRASER: Well, the position vis-a-vis judgment  
 12 number 3 and its future life depends on an application  
 13 for permission to appeal being made at some point,  
 14 permission either being granted and an appeal happening  
 15 or permission not being granted either by me or the  
 16 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 Gabor 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 Gabor will correct me at  
 24 the reply stage. This application concerns two parts of  
 25 the litigation, the extant Horizon trial --

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1 MR GREEN: Indeed.  
 2 MR JUSTICE FRASER: -- he has been very clear about that  
 3 indeed, and it is a point that I made myself nearly two  
 4 weeks ago, because although it says adjourn, it really  
 5 means a backstop and restart in front of someone else.  
 6 And the other is my role as managing judge in the group  
 7 litigation . Those are the two heads.  
 8 MR GREEN: My Lord, they are.  
 9 MR JUSTICE FRASER: Whatever concomitant effect there might  
 10 be on judgment number 3 is gloriously off-stage, isn't  
 11 it?  
 12 MR GREEN: My Lord, I'll move on. Shall we leave it  
 13 gloriously off-stage? I think I made the submission to  
 14 your Lordship that in effect there is a collateral  
 15 attack on the Common Issues judgment number 3 because  
 16 what is being said is that your Lordship had regard to  
 17 irrelevant matters and didn't behave impartially in  
 18 drafting that judgment.  
 19 MR JUSTICE FRASER: I am not sure the second of those two  
 20 points is necessarily correct, but let's put it to one  
 21 side because it is not part of this application .  
 22 MR GREEN: I will just press on with the primary submission,  
 23 which is simply this : that the authorities effectively  
 24 sing with one voice at the highest level of authority  
 25 that the litmus test really is whether what the first

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1 judge does he does is part and parcel of his judicial  
 2 assessment of the litigation before him.  
 3 And that is in Aplyazov at paragraph 70, as  
 4 your Lordship will probably know {B9.5/21/27}. What  
 5 Lord Justice Rix says there is :  
 6 "In this connection, it seems to me that the  
 7 critical consideration is that what the first judge does  
 8 he does is part and parcel of his judicial assessment of  
 9 the litigation before him. He is not prejudging by  
 10 reference to extraneous matters or predilections or  
 11 preferences. He is not even bringing to this litigation  
 12 matters from another case [et cetera and so forth]. He  
 13 is judging the matter before him, as he is required by  
 14 his office to do, and if he does so fairly and  
 15 judicially , I do not see that the fair -minded and  
 16 informed observer would consider there was any  
 17 possibility of bias."  
 18 And, my Lord, I only mention in passing that in the  
 19 next tab in the bundle we have got O'Neill , number 2,  
 20 And at page 23 of that {B9.5/22/23}, paragraph 51, that  
 21 passage, although in the context of a criminal case that  
 22 the Supreme Court was dealing with there, that passage  
 23 is cited with approval as applicable not just to civil  
 24 cases and criminal cases.  
 25 And that begs the question, my Lord, well, what is

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1 your Lordship duty-bound to do? There is a ready answer  
 2 in the bundle at tab 29, in the Harb case, which is at  
 3 {B9.5/28/1}.  
 4 MR JUSTICE FRASER: Which paragraph?  
 5 MR GREEN: If we look first of all at paragraph 28 on  
 6 page 8.  
 7 MR JUSTICE FRASER: Paragraph?  
 8 MR GREEN: 28 on page {B9/5/28/8} of the report, this is my  
 9 learned friend making submissions in that case, and:  
 10 "Lord Grabiner submits that in the light of  
 11 Mrs Harb's evidence the doubt expressed by the judge was  
 12 fully justified ."  
 13 This is where the judge in the end accepted  
 14 Mrs Harb's evidence in circumstances where the basis for  
 15 doing so was hotly disputed, and I will come in a little  
 16 more detail to why in a moment:  
 17 "But despite that, he had failed to explain what had  
 18 given rise to the doubt or what had enabled him to  
 19 overcome it. Lord Grabiner has identified several  
 20 aspects of both her evidence and that of  
 21 Mrs Mustafa-Hasan which he submits called for careful  
 22 consideration, but which had not been identified or  
 23 discussed in the judgment. In his submission, the judge  
 24 failed to analyse the evidence properly. He had  
 25 accepted the evidence of Mrs Harb and Mrs Mustafa-Hasan

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1 uncritically and as a result had reached conclusions  
 2 which were unsustainable on the totality of the evidence  
 3 before him. It is necessary, therefore, to examine more  
 4 closely the criticisms made of their evidence."  
 5 Now, pausing there, your Lordship will remember  
 6 possibly the most hard-edged submission that my learned  
 7 friend Lord Grabiner made to your Lordship was in  
 8 relation to speculations that evidence that some of the  
 9 Post Office's witnesses were giving was not necessarily  
 10 their own. And a number of passages --  
 11 MR JUSTICE FRASER: That was on the contents of witness  
 12 statements.  
 13 MR GREEN: Precisely, that what was in their witness  
 14 statements was not originally theirs .  
 15 MR JUSTICE FRASER: There was an extensive survey on the  
 16 contents of witness statements in the commercial and  
 17 business and property courts about a year ago which  
 18 received nearly a thousand responses. One of the  
 19 specific questions in it dealt with solicitors providing  
 20 material for a witness statement that wasn't in the  
 21 witness' own words. It was one of the questions.  
 22 MR GREEN: Precisely.  
 23 MR JUSTICE FRASER: And it was circulated every specialist  
 24 Bar Association and the London Litigation Solicitors  
 25 Association and widely advertised in magazines such as

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1 Counsel.  
 2 MR GREEN: I was only going to -- I wasn't going to refer to  
 3 that survey particularly .  
 4 MR JUSTICE FRASER: That is in the public domain.  
 5 MR GREEN: Completely, and it is a point frequently made and  
 6 thought about carefully since witness statements were  
 7 introduced, because when I started and certainly when my  
 8 noble and my learned friend Lord Grabiner started, we  
 9 didn't have them. You rocked up in court, the witness  
 10 stood up and you found out what they said and then you  
 11 cross-examined them without knowing what they were going  
 12 to say.  
 13 MR JUSTICE FRASER: I am not sure "rocking up" is right .  
 14 MR GREEN: I might have put that a bit lightly .  
 15 MR JUSTICE FRASER: You might have rocked up. I am not sure  
 16 that is the correct way of putting it, in all  
 17 seriousness. Evidence-in-chief was given orally .  
 18 MR GREEN: Yes, evidence-in-chief was given orally . What  
 19 I was trying to convey, albeit rather slightly clumsily,  
 20 was you didn't pore over somebody's evidence for weeks  
 21 in advance of arriving at court and listening to what  
 22 they were going to say. So the observations that my  
 23 learned friend took your Lordship to about the contents  
 24 of the Post Office witness statements were directed to  
 25 your Lordship's judicial consideration of whether or not

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1 that evidence was actually properly theirs .  
 2 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},  
 5 it says:  
 6 "Lord Grabiner has identified nine examples of what  
 7 he says was Mrs Harb's evasiveness or lack of  
 8 credibility ."  
 9 And there are various examples. At the foot of  
 10 subparagraph (iii ):  
 11 "When questioned about that, her replies were  
 12 rambling and confused and appeared to portray an  
 13 unwillingness to deal with the question.  
 14 "(iv) When asked by the judge why she had chosen to  
 15 omit that matter or any reference to the present  
 16 proceedings (but little else ), she could provide no  
 17 satisfactory explanation and resorted to little more  
 18 than bluster ."  
 19 And then at (v) over the page {B9.5/28/11},  
 20 your Lordship may think significantly , given the  
 21 submission being made to your Lordship about  
 22 your Lordship's approach:  
 23 "There were occasions when Mrs Harb professed to  
 24 being unable to remember matters set out in her witness  
 25 statement, giving rise to doubt whether the statement

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1 contained her true recollection of events."  
 2 Pausing there, these are all criticisms leveled at  
 3 the court for failing properly to make the necessary  
 4 judicial assessment of the matters before it .  
 5 So we respectfully say not only were your Lordship's  
 6 observations available to you, but the analysis which  
 7 underpinned them was actually necessary on the approach  
 8 urged upon the court by my learned friend in this case.  
 9 At paragraph 34 on {B9.5/28/12}:  
 10 "In our view the judge's approach to the evidence  
 11 was unsatisfactory in a number of significant respects.  
 12 First, he failed to identify in sufficient detail the  
 13 questions that needed to be answered if he were to  
 14 decide whether an agreement of the kind alleged by  
 15 Mrs Harb had been made. In addition, he failed to carry  
 16 out a proper evaluation of all the evidence in order to  
 17 test its strengths and weaknesses. Having referred in  
 18 paragraph 80 to the fact that counsel for the Prince had  
 19 made extensive criticisms of Mrs Harb's evidence on the  
 20 grounds that it was inconsistent with her witness  
 21 statement, he failed to deal with any of those  
 22 criticisms and brushed them aside by saying that it was  
 23 unrealistic to expect Mrs Harb to have a clear  
 24 recollection of events 13 years after the event."  
 25 It goes on to say at the bottom of that paragraph.

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1 "It also fails to deal with the criticisms of the  
 2 quality of her evidence and the way in which she  
 3 responded to questions."  
 4 Now, pausing there, so the criticisms that were made  
 5 were accepted by the court as proper criticisms and that  
 6 the judge had actually erred in failing to carry out the  
 7 necessary evaluation of all of that evidence. So,  
 8 my Lord, that illustrates -- I don't say completely or  
 9 exhaustively -- the nature of the judicial assessment  
 10 which it was your Lordship's duty to undertake of the  
 11 case actually presented before you.  
 12 And that we get both from the underlying  
 13 observations by Lord Justice Rix, but also the  
 14 repetition of that and the approval of it at  
 15 paragraph 51 of O'Neill that I have already shown  
 16 your Lordship.  
 17 So the right approach to this is to look at the  
 18 context, to look carefully at the way in which the  
 19 parties' pleaded cases were put before the court, the  
 20 evidence that the parties sought to adduce in support of  
 21 the factual assertions that they had identified in their  
 22 pleaded cases and the basis upon which the case was  
 23 opened and closed by the parties .  
 24 We respectfully say it is quite wrong for  
 25 your Lordship to be criticised for making findings on

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1 matters which had been put in issue by the parties  
 2 before you unless they could not be relevant to the  
 3 judicial assessment that your Lordship was undertaking.  
 4 We respectfully say there are no findings of that  
 5 sort to be found in the judgment anywhere.  
 6 Is that a convenient moment for a short break,  
 7 my Lord?  
 8 MR JUSTICE FRASER: I think it probably is. How are you  
 9 doing in terms of --  
 10 MR GREEN: I will be done by 4 o'clock, or 5 past 4.  
 11 MR JUSTICE FRASER: I think Lord Grabiner needs time to come  
 12 back on points of law or other matters. We will have  
 13 a five minute break for the shorthand writers. We will  
 14 go from that clock. It will be 3.22, although I know  
 15 that sounds pedantic.  
 16 (3.17 pm)  
 17 (Short break)  
 18 (3.23 pm)  
 19 MR GREEN: My Lord, before we broke a bit earlier on  
 20 I mentioned to your Lordship the right approach to the  
 21 informed observer.  
 22 MR JUSTICE FRASER: Yes.  
 23 MR GREEN: Could I just show your Lordship the Hashim  
 24 authority at tab 6 in the bundle, which we find at  
 25 {B9.5/6/8}, just below A, the paragraph beginning, "The

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1 parties to this appeal were agreed":  
 2 "The parties to this appeal were agreed that the  
 3 test to be applied in a case such as this was that  
 4 stated by the QBD in Topping, namely would a reasonable  
 5 and fair -minded person sitting in court and knowing all  
 6 the relevant facts have a reasonable suspicion that  
 7 a fair trial for the applicant was not possible?"  
 8 This was actually mid-trial, but the dictum is of  
 9 general application:  
 10 "Most, if not all, of the cases in which this test  
 11 has been discussed have been cases of modest dimensions.  
 12 We know of no case approaching the scale of this where  
 13 a charge of apparent bias has been made. That makes it  
 14 the more important to recognise, as we understand to be  
 15 agreed, that the hypothetical observer is not one who  
 16 makes his judgment after a brief visit to the court, but  
 17 one who is familiar with the detailed history of the  
 18 proceedings and the way in which cases of this kind are  
 19 tried."  
 20 So, my Lord, we say it is demonstrably right that  
 21 the informed observer is assumed to know the detail of  
 22 the history of the proceedings and the backdrop and  
 23 context of group litigation and how cases of that type  
 24 are --  
 25 MR JUSTICE FRASER: I think that passage is quoted in

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1 Otkritie .  
 2 MR GREEN: Yes, I think actually it is slightly elaborated  
 3 on, I think, if I remember correctly.  
 4 MR JUSTICE FRASER: Paragraph?  
 5 MR GREEN: It is {B9.5/25/1}.  
 6 MR JUSTICE FRASER: Remind me where it is in the hard  
 7 bundle.  
 8 MR GREEN: Sorry, it is tab 26. If we look at page 8  
 9 {B9.5/25/8} --  
 10 MR JUSTICE FRASER: It is paragraph 18, isn't it?  
 11 MR GREEN: It is, it is paragraph 18. There are the two  
 12 observations by the Master of the Rolls, the first one,  
 13 the one we just looked at, and the second one dealing  
 14 with interlocutory applications, which all go one way,  
 15 which is, I think, not actually directly in point here,  
 16 but gives some background to the role of a managing  
 17 judge.  
 18 Was there an aspect of Otkritie that my Lord wanted  
 19 assistance on from earlier, because I said I would come  
 20 back to it, or at least to hear our submissions?  
 21 MR JUSTICE FRASER: I wouldn't say necessarily assistance  
 22 because it is fairly clear, but at paragraphs 31 and  
 23 32 -- because in that case the judge did recuse himself  
 24 and he was -- it was sent back and he was told he ought  
 25 not to have done.

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1 MR GREEN: Precisely.  
 2 MR JUSTICE FRASER: But it was a relevant feature, wasn't  
 3 it, that he, the judge, in that case at first instance  
 4 felt no personal embarrassment or discomfort in  
 5 continuing?  
 6 MR GREEN: Yes.  
 7 MR JUSTICE FRASER: I thought he said in his judgment he was  
 8 only recusing himself with extreme reluctance and he  
 9 interpreted the two challenges as being actual bias,  
 10 which doesn't apply here.  
 11 MR GREEN: Quite.  
 12 MR JUSTICE FRASER: At 32, I think first instance judges --  
 13 or it is said it is important that they don't recuse  
 14 themselves too readily in long and complex cases.  
 15 MR GREEN: Indeed.  
 16 MR JUSTICE FRASER: I suppose this would count as a long and  
 17 complex case.  
 18 MR GREEN: Indeed, precisely. And there is also a point of  
 19 approach in fact in relation to the suggestion that an  
 20 applicant should be given the benefit of the doubt,  
 21 which is one of the submissions that my learned friend  
 22 made. I think that needs to be thought about quite  
 23 carefully.  
 24 MR JUSTICE FRASER: He does have authority for that.  
 25 MR GREEN: Indeed, my Lord, and I think one needs to

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1 consider quite carefully what is being said, because  
 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 readily 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  
 10 be small, but more than de minimis.

11 MR JUSTICE FRASER: In a litigant?

12 MR GREEN: In a litigant, something like that.

13 MR JUSTICE FRASER: I see, yes.

14 MR GREEN: Once that is established and it is not absolutely  
 15 de minimis, then even though it may not naturally be  
 16 thought to amount to apparent bias, one might give the  
 17 benefit of the doubt to the applicant in that situation.

18 Similarly, if it is established that what a judge  
 19 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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1 earlier authority, stepped outside the boundaries of  
 2 a proper judicial assessment of the proceedings as they  
 3 were before the court, then at that point, one then has  
 4 to look at materiality, and say, well, maybe at that  
 5 point the applicant should be given the benefit of the  
 6 doubt.

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

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

23 So I did want to make that point clear in relation  
 24 to the suggestion of being given the benefit of the  
 25 doubt, my Lord.

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1 Can I show your Lordship just briefly, in relation  
 2 to the approach to the evidence, paragraph 114 of the  
 3 closing submissions, which are at {A/8/48}.

4 MR JUSTICE FRASER: Whose closing submissions?

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

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

15 If we look at 114, we can see:

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

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

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

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1 branch to disguise shortfalls."

2 That is the Post Office's case:

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

10 And so forth.

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

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

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

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

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

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

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

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

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

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

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

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

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

14 The court is required, by completely uncontroversial  
15 cases that are trite, to look carefully at what in fact  
16 happened, to look at the nature and scope of the agency  
17 and the extent to which and how that was operated in  
18 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.

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

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1 MR GREEN: Yes, if your Lordship looks at --

2 MR JUSTICE FRASER: -- in the light of the agency  
3 relationship.

4 MR GREEN: Yes, if your Lordship looks at the Post Office's  
5 opening at opening submissions at page 8, and the  
6 opening submissions are {A/2/8}. I am grateful to  
7 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.

11 MR JUSTICE FRASER: It was just to give me a reference, you  
12 don't have to ...

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

22 Then if we look at their third point at 21:

23 "Third and most importantly, SPMs act as  
24 Post Office's agents when transacting Post Office  
25 business, with all the ordinary obligation and

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1 liabilities that agency entails. Ultimately,  
 2 Post Office cannot and does thought seek to supervise  
 3 and prescribe in detail everything that SPMs do in  
 4 operating the agency business, but the basic fact is  
 5 that SPMs are transacting Post Office business on its  
 6 behalf."

7 Then over the page, crucially {A/2/9):  
 8 "The express and implied terms of the SPMC and the  
 9 NTC need to be viewed through the prism of an expressly  
 10 created agency relationship, and so the express  
 11 contractual terms sit atop the body of the law  
 12 regulating the duties of agents to their principals.  
 13 The common law principles of agency are important  
 14 background to the contracts and any implied terms need  
 15 to be considered (and shown to be necessary) against  
 16 that agency background."

17 And then 22:  
 18 "As such, SPMs are obliged to account to Post Office  
 19 as its agent. They are acting on Post Office's behalf  
 20 and the Post Office relies on them to do so."

21 The final line of paragraph 22:  
 22 "This core fact suffuses the contractual  
 23 relationship."

24 So your Lordship was being invited to consider the  
 25 nature of the agency in the course of construing and

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1 determining what the contractual relationship was, so we  
 2 respectfully say that when you do that in accordance  
 3 with the authorities, identifying the nature and scope  
 4 and effect of the agency, it requires you to look at the  
 5 reality on the ground of who was in fact doing what.

6 And the evidence I showed you from  
 7 Mrs Van Den Bogerd was not correct in that respect.  
 8 Transactions were not -- the transactions that entered  
 9 the Subpostmaster's account were not in their sole  
 10 control. The fact there was no dispute button and that  
 11 they had to settle centrally or accept in the way that  
 12 the court heard evidence about, showed that was not  
 13 a proper starting point for the court to understand how  
 14 the branch trading statement came about and to  
 15 understand the evidence in respect of which  
 16 Angela Van Den Bogerd gave and directed those paragraphs  
 17 of her witness statement.

18 My Lord, there is a background point. Your Lordship  
 19 may remember it from the admissibility hearing, which  
 20 was that there is a suggestion that there was not  
 21 sufficient disclosure in relation to some of these  
 22 issues. Your Lordship may remember it is recorded in  
 23 your Lordship's judgment, in judgment number 2.  
 24 I directed your Lordship's attention to the disclosure  
 25 orders that did address things like helpline, training

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1 and those things.

2 Then the second CMC order, 2 February, 22 February  
 3 and then the third CMC order. So I am not going to take  
 4 your Lordship to those, but it is wrong to proceed on  
 5 a footing that there had not been disclosure given in  
 6 relation to issues like helpline and those sorts of  
 7 things.

8 My Lord, finally, what Post Office, we respectfully  
 9 say, was seeking before the court was a trial at which  
 10 evidence of what happened on the ground, which is  
 11 advanced, if accepted, would be relevant to  
 12 construction, but if rejected and contrary findings  
 13 made, could then be characterised by Post Office as  
 14 relevant to breach and, therefore, your Lordship  
 15 couldn't have regard to them.

16 We say that that was a false dichotomy and an  
 17 approach that your Lordship was entitled to meet by just  
 18 making findings on the challenges as made on the  
 19 evidence before the court.

20 In fact, there is an irony in that Post Office's  
 21 position was effectively to seek a trial that was  
 22 one-sided, when it didn't get it, to then complain on  
 23 the footing of apparent bias about that and then to  
 24 invite the court effectively to consider the recusal  
 25 application as if the trial had been one-sided, which it

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1 plainly wasn't. We respectfully say that is not the  
 2 right approach either.

3 My Lord, as to the NFSP, can I just deal with that.  
 4 Much has been made of the significance of the NFSP.  
 5 MR JUSTICE FRASER: The NFSP are actually mentioned in terms  
 6 within the NTC.

7 MR GREEN: Precisely, they are mentioned in the contract and  
 8 they are mentioned in the opening, and they are  
 9 mentioned in the evidence of two witnesses,  
 10 Mrs Van Den Bogerd and Mr Beal. And we have dealt with  
 11 this in annex 2 at page 93 onwards, which is  
 12 {B9.4/2/93}.

13 MR JUSTICE FRASER: Paragraph 235, I think.

14 MR GREEN: Exactly. We have just traced through there. For  
 15 convenience, the witness statement of Mr Beal at  
 16 paragraph 36, 40 to 41, and emphasising the NFSP's  
 17 independence at 45; the witness statement of  
 18 Mrs Van Den Bogerd at 98:

19 "The NFSP has publicly supported Post Office's view  
 20 that Horizon is robust."

21 And your Lordship will remember that was supposed to  
 22 play in by way of relevant background to the burden of  
 23 proof in an argument that, I think, was not that easy  
 24 for us to follow about the background likelihood of  
 25 Horizon being robust and, therefore, not being the cause

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1 of errors.  
 2 And then 235.3, in respect of litigation ,  
 3 Post Office 's written opening at paragraph 13:  
 4 "Furthermore, it should be noted that the NFSP,  
 5 which is the organisation which represents SPMs and  
 6 their interests nationwide, does not [underlined]  
 7 support this action and does not endorse the factual  
 8 premises of the claims."  
 9 So clearly put in issue. And then we have got the  
 10 relevant email which was disclosed during the trial ,  
 11 with the reference to:  
 12 "Please note a signed agreement with the blood of  
 13 both myself and Paula is necessary on the future of the  
 14 NFSP before any agreement is granted on either NT or  
 15 other points."  
 16 And that is the Post Office 's own document, agreed  
 17 it was only disclosed very, very late indeed, but it was  
 18 disclosed and I was able to put that to the witness in  
 19 any event.  
 20 Also, the challenge -- my learned friend is  
 21 essentially looking back at whether Mr Beal was telling  
 22 the truth about the publication of the grant framework  
 23 agreement in re-examination. And we have got the  
 24 reference to the transcript there at Day 6.  
 25 Then in closing, the assertion about the NFSP not

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1 supporting the action or endorsing the factual premise  
 2 is repeated. It is now pitched a little less high:  
 3 "Whatever the organisation's precise degree of  
 4 independence ..."  
 5 Implicitly recognising the NFSP didn't look as  
 6 independent as they had started with saying it was, but  
 7 notwithstanding that qualification, Post Office still  
 8 relied on the involvement of the NFSP as a relevant  
 9 control mechanism for the purpose of its position on  
 10 implied terms, and that is set out, as your Lordship  
 11 sees, at paragraphs 345 to 346, which we have identified  
 12 there.  
 13 So it is quite wrong for the court to be criticised  
 14 in making a proper judicial assessment on the basis of  
 15 the evidence before the court, particularly in  
 16 circumstances where the disclosure was given to us  
 17 extremely late.  
 18 So in result, my Lord, we respectfully say that this  
 19 is an application which is wrongly premised on  
 20 a misunderstanding of the correct approach, does not pay  
 21 due heed to the context, either within the judgment,  
 22 immediate context of the actual text criticised or the  
 23 judgment as a whole, fails to have regard to how the  
 24 proceedings were in fact conducted and relies on the  
 25 court and the claimants now being told at this stage

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1 that much of the evidence that we were put to the  
 2 trouble of challenging was all irrelevant. We find that  
 3 out now in a trial that happened last year.  
 4 And furthermore, the application proceeds on  
 5 a misunderstanding of the right approach in cases of  
 6 this sort, we say a fortiori where there is a designated  
 7 judge and a fortiori further where it is a managing  
 8 judge in group litigation .  
 9 For all of those reasons, my Lord, we say this is  
 10 misconceived and without merit.  
 11 Are there any points I can assist my Lord with?  
 12 MR JUSTICE FRASER: Yes, there is two questions that I would  
 13 like you to address, please, or two points.  
 14 One is the same as a point I asked Lord Grabiner  
 15 about. The Horizon Issues trial is well underway, and  
 16 there is, I think, half a day of factual evidence left .  
 17 What do you have to say about that? Were I minded to  
 18 recuse myself, what happens to that? Does it start  
 19 again in front of somebody else?  
 20 MR GREEN: I think it might have to start again. The  
 21 parties might be able to seek to agree whether the  
 22 evidence of particular witnesses was to be taken to be  
 23 their evidence.  
 24 MR JUSTICE FRASER: Absent an agreement, which, expressing  
 25 myself neutrally, can't necessarily be assumed in this

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1 trial, all those witnesses would have to be called  
 2 again, wouldn't they?  
 3 MR GREEN: Indeed.  
 4 MR JUSTICE FRASER: And then the draft judgment number 3,  
 5 which is the focus of today, was distributed to the  
 6 parties on 8 March.  
 7 MR GREEN: Yes.  
 8 MR JUSTICE FRASER: I don't think this application was  
 9 issued until the 21st. Have I got those dates correct?  
 10 MR GREEN: Yes.  
 11 MR JUSTICE FRASER: And there are different references in  
 12 your skeleton, and the authorities about waiver and  
 13 delay.  
 14 MR GREEN: Precisely.  
 15 MR JUSTICE FRASER: Is there anything that you want to say  
 16 about that?  
 17 MR GREEN: We say it is extremely unsatisfactory that having  
 18 had the draft judgment for that period of time, this was  
 19 not raised with the court before the Horizon Issues  
 20 trial began.  
 21 We are not in a position necessarily to say that  
 22 amounts to a waiver, I don't think. But, in a sense,  
 23 having had the draft judgment for that period of time,  
 24 it was open to Post Office to tell the court in advance  
 25 of the Horizon trial that it would be making this

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1 application .  
 2 MR JUSTICE FRASER: When was the first you learned of the  
 3 application?  
 4 MR GREEN: My Lord, that day. I was as surprised as  
 5 your Lordship. I think I learnt in court just before  
 6 lunch.  
 7 MR JUSTICE FRASER: Because it was Thursday, the 21st.  
 8 MR GREEN: It was Thursday, and I was cross-examining  
 9 Mr Godeseth, and I think at some point before lunch,  
 10 I was told this had been done. I had not seen it and  
 11 then my clerks printed it for us in chambers so I could  
 12 actually see it. I came with a bundle to court and  
 13 I think your Lordship got it at 5 to 2.  
 14 MR JUSTICE FRASER: I got it at 5 to 2, but then I was  
 15 sitting dealing with the trial, so ...  
 16 MR GREEN: The only observation on that is El Faraghy does  
 17 say that the correct approach is initially to write  
 18 a letter to the court to say, you know, "I think the  
 19 court should consider whether it is right that the court  
 20 continues to sit", and that very notably was not done.  
 21 There was an unheralded application at the end of week  
 22 two.  
 23 I think whether that amounts to a waiver or not is  
 24 probably a question for the court.  
 25 MR JUSTICE FRASER: Yes, all right.

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1 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  
 25 an additional point to make on that, which is that we

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1 faced precisely the same approach from Post Office in  
 2 relation to that application as we did to this.  
 3 MR JUSTICE FRASER: By "that application", you mean?  
 4 MR GREEN: The strike-out application, which is a serious  
 5 application, especially the timing of it when we were  
 6 trying to prepare for trial.  
 7 There were no particulars given of the parts of  
 8 evidence that were said to be objectionable, so I think  
 9 it was 5 September and I think my learned friend  
 10 Mr Warwick attended in order to obtain from the court  
 11 a direction, which the court gave in an order, that they  
 12 provided particulars.  
 13 So we have had the same modus operandi on two fairly  
 14 serious matters, and I leave the matter there, my Lord.  
 15 MR JUSTICE FRASER: All right. Unless there is anything  
 16 that you want to add.  
 17 MR GREEN: My Lord, no.  
 18 MR JUSTICE FRASER: Thank you very much.  
 19 Lord Grabiner, just on that point, so I don't  
 20 disrupt the flow, I assume you don't have any objection  
 21 to me looking at the 9th witness statement of Mr Parsons  
 22 again in due course.  
 23 LORD GRABINER: Certainly not, I am only too pleased if  
 24 your Lordship looks back at whatever you want to look  
 25 at.

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1 MR JUSTICE FRASER: Thank you very much.  
 2 (3.55 pm)  
 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.  
 11 MR JUSTICE FRASER: It is the 8th. It was sent out on  
 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.  
 25 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  
2 forward.

3 We had no control over the commencement of the  
4 Horizon case, obviously, because that was already  
5 predetermined by the arrangements that were then in  
6 place.

7 MR JUSTICE FRASER: I suppose one might observe an  
8 adjournment could have been requested of a week or  
9 something.

10 LORD GRABINER: It may be. I just don't know because  
11 I wasn't involved at that stage. I have only been  
12 involved just for a few days, literally .

13 MR JUSTICE FRASER: Understood.

14 LORD GRABINER: The other point that my learned friend made  
15 right at the end, but if I can deal with it now, is in  
16 relation to the El Faraghy case, which he said: well, it  
17 would have been much more appropriate for us to have  
18 communicated by letter with the court rather than to do  
19 what we did. You will find that case, I think, in  
20 tab 15.

21 MR JUSTICE FRASER: Yes.

22 LORD GRABINER: Your Lordship may remember this one. This  
23 is a postscript of Lord Justice Ward, paragraph 32, the  
24 very last paragraph of the judgment. Does your Lordship  
25 have that?

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1 MR JUSTICE FRASER: Yes, the one that says recusal  
2 applications are much more frequent than they used to  
3 be.

4 LORD GRABINER: Yes, and he says:

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."

9 Pausing there, I would obviously rely upon that:

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

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

17 MR JUSTICE FRASER: Issuing the application or asking me to  
18 hear it?

19 LORD GRABINER: Going first to the court with a letter in  
20 the form that is described there. And the decision was  
21 taken not to adopt that approach simply because  
22 your Lordship is the designated managing judge of the  
23 litigation with an enormous knowledge and understanding  
24 of the whole of the background history, and the idea  
25 that one could have mounted and dealt with today, as we

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1 have dealt with today, in front of a different judge is  
2 a little bit unlikely.

3 So there were all those circumstances to take into  
4 account. It would also have been open to your Lordship,  
5 had you been so minded, actually to refer the matter to  
6 another judge, if you had wished to do so.

7 But for all of those and some of those reasons, the  
8 procedure that we adopted is what we adopted. But so  
9 that your Lordship can be under no misunderstanding as  
10 to how it came about that we are here in the way that we  
11 are here. And I do not accept, if it is being  
12 suggested, that the Lord Justice Ward approach is the  
13 only approach and that is the one that we should have  
14 adopted. I don't accept that, and nor does  
15 Lord Justice Ward say that.

16 So far as my learned friend's submissions are  
17 concerned, apart from those closing observations, what  
18 has happened here is that my learned friend has simply  
19 looked broadly at the judgment and he has taken some of  
20 the big picture questions, and he has sought to show  
21 that those areas have been effectively traversed by  
22 Post Office's evidence and by cross-examination and so  
23 on.

24 Now, in my submission, that approach is wrong for  
25 two reasons. First of all, Post Office made clear

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1 throughout that it did not accept that this material was  
2 relevant to the Common Issues trial. That has been said  
3 more times than I can recall. As everybody in this  
4 court knows, that has been repeatedly stated all the way  
5 through and we have never waived from that position.

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

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

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

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

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

6 But, for example, findings on Post Office's  
7 knowledge of problems with Horizon: paragraphs 541, 543,  
8 1115. Whether the Post Office sent threatening letters :  
9 paragraphs 222, 462, 7231. Or the general findings as  
10 to the inadequacy of the suspension processes:  
11 paragraphs 403, 514, 517. Or the poor quality of the  
12 training: paragraphs 193, 437, and 955.

13 And, of course, the reason my learned friend did not  
14 go to the paragraphs was because he would need to  
15 justify the findings and conclusions to which  
16 your Lordship arrived, and he knows that he can't. And  
17 he knows that he can't because he knows that they go  
18 well beyond the issues, which is why he simply  
19 cherry-picked his way through the argument throughout his  
20 submissions to your Lordship.

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

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

6 MR JUSTICE FRASER: Of all the proceedings.

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

10 Now, next, my learned friend drew attention to  
11 paragraphs 93 and 94 of our generic defence. And the  
12 reason for doing that was because he used it as a basis  
13 for the proposition that thereby my clients had enlarged  
14 the Common Issues. And he did that, as I say, through  
15 reference to those pleadings, but he did not refer  
16 your Lordship to the voluntarily particulars of  
17 26 September 2018, which are in -- I don't need to turn  
18 them up -- {B4/8/1}.

19 MR JUSTICE FRASER: They are also mentioned in judgment  
20 number 2, I think.

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

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

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1 friend at all.

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

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

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

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

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

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

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

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

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1 similar cases that, somehow or other, this is an easy  
2 way in and the judge doesn't have this obligation to  
3 deal with it.

4 MR JUSTICE FRASER: I think I have made it clear that the  
5 fact that this may or may not have been the first time  
6 doesn't make any difference.

7 LORD GRABINER: Of course not. It was just a bad point from  
8 my learned friend, which I am sure he understands, and  
9 it does happen to all of us.

10 The other point he made was by reference to his  
11 paragraph -- 82, it is on page 82 of my learned friend's  
12 skeleton argument. It is the quotation of  
13 paragraph 592, which is taken from our submissions.

14 Does your Lordship have that handy?

15 MR JUSTICE FRASER: I do. Can you just give me the  
16 paragraph number again?

17 LORD GRABINER: Paragraph 592, but on page 82 of my learned  
18 friend's skeleton.

19 MR JUSTICE FRASER: Yes, I do have that.

20 LORD GRABINER: The only point I want to make about it is  
21 that it obviously is referable only to the contract  
22 terms {B9.4/2/82}:

23 "The central fact about Mr Abdulla's evidence cannot  
24 be avoided: he lied frequently and brazenly. He began  
25 by denying that, as his interview records, his previous

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1 experience included tallying up figures. He then  
2 claimed that he read the first and second paragraphs of  
3 a letter [and that of course is the contract provision]  
4 and then what appeared on its second page, but missed  
5 out ..."

6 Et cetera, et cetera. So the point about that  
7 passage is that it is concerned about the contract  
8 provision.

9 MR JUSTICE FRASER: That is, Lord Grabiner, but the first  
10 sentence after the struck through passage says:

11 "He said that he was given the impression in the  
12 interview held following the revelation of his  
13 wrongdoing that if he paid back the money, he would be  
14 reinstated; that was untrue."

15 So that is a point going purely to the truth of the  
16 evidence that he gave about post-contractual matters.

17 LORD GRABINER: Yes.

18 MR JUSTICE FRASER: Then the next two sentences follow.

19 LORD GRABINER: I take your Lordship's point, but again, it  
20 comes back to a point that I sought to make earlier.  
21 And as I have said, it is not an easy issue, but the  
22 fact is that it should have been confined to the  
23 contract issue matters that were in trial 1, and that is  
24 precisely what that post-trial written document was  
25 about that I made reference to a few minutes ago. That

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1 is precisely what it says.

2 MR JUSTICE FRASER: Understood.

3 LORD GRABINER: Then there is the separate matter which  
4 I think engaged some discussion between my learned  
5 friend and your Lordship. It was in relation to the  
6 impropriety involved in relation to the witness  
7 statements. My learned friend is perfectly correct that  
8 there were those wonderful days where one stood up in  
9 court and called the witness and neither the judge nor  
10 probably often the barristers even knew what was going  
11 to come out of the witness' mouth. There was something  
12 called a proof of evidence then, but you spent most of  
13 your time striking it through as the witness failed to  
14 come up to proof. But all that world, regrettably in  
15 some ways, has gone by.

16 That has given rise to the debate which  
17 your Lordship referred to, quite rightly, as to the  
18 usefulness of these documents, first of all because they  
19 are overlong and, secondly, you know, they make  
20 references to loads of documents and are replete with  
21 tonnes of quotes from them. They are hundreds of pages  
22 long in any meaningful commercial trial.

23 At the end of the day, they may not be actually the  
24 evidence of the individual. I completely understand all  
25 of that, but that does not justify the insertion into

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1 this judgment of the suggestion that that is what  
2 happened in this case. I know it is a nice,  
3 controversial subject, but it doesn't justify reaching  
4 a conclusion, expressly or impliedly, that that is what  
5 happened in this case.

6 It is a very serious criticism of professional  
7 people's behaviour, even more so in this case because my  
8 understanding is that the suggestion was never even put  
9 to any witness. In other words, it was never said to  
10 a witness, "That is not your evidence, that has been  
11 concocted for you by your solicitor or, worst still,  
12 your barrister", as the case may be.

13 So, in my submission, it was an entirely  
14 inappropriate passage or couple of passages actually to  
15 be inserted into the judgment.

16 Harb was interesting, only because I was in the  
17 case, but it is very difficult to imagine what relevance  
18 it had to the matters that your Lordship is presented  
19 with here.

20 The key point, in my submission, is that everybody  
21 knew that there were going to be further trials, and  
22 that's why enormous care was necessary for the  
23 production of the first judgment on the basis that it  
24 might well impact upon key facts or key issues which  
25 would inevitably arise in the later case.

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

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

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

25 But to go on and make that explicit conclusion about

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

8 So those are our submissions.

9 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.

14 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.

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1 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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1 members of the public, to be fair and impartial.  
2 Anything less is not worth having."

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

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

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

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

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

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

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1 date and time, but hopefully the first part of next  
 2 week.  
 3 (4.20 pm)  
 4 (The hearing was adjourned until a date to be fixed)  
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