

# OPUS 2

## INTERNATIONAL

Horizons Issues - Alan Bates & Others v Post Office Limited

Day 22

July 2, 2019

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1 Tuesday, 2nd July 2019  
 2 (10.30 am)  
 3 Closing submissions by MR DE GARR ROBINSON  
 4 MR DE GARR ROBINSON: My Lord, good morning. I'm going to  
 5 start by seeking to draw your Lordship's attention to  
 6 some extraordinary features of the claimants' case as it  
 7 has developed before your Lordship during the course of  
 8 this trial.  
 9 First of all, I would like to remind your Lordship  
 10 of some points of which you will be well aware, and if  
 11 I can do it by reference first of all to the Horizon  
 12 Issues which is at {C1/1/1}.  
 13 The first point is that your Lordship ordered  
 14 an expert-led trial and your Lordship will see that from  
 15 the header to the Horizon Issues. The header is taken  
 16 from remarks that your Lordship made at the CMC on  
 17 22nd February, and that's at {C8.4/4/1}. Perhaps we  
 18 could have a look at that.  
 19 Sometimes one does rather miss the old days when one  
 20 had files, my Lord.  
 21 MR JUSTICE FRASER: That's the document. Which page?  
 22 MR DE GARR ROBINSON: It is at page 54. I don't have  
 23 a document.  
 24 MR JUSTICE FRASER: There is one on the common screen.  
 25 MR DE GARR ROBINSON: I'm so sorry. The reason why I said

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1 that rather intemperate, which I now regret, is that  
 2 I see nothing on my screen. I wonder if someone could  
 3 look at that for me?  
 4 MR JUSTICE FRASER: Have you not got a screen now?  
 5 MR DE GARR ROBINSON: It is a black screen, my Lord.  
 6 Perhaps it is not plugged in.  
 7 MR JUSTICE FRASER: Well, that's unsatisfactory for obvious  
 8 reasons. It is not the best start. I think you need  
 9 a screen, but I can easily rise for a minute or two to  
 10 avoid putting pressure on anyone.  
 11 MR DE GARR ROBINSON: I would be very grateful to  
 12 your Lordship. I do apologise.  
 13 MR JUSTICE FRASER: You don't have to apologise. These  
 14 things just happen. Whenever they happen they are  
 15 always at a very inconvenient time, but I suppose at  
 16 least we haven't got into the depths of the day. We may  
 17 as well sort it all out at the beginning. 5 minutes?  
 18 MR DE GARR ROBINSON: 5 minutes.  
 19 (10.36 am)  
 20 (A short break)  
 21 (10.38 am)  
 22 MR DE GARR ROBINSON: My Lord, I'm hoping we can continue at  
 23 approximately this pace for the rest of the day. It  
 24 will be a much more enjoyable day that way.  
 25 We are on the 22nd February hearing and

2

1 your Lordship will be familiar with these words but  
 2 I will, if I may, read them out. You said:  
 3 "It is very unusual in case management to find  
 4 oneself having constantly to try and put either one or  
 5 other party back on track for cost-effective resolution  
 6 of serious disputes. I reminded myself, again by  
 7 reference to the actual transcript, of what I said last  
 8 time, although I had a pretty clear recollection, that  
 9 what I was going to be doing in March was to deal with  
 10 expert issues that were present on the pleadings  
 11 concerning Horizon which I described generically as the  
 12 next big issue. I wanted the parties to agree or each  
 13 propose an isolated number of issues on the pleadings  
 14 related to Horizon that would involve expert evidence  
 15 but not evidence of individual cases."  
 16 {C8.4/4/54}  
 17 My Lord, it was with those words ringing in their  
 18 ears that the parties agreed the Horizon Issues and  
 19 offered them to your Lordship for approval.  
 20 Disclosure was then given, hundreds of thousands of  
 21 documents were disclosed and reviewed by the experts.  
 22 They were disclosure of documents of an expert nature.  
 23 The claimants criticised Post Office on their disclosure  
 24 and Post Office criticises the claimants on their  
 25 disclosure, but for present purposes the important point

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1 is a huge amount of disclosure was given by Post Office ;  
 2 it was directed at informing the expert process and many  
 3 of the documents, I would say most of the documents,  
 4 called for expert review and comment.  
 5 The next important stage of the litigation was vast  
 6 expert reports being served. Mr Coyne's two reports run  
 7 to well over 500 pages without appendices.  
 8 They were many, many, many, hundreds of times  
 9 I would say, more detailed than my learned friend's  
 10 outlined allegation document that was produced in August  
 11 which no one has really referred to, and they took weeks  
 12 properly to assimilate. It is fair to say that the  
 13 Post Office was still trying to assimilate Mr Coyne's  
 14 second report when the trial actually began.  
 15 Your Lordship may appreciate how that felt at the time.  
 16 Now, the experts co-operated to identify the  
 17 principal agreements and disagreements between them, and  
 18 that was, in my submission, a very helpful process that  
 19 was overseen and encouraged by your Lordship and it led  
 20 to four long joint statements which in my submission  
 21 were helpful.  
 22 JS2 is particularly helpful in that it sets out in  
 23 the bug table what the experts say on each side.  
 24 Without that we would be digging through the interstices  
 25 of these interminable reports. It brought a welcome

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1 measure of focus, and given we don't have detailed  
2 pleadings or schedules in relation to specific bugs it  
3 gave the parties an opportunity to decide how to  
4 organise their cross-examination and proceed.

5 Your Lordship will be aware that the parties'  
6 cross-examination was limited. I certainly would have  
7 liked more time given the scale of the reports. But  
8 given the other factual evidence that had been called,  
9 I had four days; my learned friend took three.

10 Now, the Horizon Issues are expert issues and we  
11 have had an expert-led trial as your Lordship ordered.  
12 But anyone who came to court for the first time  
13 yesterday might have formed a very different impression  
14 of what this case was all about.

15 One expects oral closings to be about the oral  
16 evidence to explain how the case has developed since the  
17 openings now that everybody is much the wiser. But in  
18 my learned friend's submissions there was almost no  
19 reference to Mr Coyne's oral evidence or to Mr Roll's  
20 oral evidence and no reference at all to the important  
21 respects in which that oral evidence changed the picture  
22 as compared with Mr Coyne's reports on the one hand and  
23 Mr Roll's witness statements on the other.

24 I don't mention the fact that there were these  
25 changes as a criticism of Mr Coyne but merely as a point

5

1 about the unusual approach that the claimants have  
2 adopted, I would suggest felt constrained to adopt, in  
3 the final days of this expert-led trial. My learned  
4 friend was constrained to make many of his submissions  
5 largely without reference to the conclusions reached by  
6 the expert whom his clients had instructed and largely  
7 without reference to the very substantial common ground  
8 that was between the experts, both as set out in the  
9 joint statements and was achieved during the course of  
10 the cross-examination and, indeed, your Lordship's own  
11 questions.

12 Important parts of my learned friend's submissions  
13 were directly contrary to that evidence and those  
14 agreements. For example, your Lordship will have heard  
15 my learned friend say that Horizon is not robust.  
16 My Lord, that, as your Lordship will be well aware, is  
17 directly contrary to the experts' common views.

18 My learned friend tries to duck that by effectively  
19 suggesting that robustness doesn't really mean anything.  
20 But, again, that's contrary to what the experts say.  
21 And your Lordship will see that from our written closing  
22 at paragraph 361; that's at page 132. I'm not going to  
23 take your Lordship to it now.

24 Mr Green didn't engage with any of that evidence,  
25 nor did he engage with Mr Coyne's oral evidence on the

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1 likely total number of detected bugs over a 20-year  
2 period. Your Lordship will I am sure have well in mind  
3 that he said it was no more than 40 including transient  
4 bugs. So if one takes into account that of the 29 bugs  
5 in the bug table he says only 22 were lasting, then one  
6 assumes, one infers, that his view is that the number of  
7 lasting bugs that are in the system would be around 30  
8 over 20 years.

9 Nor did he engage with Mr Coyne's oral evidence on  
10 the number of instances of remote access that he had  
11 seen over that same period. Your Lordship again will  
12 I hope have in mind that Mr Coyne said he had seen about  
13 30 instances of relevant remote access for the purposes  
14 of these proceedings.

15 Those numbers loomed large in any worthwhile  
16 consideration of the key extent questions raised by the  
17 Horizon Issues. But they weren't addressed by my  
18 learned friend. Instead he gave examples of things. He  
19 told your Lordship little stories and he relied on  
20 snippets from documents. But what he didn't do is he  
21 didn't attempt to draw back and ask the question, after  
22 all the evidence that your Lordship has heard: where do  
23 we end up on the expert evidence that has been given in  
24 this case?

25 In my respectful submission, the inevitable

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1 inference is that the claimants have considered very  
2 carefully where we do end up on the expert evidence and  
3 their considered view is that they would prefer the  
4 court to look elsewhere. They would prefer  
5 your Lordship to take an impressionistic approach, and  
6 by that I mean the kind of approach under which all bugs  
7 that caused doubling up can be considered as one and the  
8 same thing, as my learned friend remarkably appeared to  
9 be suggesting last night.

10 That suggestion was apparently made -- and I may be  
11 being unfair to him, but it was apparently made to  
12 provide some colourable basis on which to call into  
13 question the criminal prosecution. My Lord, that's all  
14 headline-grabbing stuff but it is nothing to do with  
15 Horizon Issues and it is nothing to do with the  
16 expert-led trial that your Lordship ordered and on which  
17 the parties have spent so much time, money and, if I may  
18 say so, sweat.

19 Now, I propose to focus on where we are left after  
20 the trial. Most notably, in terms of Mr Coyne's  
21 evidence on Horizon Issues 1, 3, 4 and 6 and on  
22 Mr Roll's oral evidence as well. And your Lordship will  
23 see that my submissions, I should say our submissions,  
24 the submissions of myself, Mr Henderson, Mr Draper and  
25 Ms Keating are set out quite fully and at length, and

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1 I'm sorry for the length of the submissions we have  
2 submitted to your Lordship.  
3 That brings me to another feature of the case which  
4 I submit is also extraordinary. In their written  
5 submissions, their closing, the claimants say, I think  
6 more than once but they say it triumphantly, that  
7 Mr Roll was right. What they mean is the Mr Roll that  
8 was portrayed in the witness statement that he would  
9 have had drafted for him was right. But, my Lord, in my  
10 submission a very different Mr Roll came through when he  
11 gave oral evidence, and just as the claimants make no  
12 reference to Mr Coyne's oral evidence during the course  
13 of this trial, they similarly seek to distract, if I may  
14 say so, certainly pay no attention to, the oral evidence  
15 that Mr Roll gave.

16 Just to remind ourselves quite how far we have come,  
17 perhaps I could ask your Lordship to have a quick look  
18 just at his first witness statements at {E1/7/1}.  
19 Rather than reading out long chunks perhaps I could ask  
20 your Lordship to read particular paragraphs; first of  
21 all, paragraph 7 {E1/7/2}. Then the last sentence of  
22 paragraph 8. The first sentence of paragraph 10. The  
23 last sentence of paragraph 11. And then, my Lord,  
24 finally paragraph 19 {E1/7/3}.

25 That's a brief selection, but they are what could be

9

1 described as headline-grabbing statements made by  
2 Mr Roll.

3 In my respectful submission, your Lordship will have  
4 heard Mr Roll and will have seen our written closings,  
5 and from our written closings I respectfully submit that  
6 your Lordship should conclude that all of those claims  
7 have effectively gone. For your Lordship's note these  
8 are addressed in pages 38 to 63 of our closing  
9 submissions.

10 Here are some highlights. Mr Roll accepted that his  
11 recollection of 70% of the work he did could be wrong  
12 because one tends to remember non-mundane things more  
13 clearly than mundane things.

14 As regards time pressure on the SSC, that was  
15 a feeling from a long time ago and he said his  
16 recollection was quite hazy and he also said that he had  
17 that feeling not very often. He said that when he said  
18 he spent 70% of his time looking for faults on data  
19 stores he was not looking for software bugs. Remarkably  
20 he accepted that coding errors causing financial impact  
21 on branch accounts in his experience were extremely  
22 rare. He accepted that paragraph 19 was wrong, that he  
23 and other colleagues were not routinely working on  
24 coding issues causing financial discrepancies, and even  
25 more remarkably he couldn't recall ever working on

10

1 a coding issue which caused a financial impact on  
2 a branch.

3 Be that as it may, in relation to bugs causing  
4 branch shortfalls, his evidence has been, if I may say  
5 so, over taken by the KELs and the PEAKs that have been  
6 disclosed in this case and the in-depth analysis that  
7 has been performed by the experts on those documents.

8 Your Lordship will be well aware of Mr Coyne's oral  
9 evidence that he and his team, having read almost all  
10 the KELs and having done innumerable intelligent  
11 searches through all the KELs and all the PEAKs, his  
12 judgment was there are not more than 40 branch-affecting  
13 bugs over 20 years.

14 Similar points can be made about remote access.  
15 Mr Coyne accepted that any work on branch data is  
16 typically recorded in PEAKs, and for your Lordship's  
17 note that's at paragraph 740 of our closing  
18 {Day16/28:1}. Mr Coyne said that there had been no more  
19 than 30 occasions of relevant remote access; that's  
20 paragraph 746 of our closings. And Mr Coyne said that  
21 the chances of remote access adversely affecting branch  
22 accounts was small. My Lord, that's paragraph 748 of  
23 our closings.

24 My Lord, all those points are consistent with  
25 Mr Roll's oral evidence. But you would get no hint of

11

1 that anywhere in the claimants' oral or written  
2 closings. That, in my submission, is a graphic  
3 illustration of how the claimants would like to distract  
4 the court from the oral evidence given by their two most  
5 important witnesses. What they want to do is tell  
6 little stories of individual incidents instead and to  
7 give the court the impression that those individual  
8 incidents are somehow symptomatic or representative of  
9 a wider phenomenon of which there is no evidence  
10 whatsoever.

11 My Lord, they would also like to stop the court from  
12 deciding the most practically useful issue in this  
13 entire issue, the Horizon Issue trial. And that is the  
14 extent of the risk or likelihood of Horizon bugs causing  
15 branch shortfalls for which SPMs are held liable.

16 They do this in a number of ingenious ways. Indeed,  
17 they do it rather beautifully by accusing Post Office of  
18 seeking to rewrite Horizon Issues 1 and 3. Let me deal  
19 with those arguments very briefly.

20 Horizon Issue 1 first of all. They make three  
21 assertions. First of all, the threshold for satisfying  
22 the enquiry required by Horizon Issue 1 is merely that  
23 there should be a potential of causing discrepancies or  
24 shortfalls, the logic of their position being if some  
25 potential is found, however slight, the court stops

12

1 there. And they follow up that submission by saying in  
2 no circumstances, Post Office's attempt to draw  
3 attention to the kind of bug that doesn't have a lasting  
4 impact is an impermissible exercise. They say that  
5 Post Office is introducing a false concept which isn't  
6 written into the Horizon Issue itself.

7 Thirdly, they argue that the discrepancies and  
8 shortfalls referred to in Issue 1 need only relate to  
9 branch accounts, they don't need to be in branch  
10 accounts.

11 As to these three arguments, potential first of all.  
12 My Lord, it is important not to forget the words  
13 "extent" and "likelihood" at the beginning of Issue 1.  
14 I don't know if your Lordship has the issues with you?  
15 To what extent was it possible or likely for bugs of the  
16 nature alleged in the GPOC and referred to in the  
17 generic defence to have the potential to cause apparent  
18 or alleged discrepancies?

19 The essential enquiry is an enquiry as to extent of  
20 likelihood, and I won't invite your Lordship to do it  
21 but if you look at the assertions made in paragraphs 23  
22 and 24 of the generic particulars of claim and the  
23 relevant paragraphs of the generic defence, that is how  
24 the case is put.

25 These are bugs that caused these things.

13

1 "Potential" is just a word that's emphasising that what  
2 the court is doing is assessing extent of likelihood or  
3 risk or potential; it just reinforces the essential  
4 enquiry that the court is required to undertake.

5 Critically, the court is not required to stop if it  
6 identifies some potential. It actually needs to assess  
7 risk or likelihood in a sensible way and, my Lord,  
8 your Lordship will be well aware that I submit that that  
9 sensible way requires a sense of scale or perspective,  
10 another thing that the claimants would rather not talk  
11 about.

12 So, my Lord, that deals with potential. Let's now  
13 deal with the so-called impermissible concept of  
14 lasting. In my submission it is not impermissible, it  
15 is fundamental, otherwise the determination called for  
16 by Issue 1 would be practically pointless. I'm not  
17 saying, and the Post Office doesn't submit, that whether  
18 a transient discrepancy was caused is irrelevant. Of  
19 course not. Issue 1(a) refers to apparent or alleged  
20 discrepancies but it also refers to apparent or alleged  
21 shortfalls. I ask forensically: what's a shortfall?  
22 What is the difference between a discrepancy and the  
23 shortfall and why was it necessary for the Horizon  
24 Issues to distinguish between them?

25 A shortfall is that for which an SPM is held liable.

14

1 A discrepancy doesn't really matter at the end of the  
2 day. I hope no one quotes me out of context. But if  
3 your Lordship understands what I'm submitting to you, if  
4 a discrepancy occurs during the course of a month, if it  
5 doesn't actually result in a shortfall at the end of the  
6 month and the postmaster doesn't therefore have to make  
7 that shortfall good, that is not quite the same -- that  
8 is much less important than the question whether  
9 a liability is impermissibly foisted on a subpostmaster.  
10 That is what Issue 1 was trying to get at.

11 So by all means your Lordship should consider  
12 whether and to what extent there was a likelihood of  
13 bugs causing transient impacts. I'm not suggesting you  
14 should ignore them. But what I do suggest is, by the  
15 same token, nor should your Lordship ignore whether  
16 those bugs caused discrepancies that were caught by  
17 countermeasures either in the short or medium or longer  
18 term, or, on the other hand, were lasting discrepancies  
19 that became shortfalls and that required a subpostmaster  
20 to put his hand into his pocket.

21 That is why the word "shortfall" is contained in  
22 Issue 1. And by the way, it is part of the overall  
23 judgment of robustness that's called for pursuant to  
24 Issue 3.

25 My Lord, the final point relating to branch

15

1 accounts. This is the most ingenious argument of them  
2 all on Issue 1. In my submission it is sophistry. The  
3 purpose I think, or I suspect, is to allow the claimants  
4 to shoehorn into Issue 1 a consideration of whether bugs  
5 in Post Office's back end systems and whether and to  
6 what extent the bugs in those systems took place.

7 But there is a problem with that essential approach,  
8 which is that Issue 1 is about bugs in Horizon. The  
9 back end systems which may result in TCs being issued,  
10 those back end systems are not part of the Horizon  
11 system and the TC process was deliberately excluded from  
12 the Horizon Issues because if there were to be a trial  
13 of all Post Office's reconciliation processes over the  
14 last 20 years that would involve millions of documents  
15 and take a six-month trial.

16 Now, in my submission, the drafters of the Horizon  
17 Issue, of whom Mr Green may well have been one at the  
18 time, could never have dreamed that the investigation  
19 called for by Horizon Issue 1 would be as stunted as the  
20 claimants are now seeking to achieve.

21 That brings me to Issue 3. Here, two arguments are  
22 being run for which there's no hint in their written  
23 openings. There, they appear to accept that the Horizon  
24 system was relatively robust. Indeed, their suggestion  
25 appeared to be that they had always accepted that it was

16

1 relatively robust.

2 If we could look, please, at {A/1/10}. This is the  
3 second half of paragraph 17.1 of the claimants' written  
4 opening. We don't need to look at the first half. It  
5 says at the top:

6 "This reflects language pleaded in the GDef, and  
7 indeed 'robustness' has been one of Post Office's  
8 'narrative boxes' and a favoured term in Post Offices  
9 public relations pronouncements... Coincidentally or  
10 otherwise, it has also featured in the NFSP's defence of  
11 Post Office, relied upon by Mrs van den Bogerd.  
12 However, as the Claimants made clear in their GReply,  
13 whereas the Claimants'," I think it must be claimants'  
14 case, "is that it is relatively robust and has become  
15 more robust over time - but not so as to be an answer to  
16 the Claim (and in so far as 'robustness' has, in this  
17 case, a sufficiently clear meaning - addressed further  
18 herein)."

19 So they are toying with whether robustness has  
20 a meaning, but there they purport to say that relative  
21 robustness was actually accepted in their reply. That's  
22 always been their position.

23 That is the complete opposite of what the claimants  
24 are now saying. They are now trying to ditch their own  
25 expert whilst still purporting to laud him to the skies

17

1 in their written and oral submissions.

2 Their first argument is that Issue 3 raises one  
3 point, not two: robust and extremely unlikely. It seems  
4 to be an attempt to suggest that robustness can have no  
5 meaning other than that. Well, my Lord, whether  
6 robustness has a meaning and what meaning it has is not  
7 in issue between the experts. In JS3 at paragraph 3.1  
8 they both agree that it's relatively robust.

9 We have a meaning from Mr Coyne. He said  
10 "relatively robust" means performing well compared to  
11 similar big systems. And those similar big systems  
12 require transactions to be handled properly in the  
13 overwhelming proportion of cases, and that they require  
14 the system to have lasting errors of a fraction of  
15 a percentage.

16 My Lord, what that means is that when faced with any  
17 given transaction, the generic likelihood of that  
18 transaction being erroneous is extremely small. In  
19 other words, it is extremely unlikely to be the cause of  
20 shortfalls.

21 Clearly I'm not submitting to your Lordship that  
22 means that in any given case your Lordship should reject  
23 any suggestion that any accounts are wrong. I'm not  
24 suggesting that for a moment. I'm simply saying this is  
25 a trial of generic issues, and at a generic level,

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1 absent particular circumstances, and there may be  
2 several, any given set of accounts is overwhelmingly  
3 likely to be reliable.

4 Now, it is worth pausing for a moment to note some  
5 other things that Mr Coyne agreed. And if we could pick  
6 it up at {Day14/18:1}, he agreed at the bottom of  
7 page 18. Picking it up at line 20 and going over the  
8 page to page {Day14/19:1} -- I said:

9 "Question: No, I'm not asking you, Mr Coyne -- I'm  
10 not suggesting to you that you have been asked to decide  
11 on whether any particular claimants' claim is right or  
12 not, what I'm suggesting to you is that the context in  
13 which these -- given the context in which these issues  
14 arose -- were drafted, and given the pleadings by  
15 reference to which they were drafted, it was obvious  
16 that the purpose of those issues was to assist the court  
17 so that it could use the judgment that will be produced  
18 in this trial as a basis for making ultimate decisions  
19 in ultimate breach claims by claimants?"

20 Mr Coyne said:

21 "Answer: In a later trial?"

22 I said:

23 "Question: Yes."

24 He said:

25 "Answer: Yes, I was aware of that."

19

1 I said:

2 "Question: Isn't that the main reason why we are  
3 here?"

4 And he said:

5 "Answer: Well, it is certainly a reason why we are  
6 here, yes.

7 "Question: To enable the court to make useful  
8 findings as to the general likelihood of any transaction  
9 being wrongly recorded in a particular case?"

10 "Answer: Yes."

11 Then if we move on to page {Day14/25:9}, there was  
12 a passage of evidence from line 9 through to page  
13 {Day14/26:15}. Perhaps I could ask your Lordship to  
14 read that.

15 MR JUSTICE FRASER: From line 9 of page 25?

16 MR DE GARR ROBINSON: 25. (Pause)

17 MR JUSTICE FRASER: Yes.

18 MR DE GARR ROBINSON: So what Mr Coyne accepts there is that  
19 robustness involves two things. One is preventing  
20 errors from arising in the first place, but the other is  
21 having countermeasures to deal with errors when they do  
22 arise, hence the concept of lasting impacts.

23 At the bottom of page {Day14/26:1} I put to him:

24 "Question: So robustness is the very concept which  
25 underlies the issues we have been discussing for the

20

1 last half hour, yes?"  
 2 And he says:  
 3 "Answer: Yes."  
 4 He further accepted that the concept of robustness  
 5 was a mature subject which was the subject of study, and  
 6 that's at page {Day14/31:18}. Picking it up at line 18,  
 7 I say:  
 8 "Question: You agree robustness is an important  
 9 concept?"  
 10 He says:  
 11 "Answer: Yes."  
 12 "Question: You agree it is deployed very frequently  
 13 in the IT industry?"  
 14 "Answer: Yes."  
 15 "Question: It is a subject of academic study,  
 16 isn't it?"  
 17 "Answer: Yes."  
 18 Then picking it up on page {Day14/32:10}:  
 19 "Question: ... isn't it obvious, doesn't it follow  
 20 as night follows day, that the ultimate question being  
 21 wrestled with by the concept of robustness is how well  
 22 are the risks faced by a system guarded against? In  
 23 other words, what are the risks remaining after you have  
 24 taken the countermeasures into account?"  
 25 And he says:

21

1 "Answer: Yes ..."  
 2 And I invite your Lordship to read the rest of his  
 3 sentence. (Pause)  
 4 My Lord, I won't take your Lordship to the  
 5 transcript but he went on to accept that it is possible  
 6 to benchmark robustness against other systems, and  
 7 against those other systems that are similar, that are  
 8 comparable, it compares well. My Lord, that's at  
 9 paragraph 365 of our submissions but also {Day14/41:23}  
 10 to page {Day14/42:6}.  
 11 Critically, comparable systems require the  
 12 overwhelming majority of transactions to be handled  
 13 properly. They require that there should only be a tiny  
 14 proportion of lasting errors of a fraction of  
 15 a percentage. My Lord, that's at {Day14/56:1} to  
 16 {Day14/59:1}, and in our closing submissions it is  
 17 paragraphs 378 to 380.  
 18 So all in all Mr Coyne accepts the importance of the  
 19 concept of robustness, the reality of the concept as  
 20 a concept that's the subject of academic study and  
 21 practical application in the IT industry, and he accepts  
 22 that a consideration of countermeasures is an important  
 23 aspect of forming a view on robustness. And my Lord,  
 24 your Lordship will see that point made at paragraph 390  
 25 of our closing submissions.

22

1 At paragraph 391 we point out that he has sufficient  
 2 information to form a judgment on robustness. So that  
 3 was something of a lemma when discussing the first  
 4 argument that the claimants run in relation to Horizon  
 5 Issue 3.

6 I now come to the second argument. This is the  
 7 suggestion that the drafters of Issue 3 had in mind some  
 8 sort of conditional probability. It is so bold as to be  
 9 impressive. Let me see if I can find ... (Pause)

10 If your Lordship looks at Horizon Issue 3 {C1/1/1}:  
 11 "To what extent and in what respects is the Horizon  
 12 System 'robust' and extremely unlikely to be the cause  
 13 of shortfalls in branches?"

14 Now, this is an argument of which a Platonic scholar  
 15 would be proud. They don't say extremely unlikely to  
 16 cause shortfalls in branches, they say to be the cause  
 17 of shortfalls in branches.

18 So Issue 3 is not about the probability of causing  
 19 shortfalls but the probability of something being the  
 20 cause of a shortfall once a shortfall has arisen.

21 My Lord, I would respectfully submit that that  
 22 subtlety would obviously not have occurred to anyone at  
 23 the time, and bearing in mind the first argument that  
 24 the claimants are running, namely that robustness and  
 25 extremely unlikely need to be put together, it would be

23

1 a very curious argument to be running in any event.  
 2 My Lord, the claimants should have ten out of ten  
 3 for ingenuity with this argument. Their obvious  
 4 intention is to avoid their essential problem that with  
 5 3 million sets of branch accounts, ignoring for the  
 6 moment that up to 2005 accounts were weekly, that the  
 7 evidence shows that relatively speaking there were  
 8 hardly any bug impacts and the evidence suggests that  
 9 there are even fewer, infinitely fewer remote access  
 10 impacts, and that's a big problem for them. So what  
 11 they want to say is there's some smaller number of  
 12 shortfalls which, very conveniently, have not been the  
 13 subject of evidence so no finding can be made about  
 14 them.

15 The essential endeavour in this argument, all this  
 16 time and money having been spent in preparing for this  
 17 trial, is to put a block to the determination of Issue 3  
 18 because neither party has thought to engage in any  
 19 statistical analysis of the number of shortfalls versus  
 20 the number of bug branch impacts.

21 My Lord, in my respectful submission that is simply  
 22 not an argument that it is proper to run at the end of  
 23 a trial with no advance notice. If they were going to  
 24 run that kind of argument they should have raised it  
 25 before the evidence was even prepared so that the

24

1 parties could have addressed the point. And I rather  
2 suggest that if the point had come up your Lordship  
3 would very easily have simply applied exactly the same  
4 language that's used in Issue 1: to cause apparent or  
5 alleged discrepancies or shortfalls in branch accounts.

6 One of the curiosities of this argument is that they  
7 are suggesting that the mental process of the person  
8 that drafted Horizon Issue 3 was completely different  
9 from the mental process of the person who drafted  
10 Horizon Issue 1.

11 MR JUSTICE FRASER: Now, these issues I seem to remember,  
12 but I might be misremembering, were agreed by both the  
13 parties, weren't they? I don't recall being involved in  
14 the detailed drafting of the issues.

15 MR DE GARR ROBINSON: I don't believe your Lordship was.  
16 I wasn't here then but I don't believe your Lordship  
17 was.

18 MR JUSTICE FRASER: I can go back and read the transcript of  
19 the hearings but I seem to remember I was presented with  
20 the proposed issues and I approved them. Is that right?

21 MR DE GARR ROBINSON: I think that is right. But, my Lord,  
22 overall my submission is that this is a transparent and  
23 desperate attempt to frustrate the plain intention of  
24 the people that drafted Horizon Issues 1 and 3 to  
25 prevent clear findings being made of obvious practical

25

1 utility and to replace them with findings that have no  
2 practical meaning whatsoever.

3 I would urge your Lordship not to be distracted by  
4 last-minute swerves of this sort. Your Lordship will  
5 already understand that my submission is that the  
6 claimants are trying to sideline the most important  
7 issues and to distract the reader with isolated examples  
8 put forward in the hope of giving the impression that  
9 they have rather more widespread impact than is  
10 justified by the evidence.

11 Let me give some examples of making that submission  
12 good. The first one, in their written closing they  
13 start on page 1 with remote access. That's their first  
14 point even though remote access is clearly a second  
15 order issue. Mr Coyne effectively admitted in his  
16 cross-examination, and I will be taking your Lordship to  
17 it in due course, that the impact of remote access on  
18 branch accounts was de minimis. He didn't use that  
19 phrase. That's where we got to in my submission.

20 But it said in the closing submissions, and my  
21 learned friend repeated roundly yesterday morning, that  
22 there is an open back door to the system. That's said  
23 in paragraph 2. And in paragraph 5 they build on that  
24 by saying that there is unfettered remote access.

25 Now, it is intended, I surmise that it is intended,

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1 to be a headline-catching metaphor, but in my submission  
2 it is an illuminating and quite useful one, and I am  
3 sure this isn't intended. The concept or the metaphor,  
4 the picture, of an open back door, it is not an open  
5 back door onto the street, it is an open back door, if  
6 you want to call it that, onto a walled garden,  
7 consisting only of an elite group of highly trained  
8 professionals, the SSC, who require months of training  
9 before they are even allowed in.

10 Now the experts may agree that APPSUP privileges,  
11 that privileged user privileges, should not be  
12 permanently available to that many people and that when  
13 people in the SSC wish to use it there should be  
14 a process they go through to get temporary  
15 authorisation.

16 That may well be the position, but that doesn't mean  
17 that APPSUP was actually misused or that there were any  
18 harmful events as a result of the fact that the facility  
19 was there available for the SSC and then, as time went  
20 on, it became available only for the most senior members  
21 of the SSC, not to the new members.

22 There isn't evidence, my Lord, of a single harmful  
23 event that was the result of any APPSUP use. Indeed,  
24 there's no evidence of any use of APPSUP to change or  
25 delete transaction data. None at all. But the

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1 important point is that the people to whom the door was  
2 left open were trustworthy professionals. They weren't  
3 burglars waiting to get in through the back door once  
4 the homeowner had gone to bed.

5 They are not going to run away with any money and  
6 they are not going to start using APPSUP as a means of  
7 doing creative vandalism in the branch network. And to  
8 the extent that it is suggested otherwise, there is no  
9 evidential basis for making that suggestion.

10 Another example of distraction with little stories  
11 is the rather elaborate business we had yesterday  
12 afternoon in which an impression was given that there is  
13 a longstanding problem of duplicate losses in the system  
14 of which Post Office has always been aware. That's not  
15 what the evidence showed at all. But you speak quickly  
16 and you go to particular sentences in particular  
17 documents, and hey presto, you have created that  
18 impression. That is the essential endeavour that the  
19 claimants are engaging in in this trial.

20 Another example, the most extraordinary reliance  
21 that my learned friend at the last minute places on some  
22 internal Post Office documents from 2016 and 2017,  
23 largely from those years. What the claimants seem to be  
24 wanting to do is to substitute the opinions of the  
25 experts on matters on which they agree by reference to

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1 some internal management papers about how they are  
 2 planning to improve and upgrade their own back end  
 3 processes and the IT systems more generally, including  
 4 Horizon.  
 5 But I ask forensically : if that's all you need, why  
 6 have so many millions been spent on experts at all? The  
 7 important thing about those documents is none of them  
 8 say anything about whether bugs create discrepancies in  
 9 branch accounts. They are not about that at all. They  
 10 don't purport to grapple with Horizon Issues, and it is  
 11 only if you do not consider them carefully that you  
 12 might be confused for a moment into thinking that they  
 13 are even relevant.  
 14 Let me make that point good by just reference to one  
 15 document {F/1161/87}. It is a document with intent to  
 16 supply attached to a board report. I'm afraid I don't  
 17 have page 1 to hand.  
 18 MR JUSTICE FRASER: It has not come up yet, I'm afraid,  
 19 I think. Can we go to F/1161?  
 20 MR DE GARR ROBINSON: I'm sorry, I misread it. It is my  
 21 fault. It is {F/1611/87}, I do apologise.  
 22 MR JUSTICE FRASER: The dreaded spreadsheet. Where are we  
 23 going?  
 24 MR DE GARR ROBINSON: 16/11. Is it possible to become  
 25 dyslexic in your 50s? I don't know.

29

1 MR JUSTICE FRASER: Well, the F bundle generally is not easy  
 2 to use because it is so big, I think. Or the F folder.  
 3 That is a PEAK.  
 4 MR DE GARR ROBINSON: This isn't it. 1611. I'm looking  
 5 at -- page 87? 1611.  
 6 MR JUSTICE FRASER: I think this is 16/11 and we want 1611.  
 7 MR DE GARR ROBINSON: We need to agree a protocol for this.  
 8 1611, page 87, please. {F/1611/87}.  
 9 This is a board agenda, and if we go to page 87 this  
 10 is a technology strategy update. I don't want to put  
 11 words into my learned friend's mouth, but the author is  
 12 Rob Houghton who is the chief technology officer at  
 13 Post Office, and so this may be one of their golden  
 14 documents, one of my learned friend's favourite  
 15 documents. But let's just have a look at it:  
 16 "Context.  
 17 "This document forms an update to the IT Strategy  
 18 approved in July 2016 by the PO Board. In July we  
 19 outlined that IT was not fit for purpose, expensive and  
 20 difficult to change."  
 21 Stopping there. If your Lordship were a journalist  
 22 you would think that looks really bad, but let's read  
 23 on. There is a list of questions addressed in this  
 24 report, and then:  
 25 "Conclusion.

30

1 "Since reporting on the IT strategy in July; the  
 2 landscape continues to shift with increasing cyber  
 3 threat, deteriorating market conditions and several  
 4 significant service outages to our back office systems  
 5 ..."  
 6 Your Lordship will note back office and not Horizon:  
 7 "... and digital infrastructure. These reinforce  
 8 and give further urgency to, rather than change ..."  
 9 There must be a missing word there:  
 10 " ... the strategic roadmap."  
 11 Then:  
 12 "In the 5-year overlays, we have aligned our IT  
 13 strategy to the business strategies and developed  
 14 roadmaps for the digital, infrastructure and Horizon  
 15 journeys. Approval of the overlays is critical to  
 16 improve our control environment, reduce costs and  
 17 achieve our business strategy."  
 18 So improving the control environment, reducing costs  
 19 and achieving a business strategy. Then two bullet  
 20 points down:  
 21 "Our view of the operational service risk has  
 22 matured and we remain outside of our risk appetite zone  
 23 in key operational areas. The infrastructure related  
 24 change programmes focus on reducing these risks over  
 25 time."

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1 So your Lordship will see the general points being  
 2 made.  
 3 If one goes to page {F/1611/88}, the first bullet  
 4 point says:  
 5 "Supplier negotiations are underway."  
 6 Second bullet point says:  
 7 "There are a 'critical few' dependencies that drive  
 8 reduction of the cost base and future business support  
 9 in the most material way ..."  
 10 So your Lordship has seen what they want is to save  
 11 costs, they want to upgrade the system, there are all  
 12 sorts of objectives they think they can achieve:  
 13 "We need to quickly rationalise and resolve  
 14 misaligned contracts enacted to support legacy IT,  
 15 obsolescence and lack of PO technical competence  
 16 particular focus on Fujitsu and Accenture.  
 17 "'Thin Client' delivery success.  
 18 "Appetite for reduced service levels and number of  
 19 branches/users. We are developing a hypothesis to offer  
 20 two/three tier service offering to branches to reduce  
 21 cost and target service delivery."  
 22 Then on page {F/1611/89}:  
 23 "The IT strategy outlined a view of the current  
 24 state of technology within PO as failing to meet PO  
 25 aspirations on any assessment lens (cost, risk, delivery

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1 or service ).  
 2 "The strategy laid out key interventions :  
 3 "Improve IT - cost reduction, operating model  
 4 changes, supplier renegotiations, capability hires,  
 5 communications and engagement."  
 6 "Reduce operational and security risk - IT  
 7 infrastructure programmes, Back office transformation,  
 8 Security Transformation programmes and improved  
 9 Environment Monitoring/Management, collectively to take  
 10 back control of the management of IT Services."  
 11 That's a reference to outsourcing; they are planning  
 12 to bring things clearly back in.  
 13 Then, my Lord, over the page {F/1611/90},  
 14 paragraph 4 at the top says:  
 15 "Technology sits at the heart of the wider business  
 16 strategy set out in our 5 Year plan ...  
 17 Then the last sentence before the first bullet :  
 18 "Ultimately our technology strategy should be judged  
 19 in terms of the benefits it drives for each of our key  
 20 customer groupings:  
 21 "for end consumers ..."  
 22 Then it talks about them. Then for host retailers ,  
 23 that is postmasters:  
 24 " ... technology is critical to simplifying our  
 25 offer , removing the complexities which are frequently

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1 cited as the biggest deterrent to running a post office .  
 2 Our network IT strategy is working towards the  
 3 development of smaller point of sales solutions  
 4 (including EPOS integration) that are more easily  
 5 integrated alongside the main retail till , driving  
 6 operational benefits for the retailer and quicker  
 7 transactions for customers."  
 8 Stopping there. So the main branch, well, the first  
 9 branch benefit or objective that's identified , nothing  
 10 to do with the reliability of Horizon, it is to do with  
 11 enabling people running their own retail business to  
 12 plug the Post Office IT system into their existing EPOS  
 13 systems to make it easier for them, less of a barrier  
 14 for them to agree to become a Post Office branch.  
 15 Then it goes on to say:  
 16 " Stability of service is also vital for our  
 17 postmasters, ensuring they do not suffer the significant  
 18 business detriment that can arise from prolonged outages  
 19 ..."  
 20 So there's a problem that is identified : prolonged  
 21 outages. Your Lordship may think it appropriate to note  
 22 that that's the only problem that's relating to branches  
 23 that is identified in this entire paper, as far as I'm  
 24 aware.  
 25 Then, my Lord, page {F/1611/98}. I will take

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1 your Lordship to this because this is quoted by my  
 2 learned friend in his submissions.  
 3 At paragraph 25, it says:  
 4 "There are tensions in each contract. Our approach  
 5 and risk appetite around public Contract Regulations are  
 6 likely to also inform outcome ..."  
 7 First bullet point:  
 8 "Fujitsu - a 6 year fixed contract signed with PO  
 9 which continues to invest in legacy and obsolescence  
 10 where FJs own strategy globally is to move to Cloud.  
 11 Success is to re-contract to prime UK Cloud partner,  
 12 align innovation, re- architect and position as a true  
 13 retail partner."  
 14 So there's the word obsolescence. My learned friend  
 15 loves the word obsolescence that's quoted. But what is  
 16 actually being talked about? Moving to the cloud. It  
 17 is an improvement, it is not the fixing of a defect.  
 18 Then, my Lord, over the page {F/1611/100}, I'm  
 19 afraid this is in management speak, I find it hard to  
 20 read with a straight face, but paragraph 30:  
 21 "Our target state is to deliver an elastic , agile ,  
 22 secure, future proof, low cost model for the Post Office  
 23 without undue reliance on specific suppliers."  
 24 Then in 34 it says:  
 25 "For Back Office : A Back Office system that provides

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1 a stable and robust financial system and MI/Analytics  
 2 capability ."  
 3 Then "For Retail ", it says:  
 4 "The Horizon (HNGX) platform is at the end of its  
 5 life and needs replacing. Previous attempts to move  
 6 away from HNGX platform, specifically with IBM, have  
 7 been unsuccessful.  
 8 "The current plan is to transition from HNGX to the  
 9 updated HNGA (part of the Branch Technology programme)  
 10 platform from April 2017 will incur (budgeted) capex of  
 11 £16m."  
 12 So they are spending £16 million on an improved  
 13 version of the existing Horizon system.  
 14 Then over the page that's made clear with the next  
 15 bullet point {F/1611/101}:  
 16 "However, whilst HNGA runs on updated Windows  
 17 software, fundamentally its architecture is the same.  
 18 This means that it remains a 'closed' and inflexible  
 19 platform that cannot support the business' strategic  
 20 objectives and is a drain on respective PL's. HNGA will  
 21 work and support our business BUT it will not enable us  
 22 to compete and succeed with Clients retailers or  
 23 Customers."  
 24 Then there is an explanation of this thin client  
 25 concept, and I don't need to take your Lordship to that.

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1 So I ask forensically : what does this document show  
2 us about how good the Horizon system is? What does it  
3 show us about its likelihood of creating false  
4 discrepancies or false shortfalls in branch accounts?  
5 What does it show us about the robustness of the  
6 existing system and the reliability of the figures in  
7 it? Answer: absolutely nothing.

8 It is not about those questions, my Lord. And this  
9 demonstrates in really graphic terms the dangers of  
10 taking little snippets from documents and pulling them  
11 together and seeking to create an impression that's far  
12 larger than the document from which the snippets are  
13 drawn.

14 By relying on documents such as this, in my  
15 respectful submission, the claimants are inviting  
16 your Lordship to make a category error. They are  
17 relying on documents with a completely different focus  
18 in order to establish a position in relation to the  
19 Horizon Issues which is inconsistent with the agreement  
20 between the experts. They are trying to wallpaper over  
21 that inconvenient agreement between the experts by  
22 focusing on different points, by focusing on the  
23 position now, when of course it must be remembered that  
24 most of the claims made in this case relate to  
25 a position many years ago.

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1 My Lord, that entire approach, in my submission, is  
2 the very antithesis of what this trial is supposed to  
3 be. If there is to be an analysis of the document it  
4 should look and see what particular point in time the  
5 document operates, what precisely the document says,  
6 what can properly be drawn from the document and what  
7 cannot properly be drawn from that document. But that  
8 is not an endeavour which, in my submission, the  
9 claimants are interested in doing. Just as, I say this  
10 with some regret, it was not an endeavour which Mr Coyne  
11 was particularly interested in doing in his two reports.  
12 When he came to give evidence the position changed.

13 If documents like this do my learned friend's job as  
14 he seems to think, I do ask rhetorically why have we  
15 just spent four weeks trying this case?

16 Another aspect of these documents which really is  
17 very striking is the attempt that my learned friend  
18 makes to criticise Dr Worden for not being aware of  
19 them. There was a clear implication in the tone of my  
20 learned friend's questions of Dr Worden. You are not  
21 aware of these questions, the implication being that he  
22 really ought to be as a reputable expert. And that  
23 implication is made explicit in the claimants' closing  
24 submissions as if the documents represented exactly what  
25 any expert should be looking at instead of looking at

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1 the architecture, looking at the countermeasures and  
2 looking at the operation of the system and seeing how it  
3 worked, which is what Dr Worden has actually done.

4 But, my Lord, there is a problem with that  
5 criticism. The problem with that criticism is that  
6 Mr Coyne doesn't refer to any of these documents either.  
7 They weren't mentioned in his reports. They weren't put  
8 to him in examination-in-chief. They certainly weren't  
9 put to him in cross-examination. I was blissfully  
10 unaware of them until they were pulled like a rabbit out  
11 of the hat when Dr Worden was giving evidence.

12 So perhaps conveniently for the claimants, I wasn't  
13 able to ascertain Mr Coyne's views on those documents.  
14 I certainly didn't have a realisation that that was  
15 something I ought to be doing.

16 Now, my Lord, in my submission, the inevitable  
17 inference is one of two things. Either Mr Coyne wasn't  
18 aware of them either, so by criticising Mr Coyne my  
19 learned friend is also criticising his own expert, or,  
20 which may be more likely --

21 MR JUSTICE FRASER: You mean by criticising Dr Worden?

22 MR DE GARR ROBINSON: I'm so sorry, I do this too often. Or  
23 Mr Coyne didn't think these documents were sufficiently  
24 material to the Horizon Issues to be worth referring to.

25 My Lord, either way this last-minute tactic by the

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1 claimants to change the narrative in my submission is  
2 completely inappropriate. They don't undermine  
3 Dr Worden's view on the Horizon Issues any more than  
4 they undermine Mr Coyne's views that Horizon is  
5 relatively robust and, indeed, is more robust now than  
6 it has ever been before.

7 My Lord, I would like now to say a few words about  
8 bugs affecting branches. Mr Coyne says that he and  
9 Dr Worden together found 29 potential branch-affecting  
10 bugs in PEAKs and KELs, and in his oral evidence he said  
11 that given the reading he had done and the searches that  
12 he and his team had performed, he didn't think there  
13 were more than 40 bugs overall in PEAKs and KELs.

14 Now, of the 29 that he has found, he now says that  
15 22 are lasting; in other words, 22 are of a type that  
16 wouldn't, or might not ordinarily be caught by  
17 countermeasures. Pro rata that suggests that the  
18 overall number of lasting bugs in PEAKs and KELs would  
19 be around 30, although I have to say I didn't put that  
20 to him. I didn't realise that there would be this shift  
21 from 29 to 22 when we discussed the point.

22 Now, the claimants absolutely hate that logic. So  
23 they attack the concept of a lasting impact. In his  
24 written closing and in his oral submission yesterday my  
25 learned friend said that Mr Coyne's use of the term

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1 "lasting impact" in the joint statement -- that's  
 2 paragraph 115 of JS2. Perhaps we could look at that.  
 3 It is at {D1/2/29}, paragraph 1.15. This is agreed:  
 4 "The number of distinct bugs, for which the experts  
 5 have seen strong evidence of the bug causing a lasting  
 6 discrepancy in branch accounts, is between 12 and 29."  
 7 Now, that is something which Mr Coyne has agreed.  
 8 It is language that he has used. It is obvious what he  
 9 meant. He means not transient, and your Lordship will  
 10 see the reference to transience in paragraph 1.10 at the  
 11 top of the page. That is an RW statement.  
 12 These are bugs whose impacts are not caught by some  
 13 countermeasure and so one can't expect that they would  
 14 necessarily be corrected.  
 15 Now, Mr Coyne accepted all of that, he accepted what  
 16 "lasting" meant in cross-examination. And I frankly  
 17 don't understand the attempt to suggest now that he  
 18 somehow didn't.  
 19 The claimants themselves have deployed the concept  
 20 of lasting in their own opening. My Lord, that's at  
 21 {A/1/35}, paragraph 108:  
 22 "As noted above, in Joint 2, the experts have  
 23 resolved some but not all points of difference  
 24 (eg Dr Worden now accepts that there is strong evidence  
 25 of a lasting discrepancy on branch accounts from 12 of

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1 the 29 bugs which Mr Coyne identifies as having such an  
 2 effect."  
 3 So there we have two statements in that paragraph.  
 4 First of all, they themselves are deploying the  
 5 concept of lasting effect. Secondly, they are clearly  
 6 saying that they clearly thought at that time that  
 7 Mr Coyne was saying that there were 29 bugs which had  
 8 a lasting effect. And your Lordship will recall the  
 9 cross-examination on his last day of evidence about  
 10 that.  
 11 So against that background it is difficult to  
 12 understand what the claimants mean when they say that  
 13 the use of the word in paragraph 1.15 was a compromise.  
 14 Unless they are seeking to go behind it in some  
 15 impermissible way, an agreement was made in without  
 16 prejudice discussions between the experts. I can't  
 17 imagine they are doing that, but I can't imagine what  
 18 else they are doing.  
 19 My Lord, what one gets from paragraph 108 is that  
 20 while the claimants were entirely comfortable with the  
 21 concept which was fully deployed and explained in  
 22 Dr Worden's first report, as the evidence has come out  
 23 and as Mr Coyne's own evidence on these points has come  
 24 out, they have had second thoughts. Now that Mr Coyne's  
 25 views have been properly explored, they want to

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1 backtrack.

2 In my respectful submission, that this process is  
 3 being engaged in is actually a good illustration of what  
 4 cross-examination can achieve. Nowadays it is  
 5 fashionable to suggest that what one gets by  
 6 cross-examining witnesses is very limited and shouldn't  
 7 we have trial mainly by reference to the documents? In  
 8 my submission, this trial is a good example on both  
 9 sides of points being established in cross-examination  
 10 that wouldn't be established without it.

11 I make the same submission about Mr Roll's  
 12 cross-examination. My learned friend is entitled to  
 13 make the same submission about some of my witnesses.  
 14 But be that as it may, it is important to recognise the  
 15 significance of Mr Coyne's evidence on the number of  
 16 bugs to be found in PEAKS and KELs and the proportion of  
 17 lasting bugs that are liable not to be caught by  
 18 countermeasures. He and Dr Worden disagree on  
 19 particular bugs, and your Lordship has our submission on  
 20 the bugs in appendix 2 to our closing, but let's take  
 21 Mr Coyne's views at face value.

22 At {Day15/94:1}, he said if you get a bug with  
 23 a branch impact there will be a KEL for it. My Lord,  
 24 that is addressed at paragraph 352 of our closing  
 25 submissions.

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1 At page 122, unless your Lordship would like me to  
 2 I'm going to go too fast to allow the reading of the  
 3 transcript --

4 MR JUSTICE FRASER: No, but the transcript I think you are  
 5 just referring to has just come up and that's him  
 6 agreeing to your question that:

7 "Question: ... generally speaking, if you get a bug  
 8 ... once it is detected there will be a KEL ...?"

9 MR DE GARR ROBINSON: Yes. My Lord, {Day15/122:1} Mr Coyne  
 10 says he has now reviewed between 5 and 6,000 KELs. He  
 11 says at line 24:

12 "Answer: ... probably ... between 5 and 6,000."

13 MR JUSTICE FRASER: Yes.

14 MR DE GARR ROBINSON: At page {Day15/123:1}, he says that  
 15 his team will have reviewed an additional 1,000 KELs.  
 16 So between he and his team there has been a review of  
 17 between 6 and 7,000 KELs of the 9,500-odd that have been  
 18 disclosed.

19 At page {Day15/123:1} he says that all the bugs that  
 20 have been found come to 29. And he goes on to say that  
 21 the total number of bugs likely to be found in the KELs  
 22 is likely to be no more than 40.

23 My Lord, at page {Day15/128:16} Mr Coyne agrees that  
 24 his search processes are reliable and will have  
 25 successfully identified the majority of bugs identified

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1 by the SSC during the operation of the PEAK and KEL  
 2 system.  
 3 So there aren't that many more bugs to be found even  
 4 if he had had more time to look.  
 5 Your Lordship will also recall, I'm afraid I don't  
 6 have the reference in my note, Mr Coyne saying that it  
 7 is possible to identify the number of impacts of  
 8 a particular bug by looking at the PEAKs, and that's  
 9 quite a reliable system too. And he then shamed me by  
 10 indicating that he had given an indication in JS2 as to  
 11 the number of impacts.  
 12 My Lord, on this side of the court we have done our  
 13 best to do a calculation --  
 14 MR JUSTICE FRASER: Was it in JS2? I thought it was in his  
 15 report. Was that when you took him to the graphic?  
 16 MR DE GARR ROBINSON: It was JS2. Second column.  
 17 MR GREEN: It is actually both.  
 18 MR DE GARR ROBINSON: My learned friend helpfully says it is  
 19 also in his report.  
 20 MR JUSTICE FRASER: No, when you said he had shamed you  
 21 I thought that might be when you said you'd put  
 22 a question to him and he then pointed to a graphic.  
 23 MR DE GARR ROBINSON: I think I had missed it and he pulled  
 24 me up on it, very properly.  
 25 On this side of the court we have done our best to

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1 work out how many impacts are suggested, and I'm not  
 2 suggesting for a moment that this is accepted but it  
 3 appears to be in the region of 545/550 branch impacts in  
 4 very round numbers.  
 5 So that would suggest less than 20 impacts per bug,  
 6 and I would ask your Lordship to bear that statistic in  
 7 mind.  
 8 I wonder whether this would be a convenient moment?  
 9 MR JUSTICE FRASER: I am sure it would, yes.  
 10 When you say on your side you have identified it,  
 11 that's the one in your closing? The 545/550, that's in  
 12 your closing submissions?  
 13 MR DE GARR ROBINSON: It is in a footnote to our closing.  
 14 I can give you the reference if your Lordship would like  
 15 after the break.  
 16 MR JUSTICE FRASER: I do not think it is in any of the  
 17 evidence, is it?  
 18 MR DE GARR ROBINSON: No, it isn't. What has been done --  
 19 I'm afraid I haven't done the process, but what has been  
 20 done is you look at the column, you and try and work out  
 21 what that implies. It is not a simple counting process,  
 22 one has to use a degree of judgment. It is footnote 794  
 23 of our closing submissions, my Lord.  
 24 MR JUSTICE FRASER: Thank you very much. All right. We  
 25 will have ten minutes. We will come back in at

46

1 11.55 am.  
 2 (11.47 am)  
 3 (A short break)  
 4 (11.55 am)  
 5 MR DE GARR ROBINSON: My Lord, talking about bug numbers and  
 6 bug impacts, it may be helpful at this point to look at  
 7 one of Dr Worden's calculations. If I could ask  
 8 your Lordship to go to {D3/8/1}.  
 9 Thank you very much. Your Lordship will have seen  
 10 this before. It is worth spending a few minutes so that  
 11 we all understand it.  
 12 This is a calculation which involves all sorts of  
 13 financial impacts and also involves an estimate of the  
 14 number of bugs detected and undetected in a system over  
 15 a period of 20 years.  
 16 It starts at row 3, but your Lordship will see the  
 17 label in column B. So I'm working behind those column B  
 18 labels. So row A is "mean number of branches in PO  
 19 network, 1999-2018".  
 20 Your Lordship may recall Dr Worden being taken to  
 21 task because his number of 13,560 was from 1999, not  
 22 from 2000. I think his report did say 2,000, but in  
 23 actual fact, as is clear from his spreadsheet, it was  
 24 from 1999. So that is the number of branches, mean  
 25 number of branches over that period.

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1 Then row B is years of Horizon. 19 years. Total  
 2 branch months in C. Nearly 3.1 million in branch  
 3 months. So that is 3.1 million sets of accounts, as it  
 4 were. But Dr Worden, your Lordship will be aware, has  
 5 rounded that down to 3 million. In his reports he talks  
 6 about 3 million. He could of course have said 3.1, but  
 7 he said 3 because that was sufficient precision for him.  
 8 Then there is the scaling factor in relation to  
 9 which some time was taken in Dr Worden's  
 10 cross-examination, and your Lordship will see --  
 11 actually, this is a good place to see. Column C is  
 12 central estimate. That is Dr Worden's central estimate,  
 13 what he thinks is likely to be the case, and D is his  
 14 conservative estimate, because as your Lordship will  
 15 recall, he deliberately makes assumptions in favour of  
 16 the claimants to increase likelihood or reduce the  
 17 likelihood of things happening so as to increase the  
 18 number of bugs and so on. And that's his conservative  
 19 estimate. He explains all this in his report.  
 20 Your Lordship will see that there is a scaling  
 21 factor of 0.45 central and he just pushes it up by just  
 22 over 10% to 0.5 conservative. We needn't worry about  
 23 scaling for these purposes.  
 24 Row E is another scaling number. Then row F is the  
 25 total number of claimed shortfall. And as your Lordship

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1 ascertained yesterday, that's taken from the schedules  
2 of information and is explained in Dr Worden's first  
3 report.

4 Row G is:

5 "Total claimant branch months (sets of monthly  
6 branch accounts for claimants)"

7 Or, indeed, any other SPs with similar  
8 characteristics. That is 52,000. So of the  
9 3 million-odd monthly branch accounts, ignoring for the  
10 moment until 2005 they were weekly, 52,000 was occupied  
11 as it were by claimants.

12 Then H is "scaling factor". I'm not going to talk  
13 to your Lordship about that. Then here's an assumption  
14 in row L:

15 "Maximum number of KELs with potential impact on  
16 branch accounts, based on limited sampling of KELs."

17 And his central estimate is 100. Does your Lordship  
18 see that?

19 MR JUSTICE FRASER: Mm.

20 MR DE GARR ROBINSON: And his conservative estimate is 200.

21 It is quite important to note that those two estimates  
22 are explicitly based upon limited sampling of KELs.

23 Dr Worden didn't do what Mr Coyne did. What Mr Coyne  
24 did is he looked at virtually all the KELs; he and his  
25 team looked at between 6 and 7,000 of the 9,500. That's

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1 not what Dr Worden did. What Dr Worden did is he looked  
2 very carefully at a limited number of KELs. He did  
3 a number of passes through the KEL system, one of which  
4 was he looked at 200 KELs at random, and another pass  
5 that he did was he looked at KELs that referred to  
6 a pound sign, and a third pass that he did was he looked  
7 at KELs that had been referred to in Mr Coyne's expert  
8 report.

9 The result of those enquiries are set out in  
10 appendix D to his first report, and then of course in  
11 his supplemental report he has looked at more KELs, so  
12 there is an expanded appendix for the 200 KELs that he  
13 looked at. But on any view he had only looked at  
14 a small proportion of KELs; not statistically  
15 insignificant, but hardly occupying the whole ground.

16 It is important to note, and I will be coming back  
17 to this, that Mr Coyne has now looked at the whole  
18 ground or more or less at the whole ground. He has  
19 looked at over 6,000, over two-thirds, of the KELs.  
20 What's more, he has done intelligent searches through  
21 all of them. What's more, he's done intelligent  
22 searches through the 220,000 PEAKs.

23 As I think he may have demonstrated to your Lordship  
24 already, his opinion is that he has found most of the  
25 bugs, potentially branch-affecting bugs that are out

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1 there to be found.

2 I hope I'm not oversimplifying his evidence when  
3 I say that.

4 And he has found -- his view is that there wouldn't  
5 be more than 40.

6 MR JUSTICE FRASER: Mr Coyne's view?

7 MR DE GARR ROBINSON: Mr Coyne. Am I saying --

8 MR JUSTICE FRASER: No, no, you switched to "his", so  
9 I wanted to be clear.

10 MR DE GARR ROBINSON: Mr Coyne's view is that there are not  
11 more than 40, and that is compared with 100 in row L,  
12 conservative Dr Worden and the 100 central, 200  
13 conservative.

14 MR JUSTICE FRASER: Yes.

15 MR DE GARR ROBINSON: Those have been superseded, I would  
16 respectfully submit, by Mr Coyne's own analysis.

17 If one takes into account the revelation on the last  
18 day of his cross-examination that of the 29 bugs that he  
19 has found that scale up to 40, he is now of the view  
20 that only 22 of them are lasting, so if one were  
21 interested in only lasting bugs, the figures to put in  
22 row L would be 30, rather than 100 and 200.

23 If one does that, my Lord -- your Lordship may,  
24 I fear, and I'm sorry to say that your Lordship is  
25 probably better at this than I am, but even I can do

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1 this -- that one can insert the figures into the  
2 spreadsheet, one could put the figure of 30 or 40 in  
3 those two columns, C and D, and then see where you get  
4 to. And where you get to is that at the bottom of the  
5 page, in row E2, maximum possible number of bugs, that  
6 changes from 145; if the figure is 30, it becomes 44.

7 And would it be helpful if I talked you through how  
8 the calculation works?

9 MR JUSTICE FRASER: I think I can tell how it works.

10 MR DE GARR ROBINSON: You have it. It is to do with various  
11 assumptions about KEL efficiency, and so on.

12 MR JUSTICE FRASER: Well, L -- yes -- L is going to change  
13 and that's the figure that's currently in N.

14 MR DE GARR ROBINSON: One very annoying typographical error  
15 that your Lordship will see in E2 at the bottom of the  
16 page, you see that E2 is defined as R/X?

17 MR JUSTICE FRASER: Yes.

18 MR DE GARR ROBINSON: Actually that should be L/X. That's  
19 a typo.

20 MR JUSTICE FRASER: On the basis there isn't a R.

21 MR DE GARR ROBINSON: Well, on the basis that what it should  
22 be doing is it should be starting with the number of  
23 bugs in the KELs and then doing something with them in  
24 order to scale up to an estimate of a total number of  
25 bugs to include undetected bugs.

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1 MR JUSTICE FRASER: So E2 equals L/X.  
 2 MR DE GARR ROBINSON: E2 equals L/X. And on Dr Worden's  
 3 central approach, if there were 30 lasting bugs  
 4 detected, one would end up with 44 lasting bugs in  
 5 total. That's detected and undetected. The figure  
 6 would be higher, significantly higher, in D, but much  
 7 lower than 672.

8 Now, in the claimants' closing, it is quite  
 9 interesting, it is suggested that there is a reasonable  
 10 evidential basis for assuming that your average bug will  
 11 have 40 or 48 affected branches, and that's worth  
 12 noting, my Lord. That's {A/5/177}, paragraph 1515. We  
 13 don't need to go to it.

14 But on the basis of the results of Mr Coyne's  
 15 enquiries in JS2 in the second column, where he has  
 16 found 440- impacts, or 450-odd, one would imagine it is  
 17 rather less than 40 or 48, could be closer to 20. And  
 18 just for the sake of illustration, if one took E2, the  
 19 central estimate of 44 bugs, that's on the basis of 30  
 20 lasting in the KELs, and one multiplied by 20, one would  
 21 get a total of 880 branch impacts over 3 million sets of  
 22 branch accounts over 20 years. I say 20, I should  
 23 say 19.

24 That is a vivid illustration, in my respectful  
 25 submission, of the kind of scale of the extent that we

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1 are really talking about when we talk about bugs in  
 2 Horizon affecting branch accounts.

3 But that's not the calculation that the claimants  
 4 put to Dr Worden. They rather like, although they  
 5 refute his entire methodology, the figure that's  
 6 currently in row E2 in column D. They like the 672  
 7 figure. Your Lordship will see that in  
 8 cross-examination they put to him that if you take 40 or  
 9 48 branch impacts per bug and you multiply by 672,  
 10 I think if you take 48 branch impacts you get something  
 11 like 32,000 branch impacts. Does your Lordship recall  
 12 that evidence?

13 MR JUSTICE FRASER: I do.

14 MR DE GARR ROBINSON: And by that means Dr Worden, with some  
 15 heroic mental arithmetic that I would not have been able  
 16 to do, worked out that you would end up with one branch  
 17 impact per claimant on average.

18 Now, I am sure that my learned friend was quite  
 19 pleased with that result and I am sure if you were  
 20 a journalist you would think "Crikey", but it should be  
 21 remembered that there are 561 claimants who are claiming  
 22 £19.7 million in shortfalls. On average that's about  
 23 £33,000 each. So if you have one claimant with one bug  
 24 impact in their tenure, how do you get to a £33,000  
 25 shortfall? In my submission, that calculation on its

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1 own is another vivid illustration of the scale of the  
 2 judgments that are really called for by the evidence in  
 3 this case.

4 But, my Lord, it goes further than that. As is  
 5 explained in our closing at pages 157 to 158, and  
 6 perhaps I could ask your Lordship to look at that. It  
 7 is {A/6/157}.

8 MR JUSTICE FRASER: Just while that's coming up I think you  
 9 said 19.7 million in shortfalls, but you mean 18.7.

10 MR DE GARR ROBINSON: Oh gosh, I do. Absolutely.

11 Thank you.

12 MR JUSTICE FRASER: Yes.

13 MR DE GARR ROBINSON: If we could pick it up at  
 14 paragraph 439:

15 "If no scaling factor for small claimant branches is  
 16 applied at all ..."

17 So the table in paragraph 637 of Worden 1, and  
 18 that's the same table we have been looking at, label D  
 19 becomes 1, then label E -- your Lordship will recognise  
 20 the 3.1 million-odd figure, H becomes 193,000 and so on,  
 21 and then what that produces. And that's explained in  
 22 paragraph 440 on the next page {A/6/158}, 440.1:

23 "For a bug such as the Suspense Account bug which  
 24 occurs 16 times with a mean financial impact of £1,000  
 25 ..."

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1 And your Lordship will recall Mr Coyne accepting  
 2 this is one of the big ones. Or your Lordship may  
 3 recall. I should not assume your Lordship has perfect  
 4 recall of every single piece of evidence that's given in  
 5 the case:

6 "... in order for there to be a 1 in 10 chance that  
 7 a shortfall of £1,000 would be caused in a claimant's  
 8 branch in any given month, there would need to be 19,000  
 9 similar bugs ..."

10 Because each bug is assumed to have 16 impacts or  
 11 occurrences, that would mean 304,000 occurrences, or  
 12 incidents they are called there. So you are looking at  
 13 19,000 bugs to give a 10% chance of causing a £1,000  
 14 loss and you are looking at 304,000 branch impacts in  
 15 order to have that result.

16 And if the mean financial impact was smaller, let's  
 17 assume it is £500, there would have to be 38,000 similar  
 18 bugs and 608,000 incidents. And if the mean financial  
 19 impact were £100, there would have to be 190,000 similar  
 20 bugs with over 3 million incidents.

21 Now, my Lord, these are just illustrations but what  
 22 they illustrate, or what they are intended to do is to  
 23 give your Lordship a sense of perspective, a sense of  
 24 scale as to what the evidence demonstrates as to the  
 25 likelihood of bugs causing shortfalls in branch

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1 accounts.  
2 In my respectful submission, a useful touchstone,  
3 a useful yardstick for measuring scale is the claimants'  
4 claim. That's not to suggest -- I'm absolutely not  
5 suggesting -- that this is a way of disproving the  
6 claimants' claim. Indeed, this calculation that we are  
7 looking at here ignores any scaling factor, it just  
8 looks at average branches of the same sort of tenure as  
9 the claimants. That's all.

10 But it gives your Lordship a handle on the sense of  
11 how big the bug problem would need to be in order to  
12 have a material chance of generating the sort of losses  
13 that are being -- in fact, a small proportion of the  
14 sort of losses that are being claimed in this case. And  
15 your Lordship may find that useful as a touchstone. It  
16 certainly shouldn't be your only touchstone.

17 But what touchstone do the claimants use? What do  
18 they say about extent in relation to these Horizon  
19 Issues? They say, and your Lordship will see that from  
20 the appendix to their closings where they very helpfully  
21 set out in a table what they say the answers are to each  
22 issue. In relation to Horizon 1, Issue 1, 3, 4 and 6,  
23 those I hope are the extent of the issues that are  
24 extent questions. They say material and significant  
25 risk.

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1 Now, that begs an important question: material  
2 compared with what? Significant in comparison with  
3 what? And in my submission the complete absence of any  
4 sense of scale is a complete giveaway. To say material  
5 insignificance is not actually an answer to the Horizon  
6 Issues, it is an attempt to avoid answering them.

7 My Lord, the point is just as stark. Perhaps it is  
8 even more stark with remote access. If I could go to  
9 our closing submissions. That's {A/6/247}. At  
10 paragraph 740 of our closing, perhaps I could invite  
11 your Lordship to read it.

12 Mr Coyne accepted that any remote access work  
13 involving branch data is typically recorded in PEAKs.  
14 So if there is any remote access happening you will see  
15 it in a PEAK. You may not have full details but you  
16 will see that it happened, typically.

17 The relevant reference is {Day16/28:1}. Then if one  
18 moves to the next page {A/6/249}, actually,  
19 paragraph 746:

20 "Mr Coyne fairly accepted that he had identified  
21 relatively few instances of remote access being used to  
22 affect branch accounts, especially compared to the vast  
23 number of branch accounts over the life of Horizon."

24 So I ask:

25 "Question: I would be right in thinking, wouldn't

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1 I, that of the PEAKs you have seen you found relatively  
2 few examples of remote access having been exercised?  
3 Would the answer to my question be right?

4 "Answer: I don't know exactly what the number will  
5 be, but it is tens, twenties --

6 "Question: Looking at your report it would be low  
7 tens, wouldn't it? You haven't found hundreds?

8 "Answer: No, I haven't found evidence of hundreds,  
9 no."

10 I ask:

11 "Question: So you have found, as I say, a  
12 relatively small number; relative to the fact that we  
13 are talking about 3 million branch accounts over the  
14 last 20 years, all you have actually found is a very  
15 small number which is less than 20 or 30, let's call it  
16 less than 30, would you agree with that?

17 And his answer was:

18 "Answer: Yes."

19 So when considering remote access, which is a big  
20 subject and by its very nature it is bound to be the  
21 subject of forensic interest, it is easy for lawyers to  
22 be considering that kind of issue and it is fun for the  
23 lawyers to do it because there is the Select Committee  
24 meeting at which Post Office gave evidence, and  
25 Post Office's response to the Panorama programme, all

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1 the things which engage the press and are in the public  
2 eye. These things naturally focus attention, and not  
3 surprisingly -- I don't blame my learned friend for  
4 doing it, I am sure I would do it were I in his  
5 position -- that goes on page 2 of my learned friend's  
6 closing submissions.

7 But if you take your eyes away from the pyrotechnics  
8 to stage left and you actually look at the Horizon  
9 Issues, you see that to call remote access a second  
10 order issue actually overstates its importance. It is  
11 actually, if you think about it, a third order issue.

12 You would need some remote access to change branch  
13 accounts. Mr Coyne says he hasn't found more than 30.  
14 I respectfully submit the number is far lower than that.

15 Your Lordship has seen what we say in our  
16 submissions but let's take him at his highest. He says  
17 there is not more than 30. Then you need error or  
18 malice which might have an adverse impact on branch  
19 accounts. That, on any view, is going to be rare  
20 because we know from the evidence given by Mr Roll and  
21 the evidence given by Mr Parker that these things were  
22 done carefully.

23 And no examples have been found of any remote access  
24 actually causing a discrepancy, and certainly not  
25 a shortfall in branch accounts. Only one candidate has

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1 been put forward; that's {F/432/1}. That's the \$1,000  
2 bug. Your Lordship has lengthy submissions about that  
3 in our closing submissions.

4 We say as a matter of principle it is clear that the  
5 error was made in that case, if it was an error -- no,  
6 it wasn't an error. The change to data that was made in  
7 that case which it is suggested had an impact on branch  
8 accounts was actually a change in back end data; it was  
9 an OCR making a change to data that was in the TPS  
10 system. It wasn't any change to branch account data at  
11 all, it couldn't be because it was in the TPS system.

12 So there is not one single, we submit, example given  
13 of any exercise of any remote access facility which has  
14 actually been shown to adversely have affected the  
15 branch account.

16 So, on any view, the proportion of cases in which  
17 that happens is going to be small. As I have already  
18 submitted to your Lordship, the remote access when it is  
19 done, it is done reluctantly, it is done professionally.  
20 There is a four eyes principle. My learned friend has  
21 perfectly fairly drawn attention to what I think he  
22 describes as many examples of OCPs where the monitoring  
23 individual seems to be the same as the individual doing  
24 the change, from which it is inferred, and I don't know  
25 whether this is right or not, I'm not in a position to

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1 dispute it, that the four eyes principle has become two  
2 eyes in those particular cases. That doesn't mean  
3 mistakes have actually been made, but whether they were  
4 or not, it is quite interesting to note that he says  
5 many. So far as we are aware on this side of the case  
6 it is only four examples.

7 They have plainly been looking very hard. That  
8 gives an idea of the smallness of the problem that we  
9 are looking at. And there's the third requirement. Not  
10 only is it necessary for there to be some relevant  
11 remote access in the first place and for there to be  
12 an error, carelessness or malice, one can't imagine what  
13 malice there would ever be, but there would also have to  
14 be the sort of situation where the postmaster himself  
15 doesn't know that it is happening.

16 My Lord, it is very important to recognise that in  
17 all the PEAKs that have been looked at and all the OCPs  
18 and the OCRs and the MSCs that have been looked at, so  
19 far as I'm aware only one example has been found of  
20 an SPM not being involved in the process by which his  
21 branch data was worked on.

22 And I discussed that, as I recall, in  
23 cross-examining Mr Roll who frankly admitted -- this is  
24 from memory so I need to be careful, but my recollection  
25 is that he frankly admitted that it would be suicidal to

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1 muck about with a postmaster's branch accounts without  
2 involving him because then all sorts of problems could  
3 occur.

4 I do hope my memory is correct. And I will check it  
5 to make sure.

6 So where do we get to with all of this? 30, taking  
7 Mr Coyne's figure at its highest, multiplied by a small  
8 fraction to reflect a possible error rate, multiplied by  
9 a small fraction to reflect the SPM not knowing what has  
10 happened results in an absolutely tiny number. It would  
11 be surprising if it were more than one in the real  
12 world.

13 What scale are we talking about? The scale is over  
14 3 million branch accounts. So the chance of a remote  
15 access problem adversely affecting a branch account is  
16 absolutely tiny. It is 1 in 3 million. 2 in 3 million  
17 maybe. It is being hit by lightning territory.

18 Even Mr Coyne accepted that the chance of remote  
19 access adversely affecting accounts is reasonably small.  
20 My Lord, that's referred to in our submissions at  
21 paragraph 748 at the bottom of this page {A/6/249}. He  
22 didn't want to say vanishingly small, but he couldn't  
23 resist saying it was small.

24 Yet in their answers to the Horizon Issues regarding  
25 remote access, what do the claimants say? They say

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1 material and significant risk. In closing they put  
2 remote access at the forefront of their case. In my  
3 respectful submission, that they seem to think that  
4 remote access is their best point might be thought  
5 revealing about the overall merits of their case.

6 My Lord, I'm going to move on and deal briefly now  
7 with some criticisms that were made of Dr Worden. I'm  
8 going to do this as quickly as I possibly can.

9 The suggestion is made that he is biased. I refute  
10 that suggestion. Reliance was made on the first joint  
11 statement which, in my submission, was entirely  
12 misplaced. If we could go to JS1 at {D1/1/1}, please.

13 I don't have the page reference. Would  
14 your Lordship give me a moment?

15 MR JUSTICE FRASER: Is this the part where they set out  
16 balanced approach?

17 MR DE GARR ROBINSON: Yes.

18 MR JUSTICE FRASER: I think it is the first page after this,  
19 if we could just go forward.

20 MR DE GARR ROBINSON: It is page {D1/1/3}. So:

21 "Each expert's approach to writing his report, and  
22 to this joint memorandum which foreshadows their  
23 reports, could broadly be one of three possible  
24 approaches:

25 "(a) to focus mainly on negative points ...

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1 "(b) To focus mainly on those aspects of Horizon  
2 which were intended to achieve robustness ... and the  
3 evidence implying that they succeeded."

4 And (c):

5 "To provide the court with a clear foundation for  
6 understanding the design and operation of Horizon; then,  
7 building on that foundation, to provide a balanced  
8 assessment of the ways in which Horizon succeeded,  
9 whilst addressing any disclosed issues where Horizon may  
10 have fallen short."

11 What Mr Coyne said he was going to do is at the  
12 bottom of the page, two lines from the bottom:

13 "Whilst my report will take a balanced approach, it  
14 is the case that many of the issues require a deep focus  
15 on the occurrences of bugs, errors and defects as well  
16 as the potential for modification of transactional  
17 data."

18 It is interesting to note that his deep focus was on  
19 bugs and his deep focus was on potential for  
20 modification. But I ask rhetorically, how many  
21 instances did he find of bugs? 29. How many impacts?  
22 500 and something. And how many instances of remote  
23 access? Not more than 30.

24 My Lord, both of those numbers, as your Lordship  
25 will be aware, are disputed on this side of the court.

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1 But that was the result of his deep focus.

2 Then Dr Worden, he says:

3 "I intend to take the balanced approach (c)."

4 My Lord, in my respectful submission, that's exactly  
5 what he did. He looked at the architecture to see how  
6 Horizon worked. He looked at the countermeasures within  
7 Horizon to see whether they were properly configured and  
8 designed in order to achieve the robustness which they  
9 were designed to achieve. He looked at testing to see  
10 how they were tested to make sure that they were tested  
11 properly.

12 There is an entire section on testing in his second  
13 report, for example, where he enhanced his review of the  
14 testing process. Then he reviewed how the  
15 countermeasures had operated during the entire life of  
16 Horizon. Your Lordship will see that from his tables in  
17 appendix D of his first report and then the updated 200  
18 bug table in his second report.

19 My Lord, in my respectful submission, that was the  
20 right thing to do. My learned friend criticises him for  
21 taking a top down approach, but I would respectfully  
22 observe that Horizon is a massive system. If you don't  
23 start by seeing how it is configured and how it works  
24 from the top, and if you don't then delve into the  
25 system to see how the support systems work, to see how

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1 bugs are dealt with and so on, then you are likely just  
2 to get an incoherent catalogue of problems which aren't  
3 properly organised and are just a wall of problems which  
4 are very difficult to manage.

5 In my respectful submission, that's exactly what  
6 Mr Coyne's reports produced.

7 I do refute the suggestion, which I am sure my  
8 learned friend has made, that Dr Worden only stayed at  
9 the top level. He went down, he looked down into the  
10 KELs, he looked at PEAKs, he looked at dozens of PEAKs  
11 at the time of his first report and looked at many, many  
12 more by the time of his second report and by the time of  
13 the trial.

14 The exercise that he performed was not a biased one.  
15 He looked for good and bad. There were sections in his  
16 report where he criticised Post Office and Fujitsu. It  
17 is worth noting, my Lord, that of the 29 bugs that are  
18 currently in the bug list, nine of them were actually  
19 identified by Dr Worden. So if it hadn't been for him,  
20 we would be looking at 20 bugs in all probability.

21 Your Lordship will get that. It is paragraph 253 of  
22 our closing at footnote 383, page 100. We needn't go  
23 to it.

24 Dr Worden made some mistakes. He, for example, it  
25 is just an example, made a mistake when doing his

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1 scaling calculation first time round, dividing by 461  
2 instead of a smaller figure. 561 instead of 496,  
3 I think it was. My Lord, that was a mistake. Actually,  
4 as he explained in cross-examination, he dealt with the  
5 mistake. The mistake wasn't repeated when he redid the  
6 calculation for the purposes of his second report, but  
7 it wasn't his only mistake. He did make mistakes.

8 But there's no basis for saying that he was biased  
9 and there's no basis for suggesting that his mistakes,  
10 if that's what they were, had any substantial impact on  
11 the validity of his ultimate conclusions.

12 The second suggestion that's made was that he  
13 assumed Horizon was working properly and worked back  
14 from that. My Lord, that's simply not the case. If you  
15 look at all his assumptions, if you look at the  
16 financial calculation we looked at previously, the  
17 spreadsheet, look at all his assumptions about rate of  
18 imperfections. A fortiori look at all his conservative  
19 assumptions which push things radically into the  
20 claimants' direction.

21 Criticisms are made of his scaling approach.  
22 My Lord, there were some mistakes, but his evidence was  
23 clear. Most of the points that were put to him were  
24 points which misunderstood his approach to undertaking  
25 calculations of that kind. Approximations are not

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1 mistakes. Engineering estimates always involve  
2 approximations. The important question is what  
3 precision do you need to arrive at a usable answer and  
4 what precision is available in the light of the  
5 information you have?

6 You have to beware searching for spurious precision.  
7 My Lord, I freely accept it doesn't make my job easier  
8 that he did take approximations of figures, he took  
9 48 million instead of 47 million for one of his  
10 calculations, and your Lordship will remember the GAAP  
11 figures. He didn't take the GAAP figures in another one  
12 of his calculations. But, my Lord, all of these things  
13 are small beer compared with the assumptions he makes in  
14 the claimants' favour in {D3/8/1}, 0.45 to 0.5, the  
15 row Y calculations and so on.

16 Dr Worden is criticised because he didn't consider  
17 Dalmellington at all in his first report and he didn't  
18 consider it properly in his second report. Well,  
19 my Lord, he did consider it in his first report. It is  
20 considered twice actually in his appendix D3 where he  
21 goes through the KELs that Mr Coyne had relied on.

22 For your Lordship's note -- we don't need to go to  
23 it -- it is {D3/2/117} and 132. Both of them consider  
24 the KEL aha621P. That's the Dalmellington KEL,  
25 I think. So he did consider it but he didn't consider

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1 it, address it specifically in the text. He did address  
2 it specifically in his second report, but there he is  
3 criticised for not having specifically mentioned, for  
4 example, that there were 102 occurrences of the  
5 Dalmellington bug before it was detected.

6 The reason why there were so many, of course,  
7 your Lordship will be aware, is because the  
8 Dalmellington bug mimicked, it caused human error. So  
9 it looked exactly like human error when it occurred.  
10 And what's more, it was fixed as and when it occurred by  
11 reason of the ordinary countermeasures that apply in  
12 Horizon.

13 So it never caused any lasting harm. It just looked  
14 like human error and it only got picked up. That's why  
15 it lasted as long as it did and that's why there were so  
16 many impacts. It is not a representative bug in that  
17 respect.

18 But he deals with it quite fully in his second  
19 report at paragraphs 144 to 163. Mr Green seems to be  
20 aggrieved because he doesn't specifically mention the  
21 112 occurrences, but what he does do is he refers to  
22 Mr Godeseth's second statement, paragraph 55 onwards,  
23 which does contain that information.

24 I do find myself asking forensically why on earth  
25 does Dr Worden have to repeat the same information

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1 a second time? My Lord, I'm now going to address you on  
2 what's loomed large in this litigation. It is not  
3 a Horizon Issue, but it is a matter to which the  
4 claimants keep going back. It is the question of  
5 disclosure. I'm going to do that, if your Lordship will  
6 permit me by reference to our closing submissions.

7 If I could ask your Lordship to go to {A/6/371},  
8 picking it up at paragraph 1119. There's  
9 your Lordship's order of 2nd February requiring Model C  
10 disclosure.

11 Paragraph 1120 and 1121 draws your Lordship's  
12 attention to the practice direction dealing with the  
13 pilot scheme disclosure, and notes that:

14 "... It is for the party requesting Extended  
15 Disclosure to show that what is sought is appropriate,  
16 reasonable and proportionate (as defined ..."

17 It is described also as "request-led, search-based  
18 disclosure".

19 Paragraph 8 of the practice direction also provided  
20 over the page at {A/6/372}:

21 "(1) The court may order a party to give disclosure  
22 of particular documents or narrow classes of documents  
23 relating to a particular Issue for Disclosure, by  
24 reference to requests set out in or to be set out in  
25 Section 1B of the Disclosure Review document or

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1 otherwise defined by the court."

2 So what does that establish? It established the  
3 requirement of a request:

4 "(2) If the parties cannot agree that disclosure  
5 should be given, or the disclosure to be given, pursuant  
6 to a request, then the requesting party must raise the  
7 request at the case management conference ..."

8 Now, I ask forensically, why does it use the word  
9 "must"? The answer is simple. The fundamental shift  
10 that has been achieved between ordinary, if I may say  
11 so, sounding like a dinosaur, standard disclosure and  
12 modern Model C disclosure is that with standard  
13 disclosure there is a default obligation to provide  
14 documents that adversely affect your case or support  
15 your opponent's case.

16 There is no such requirement in relation to Model C.  
17 All there is is a requirement to disclose known adverse  
18 documents, and a critical word there is of course  
19 "known". You have to know about, and if you don't know  
20 about it then you are not under an obligation to  
21 disclose it.

22 So in order to be in a position to complain about  
23 not having had a document, it is incumbent upon you as  
24 the requesting party if you are not satisfied by the  
25 response to go to court to get an order. That's how it

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1 is supposed to work. Ironically, it means that more  
2 work now needs to be done by the court than hitherto.  
3 Although it is supposed to reduce costs, I rather wonder  
4 whether in the long run it will increase them.

5 So that's the regime that we work under nowadays in  
6 these courts.

7 If I could pick it up at paragraph 1125:

8 "By the 'Courts Fourth CMC Order 1368 Post Office  
9 was ordered to disclose the documents set out in  
10 Schedule 1 to the Order. Schedule 1 was largely agreed  
11 by the parties (mainly before the CMC but some of it  
12 after). It focused on various documents (in particular  
13 reports and briefings) being provided to various  
14 categories of custodians which were defined in the  
15 Schedule itself."

16 So that's Model C working as intended.

17 The parties come together, they have a conversation,  
18 they reach an agreement and an order is made. There was  
19 no outstanding issue at that stage, it would seem.  
20 Certainly there was no application for anything further.

21 So we say at 1126:

22 "This was an example of Model C disclosure working  
23 broadly [as intended]."

24 If one goes over the page {A/6/373}, paragraph 1127  
25 adverts to paragraph 13 of the third CMC order where

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1 your Lordship reminded the parties that the experts had  
2 the right to come to court to seek directions.

3 If I could pick it up at paragraph 1130. Well,  
4 perhaps at 1129, the fourth CMC order:

5 "... the Court, by paragraphs 8 and 9 of the Order  
6 ordered the experts to provide an Error Codes List and  
7 jointly to compile a list of information which either or  
8 both considered they required."

9 1130:

10 "This joint report was duly produced on  
11 26th June 2018."

12 It should be, it was a request:

13 " ... for a huge amount of information, explanation  
14 and documentation."

15 My Lord, stopping there, what often happens in cases  
16 of this kind is that when issues have arisen, when the  
17 car crash has already arisen, you look back with the  
18 benefit of hindsight and you look back at a particular  
19 decision or letter and you look at it through  
20 a microscope and you think "Isn't that awful, I can't  
21 imagine why on earth that was done". Of course at the  
22 time when a party is faced with 30 or 40 pages of  
23 requests which go up hill and down dale which involve  
24 all sorts of different things, and remember these are  
25 technical requests which often the lawyers won't

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1 entirely understand, the lawyers don't act for Fujitsu,  
2 they act for Post Office, that can put a recipient,  
3 a receiving party in a difficult position. And it put,  
4 in my submission, Post Office in a difficult position.

5 Then over the page {A/6/374} at paragraph 1131,  
6 Mr Coyne on 20th July sent an email to Freeths and WBD  
7 requesting yet further material. And at 1132, it says:

8 "Some mechanism was clearly required in order that  
9 (i) each side's position on the various requests being  
10 generated by Mr Coyne was properly set out and could be  
11 fully considered and (ii) the requirements of Model C  
12 were met."

13 And 1133:

14 "The parties agreed a sensible mechanism which the  
15 Court approved in the Fifth CMC Order ..."

16 Perhaps I could invite your Lordship to read the two  
17 paragraphs quoted there, the order's at C7, tab 22, but  
18 we needn't look at it.

19 MR JUSTICE FRASER: The two paragraphs at 1133?

20 MR DE GARR ROBINSON: Yes.

21 MR JUSTICE FRASER: Yes.

22 MR DE GARR ROBINSON: My Lord, if I was a trust lawyer

23 I would say those two paragraphs gave effect to the  
24 spirit and intendment of the pilot scheme for  
25 disclosure, Model C disclosure. In particular, it

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1 created a mechanism by which, if there were any  
2 objections, the claimants would explain why the  
3 documents were needed and then the recipient,  
4 Post Office in this case, would be required to elect as  
5 to whether to continue its objection or not, with the  
6 benefit of the explanation as to relevance and why it is  
7 reasonable and proportionate.

8 That is how Model C is supposed to work in my  
9 submission.

10 This mechanism would have ensured that by the end of  
11 August, in fact by the middle of August, the parties  
12 would have known where they stood and it would have been  
13 open to the claimants to raise the matter with  
14 your Lordship and seek an order if need be, if agreement  
15 couldn't be reached.

16 That is how Model C disclosure is supposed to work.  
17 That's effectively what's said at paragraph 1134. But  
18 your Lordship will see over the page at 1135 {A/6/375}  
19 or 1136, Post Office's response on 8th August:

20 "[It] provided its response, as required by the  
21 Fifth CMC Order, on 8 August 2018. In many cases, it  
22 provided the information requested and additional  
23 documentation. In other cases it did not. Post Office  
24 was genuinely unsure of what Cs' case was in relation to  
25 many of the Horizon Issues - neither the Outline

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1 Document nor Mr Coyne's reports had been served at this  
2 point – and many of the requests sought not categories  
3 of documents but lengthy analyses and explanations of  
4 matters which Post Office did not have and which  
5 appeared to cut across the carefully negotiated  
6 categories of documentation which the Court had ordered  
7 at the Fourth CMC.”

8 So following this impasse, the claimants were put to  
9 their election pursuant to the fifth CMC order, they  
10 should have served an explanation by 18th August if they  
11 maintained a claim to any of these requests together  
12 with the necessary explanation.

13 Did they do that? No, they didn't. They in fact  
14 sabotaged this entire exercise by doing nothing. I'm  
15 not here to blame them for doing nothing, I am sure they  
16 had plenty of other things to do at the time. But,  
17 my Lord, I'm here defending constant criticisms made of  
18 my clients, including during my cross-examination of  
19 witnesses. My learned friend kept popping up and giving  
20 your Lordship "That was disclosed on such-and-such  
21 a date". The reason why we are having this conversation  
22 is because Post Office has been consistently attacked by  
23 the claimants for failing to give proper disclosure in  
24 circumstances where those criticisms are based upon  
25 a fundamental misunderstanding of the way that

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1 disclosure is supposed to operate in the modern world,  
2 in my submission.

3 If one were to look at the claimants' account of  
4 disclosure in their own closing submissions, it is quite  
5 revealing. We needn't go to it, but that is  
6 paragraph 40 of their closing, {A/5/15}. They suddenly  
7 say Mr Coyne made some requests in December or renewed  
8 his requests in December. But, my Lord, by then it was  
9 the ground rush to trial.

10 Two points that it is important to make clear about  
11 their complaint about disclosure. The first point is in  
12 actual fact, in my respectful submission, the claimants  
13 have had the disclosure that they could legitimately  
14 expect to have. Their real complaint is not that they  
15 have not been given the disclosure they need, their  
16 complaint is that it was disclosed late.

17 But, my Lord, that brings me to my second point,  
18 which is why was it disclosed late? The answer is it  
19 was disclosed late because they didn't take the  
20 opportunity that they had agreed that they would take in  
21 the terms of the fifth CMC order.

22 If, as I say, the claimants' only objection is one  
23 of delay, at whose door should responsibility for that  
24 delay be laid? In my submission, it should not be laid  
25 at the door of Post Office. Post Office tried to comply

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1 with the order. It did comply with the order and it got  
2 no response from the claimants, and it does not lie in  
3 the claimants' mouths in those circumstances to say that  
4 between August and December Post Office should have been  
5 busying itself voluntarily disclosing documents it  
6 thought were a dead letter because it had no response.

7 My Lord, there is the third submission that it is  
8 important to bear in mind as well, because although in  
9 my submission the only real complaint that can be made  
10 about disclosure is one of delay and, as I say, if  
11 a complaint is to be made it is to be made of the  
12 claimants, not of the Post Office, but at the same time  
13 the claimants also wish to maintain a suggestion that  
14 the reason why this has been happening, the reason why  
15 they didn't get these documents when they needed them,  
16 was because Post Office is exhibiting a lack of candour  
17 about its case. That's lawyer's speak for trying to  
18 conceal the truth from the court.

19 My Lord, nothing can be further from the truth. In  
20 my respectful submission, it is an outrageous submission  
21 for the claimants to make in circumstances where they  
22 had the power in their own hands, an agreed power, to  
23 ventilate this issue in a way that they were required to  
24 do pursuant to the pilot scheme practice direction and  
25 they chose not to take it for whatever reason.

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1 My Lord, just a final point on lack of candour. It  
2 really is important to note that the documents that have  
3 been disclosed, the KELs were disclosed in May last  
4 year, they have had the KELs for well over a year. As  
5 soon as the Horizon Issue trial was ordered, KELs were  
6 agreed to be disclosed.

7 No order of disclosure for PEAKs has ever been made,  
8 but the PEAKs were identified in the Post Office's EDQ  
9 back in December 2017 and steps were taken. It was  
10 difficult to extract the PEAKs from the proprietary  
11 database on which they are held by Fujitsu and software  
12 had to be written in order to allow them to be extracted  
13 so that they could be used in a usable way. And that  
14 cost quite a bit of money, as I understand it, and that  
15 took time, but there was no resistance to giving them  
16 the PEAKs. No order has actually been made but PEAKs  
17 were provided as soon as they became available, and they  
18 became available in the September.

19 It is in the submissions. I'm going too fast.  
20 My Lord, OCPs, OCRs, MSCs, I have to confess at the time  
21 I didn't really understand what these documents were.  
22 I'm speaking for me. But, again, once Mr Coyne's report  
23 had been served and it became clear what the  
24 significance of these documents were, urgent steps were  
25 taken actually to secure that these documents were

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1 available . And the dates on which they became available  
2 were set out later on in these submissions.

3 But, my Lord, this is not a story of Post Office  
4 seeking to hold back material that's unhelpful to its  
5 case. If that had been Post Office's objective, it  
6 wouldn't have run around like a headless chicken trying  
7 to get these documents for the claimants without any  
8 even threat of a court application.

9 What's more, the effect of these documents has not  
10 been unhelpful to Post Office. In fact, they have been  
11 helpful. The PEAKs, its OCRs and the OCPs and the MSCs  
12 all show, first of all, how few bugs there have been  
13 that are relevant for the purposes of at least Horizon  
14 Issues 1(a) and 3, and secondly, how minuscule the  
15 exercises of remote access have been in the context of  
16 a system of this size.

17 Those documents are actually helpful. There has  
18 been no smoking gun. There has been nothing that has  
19 been revealed that changes the whole complexion of the  
20 case, save insofar as it reveals things and has been  
21 useful for the arguments I'm now making to  
22 your Lordship.

23 So I would invite your Lordship to view with some  
24 scepticism an entirely understandable and, I have to  
25 say, entirely typical submission from my learned friend

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1 to the effect that Post Office is engaging in a process  
2 that is inappropriate and deserves judicial criticism in  
3 relation to this particular instance. In my submission,  
4 such a suggestion is grotesquely unfair.

5 Then, my Lord, just going on through the  
6 submissions. It is worth adverting to, but only very  
7 briefly, paragraph 1146: the decision of the Court of  
8 Appeal in *Serafin v Malkiewicz*. A very different case:  
9 a question of procedural unfairness to a party. And the  
10 Court of Appeal naturally drew attention to the fact  
11 that the judge made criticisms of the party for not  
12 disclosing documents that that party had not been  
13 ordered to disclose. And I would invite your Lordship  
14 similarly to refrain from making criticisms of that  
15 sort.

16 MR JUSTICE FRASER: I am glad you have mentioned that case  
17 because that was one of the questions I had for you.  
18 That is under the heading "The Court's interventions on  
19 disclosure".

20 That case concerned demands and criticisms by the  
21 judge during the trial. Now, I'm unaware of making any  
22 criticisms or demands during this trial.

23 MR DE GARR ROBINSON: I'm going to interrupt your Lordship  
24 with the greatest of deference.

25 MR JUSTICE FRASER: Well, I'm interrupted regularly by both

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1 of you, so ...

2 MR DE GARR ROBINSON: I want to make it clear that this case  
3 is not cited for the purpose of affecting your Lordship  
4 in any way, or suggesting to your Lordship in any way  
5 that that has happened during the case of this trial.  
6 And I would like to reassure your Lordship of that fact.

7 MR JUSTICE FRASER: I'm not necessarily seeking reassurance,  
8 I'm just seeking clarification because 1146 [A/6/377]  
9 says that that passage is relevant and it is under  
10 a heading "interventions on disclosure". Now, when  
11 I read it I went back and reminded myself not only of my  
12 approach to disclosure during this trial, but Common  
13 Issues trial as well, and I did in the Common Issues  
14 Judgment make certain observations in respect of  
15 managing the group litigation generally.

16 But so far as this trial is concerned, I think  
17 I have only been involved on three occasions. One was  
18 to invite you to perform a redaction review.

19 MR DE GARR ROBINSON: Yes.

20 MR JUSTICE FRASER: One was to require a witness statement  
21 of explanation in respect of Royal Mail.

22 MR DE GARR ROBINSON: Yes.

23 MR JUSTICE FRASER: One was to require a witness statement  
24 of explanation in respect of a large quantity of  
25 documents which came, I was told, originally in May, May

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1 of this year. But I do not think I have criticised  
2 anybody. I certainly haven't intervened. But if I have  
3 I would like you to identify those occasions to me.

4 MR DE GARR ROBINSON: My Lord, I do not think you have  
5 criticised. No, I would go further. If you had I would  
6 remember, and you haven't. The purpose of my reliance  
7 on this case -- this is a terrible thing, I'm throwing  
8 my learned friend under a bus here --

9 MR JUSTICE FRASER: No, please don't throw anyone under  
10 a bus.

11 MR DE GARR ROBINSON: It is that the importance of this  
12 case, this paragraph -- it is a paragraph -- is simply  
13 the principle that my learned friend is making  
14 criticisms which are based upon the very error that was  
15 identified by the Court of Appeal in this case.  
16 That's all.

17 MR JUSTICE FRASER: Well, that's rather my point. But it is  
18 not necessary to spend too long on it. But what  
19 occurred in that case were interventions during the  
20 trial in respect of disclosure said to be deficient, in  
21 respect of which there was no order.

22 MR DE GARR ROBINSON: Yes.

23 MR JUSTICE FRASER: What Mr Green did and his team did in  
24 their opening is they made a number of complaints in  
25 respect of the known error log, which we call the KELs,

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1 the PEAKs etc. And as you rightly point out there have  
2 been no applications in respect of that. It is more  
3 what could be said to be a generic complaint about the  
4 Post Office's approach generally, which I understand  
5 your submission to be effectively made for forensic  
6 reasons, is what it comes down to.

7 Let me put it slightly differently. I'm generally  
8 unimpressed with a party complaining about not receiving  
9 disclosure if they haven't made a specific application.  
10 Equally, during this trial there have been certain  
11 features of disclosure that have developed, for example,  
12 Royal Mail and the recent bulk disclosure when Fujitsu,  
13 I think you explained, had forgotten that there was some  
14 archive documents --

15 MR DE GARR ROBINSON: This is the OCRs?

16 MR JUSTICE FRASER: Yes. Which so far as the court is  
17 concerned I'm always interested in having an explanation  
18 in a witness statement. But I'm not aware I have  
19 criticised the Post Office.

20 MR DE GARR ROBINSON: Nor am I, my Lord, and I'm happy, I'm  
21 glad your Lordship has given me the opportunity to make  
22 that clear.

23 The simple point that I make, and I'm glad I have  
24 come to this so we have had this discussion, the simple  
25 point that I make is that just as it would have been

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1 inappropriate were your Lordship to have done that, by  
2 the same token it is inappropriate for my learned friend  
3 to make those criticisms in the hope that your Lordship  
4 is going to echo them.

5 MR JUSTICE FRASER: I understand. I mean, I also  
6 appreciate, so far as disclosure is concerned generally,  
7 that the Post Office has been reliant on Fujitsu to  
8 a large extent.

9 MR DE GARR ROBINSON: Yes.

10 MR JUSTICE FRASER: But now that we have the Fujitsu  
11 Post Office contract, it is obvious that Fujitsu has got  
12 a contractual obligation in respect of assistance so far  
13 as documents are concerned, but those things take time  
14 obviously.

15 MR DE GARR ROBINSON: Yes, and whether that obligation --  
16 I was going to raise the question of what that meant  
17 about control, but my Lord, I'm not in a position to do  
18 that.

19 MR JUSTICE FRASER: I do not think it is necessary, to be  
20 honest. But the short point is, and I think it is  
21 mentioned once or twice in this passage in your closing,  
22 that the Post Office was reliant upon Fujitsu.

23 MR DE GARR ROBINSON: Yes.

24 MR JUSTICE FRASER: And as you say, for example, the PEAKs,  
25 they had to develop the certain piece of software to

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1 extract them.

2 MR DE GARR ROBINSON: Yes, my Lord. I believe that's also  
3 the case with OSPs, and also MSCs have to be -- a lot of  
4 work had to be done in order to -- your Lordship will  
5 have heard Mr Coyne complain about the form in which  
6 MSCs were disclosed. Well, they would have been  
7 completely unusable if effort hadn't been made to put  
8 them into spreadsheet form. And actually, in relation  
9 to that it is worth mentioning that it is possible, it  
10 was possible on the spreadsheet to actually download  
11 individual documents and drop them onto paper in the way  
12 that I did, or was done at my request, so that one could  
13 see precisely what the documents showed.

14 My Lord, I see that it is 12.58. I have still got  
15 perhaps 10 or 15 minutes on disclosure.

16 MR JUSTICE FRASER: Do you want to stop now?

17 MR DE GARR ROBINSON: This may be a convenient moment.

18 MR JUSTICE FRASER: All right. We will come back at  
19 1.58 pm. Thank you very much.

20 (12.59 pm)

21 (The short adjournment)

22 (1.58 pm)

23 MR DE GARR ROBINSON: My Lord, two matters of housekeeping  
24 before I proceed.

25 First of all, I have handed up a series of

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1 typographical -- they are purely typographical --  
2 corrections to our closing submissions. Some of the  
3 internal paragraph references hadn't been updated when  
4 the document was served and there were some false  
5 references. An amended version of the submissions will  
6 be uploaded onto Magnum, but I imagine that  
7 your Lordship will have already started marking up the  
8 version that you have got, so a copy of just the  
9 amendments that have been made has been provided and  
10 that's available to your Lordship.

11 MR JUSTICE FRASER: I actually got two hard copies. I was  
12 working off the one that came from your solicitors,  
13 although I did get one from you. Yours was in two  
14 volumes and theirs was in one, which is why I used  
15 theirs not yours. But I assume they are both exactly  
16 the same.

17 MR DE GARR ROBINSON: I would be very surprised if they  
18 weren't.

19 MR JUSTICE FRASER: That's why I mentioned it. These are  
20 corrections to the submissions?

21 MR DE GARR ROBINSON: Yes. They are purely typographical.  
22 It is things like footnote 5 should be GDCC, and things  
23 like that.

24 MR JUSTICE FRASER: Thank you very much.

25 MR DE GARR ROBINSON: My Lord, the second housekeeping

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1 matter is something I have been taken to task on over  
2 the short adjournment.

3 When addressing your Lordship on what the impact  
4 would be of having a trial of the reconciliation and  
5 transaction correction processes in Post Office that  
6 have existed over the last 20 years, they have changed  
7 quite a bit during the course of those years, as  
8 I understand it, I told your Lordship it would be over  
9 1 million documents and could take six months. I have  
10 to say that was a product of my brain.

11 My instructing solicitors have very properly  
12 indicated to me that rather than just firing off the hip  
13 with a prediction of that sort one should be rather more  
14 careful, and really my submission should have been if  
15 those things were to be included in the Horizon trial it  
16 would not have been possible to have covered them within  
17 the timetable that was available by any means.

18 MR JUSTICE FRASER: All right.

19 MR DE GARR ROBINSON: So I stand corrected in relation to  
20 that.

21 My Lord, disclosure. I was on the question of  
22 disclosure and I addressed your Lordship on the  
23 standards that I submitted the claimants were, in my  
24 submission, inappropriately seeking to impose on  
25 Post Office.

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1 Before leaving the question, I would like to compare  
2 the standards that the claimants have been seeking to  
3 impose with the standards that they are willing to  
4 accept for themselves.

5 My Lord, if we could pick it up in the disclosure  
6 section of our written submissions, and if we could pick  
7 it up, please, at page 382, paragraph 1171 {A/6/382}:

8 "By paragraph 5 of the Fourth CMC Order, Cs were  
9 ordered to provide disclosure of documents upon which  
10 they intend to rely at Horizon Issues Trial ..."

11 At that time, it pointed out in 1172:

12 "... that the Fourth CMC Order provided for witness  
13 statements to be limited to 'any witness of fact whose  
14 generic evidence (in distinction to Claimant-specific  
15 evidence) they wish to rely upon for the purposes of  
16 determining the Horizon Issues ..."

17 So those two orders went together.

18 The reason why there was a limitation in the order  
19 that was applicable to the claimants was because the  
20 claimants weren't expected to be given the same sort of  
21 evidence that the Post Office would be giving.

22 That point is made in paragraph 1173 {A/6/383}, and  
23 I invite your Lordship to read that.

24 MR JUSTICE FRASER: Yes.

25 MR DE GARR ROBINSON: Then picking it up at {A/6/383},

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1 paragraph 1174:

2 "On 17th July ... Cs provided disclosure of 45  
3 documents. At this time it was not known to Post Office  
4 that Cs would be serving extensive claimant-specific  
5 witness statements."

6 But certain slightly ominous sounding statements  
7 were made and Post Office sought to explore that in  
8 1175, explaining that:

9 "... 'additional relevant documents may come to  
10 their attention, and most likely as a result of the work  
11 of experts ..."

12 So no mention was made of claimant-specific evidence  
13 that was to come, but they did say it was not their  
14 intention to make another round of disclosure.

15 Then there was correspondence in which my  
16 instructing solicitors sought to press my learned  
17 friends on the scope of the disclosure which had been  
18 given, and your Lordship will see the submission that's  
19 made in paragraph 1178 on page {A/6/384}.

20 There is a suggestion that there was a desire to  
21 avoid a repeat of late disclosure of documents close to  
22 trial which had happened at the Common Issues trial.  
23 My Lord, I don't know about that.

24 Then we then come to 28th September where the  
25 claimants serve nine witness statements, including

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1 several claimant-specific witnesses. Those witness  
2 statements for the first time exhibited 17 new  
3 documents -- that's in paragraph 1180 -- and a total of  
4 30 new documents were disclosed at that time.

5 MR JUSTICE FRASER: Is this with the witness statements that  
6 means?

7 MR DE GARR ROBINSON: My Lord, I believe so, yes. At the  
8 end of paragraph 1180.

9 Then, your Lordship will see quite a lot of  
10 correspondence where my instructing solicitors are  
11 pressing for information as to the scope of the  
12 disclosure that has been taken.

13 Then at 1182 there is a reference to the letter of  
14 14th January:

15 "... 'Given the nature of the Horizon Issues Trial  
16 there was good reason for the court to seek to limit the  
17 ambit and cost of disclosure from the Claimants  
18 themselves. Hence, the disclosure order made here; the  
19 obvious good sense of that has not changed.'"

20 Well, my Lord, your Lordship will anticipate what my  
21 response to that is. Everything changed when the  
22 claimants served substantial evidence of their own which  
23 they weren't supposed to, and that's the point that's  
24 made in paragraph 1183.

25 At paragraph 1184 it is pointed out that as

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1 claimants had flouted the order that your Lordship had  
2 made about evidence, Post Office sought to understand  
3 what searches, if any, had been conducted by claimants  
4 so that it could understand whether further disclosure  
5 would be required.

6 Several requests were made.

7 1185:

8 "This lack of response by the Cs should be viewed in  
9 light of the approach adopted by Post Office. One  
10 example of the further disclosure that Post Office has  
11 agreed to give to Cs which is outside that ordered by  
12 the Court is the requests for disclosure made by Cs on  
13 18 December 2018 in which the Cs sought ..."

14 Your Lordship will see the following categories of  
15 documents including:

16 "... disclosure of the documents that were  
17 responsive to searches by, and collated by the Defendant  
18 in respect of the operation of branches by Angela Burke,  
19 Aakash Patny, Anup Patny, Jayesh Tank, Setpal Singh and  
20 Adrees Latif. We would expect such documents to include  
21 but not be limited to."

22 Then there is a whole series of documents which the  
23 claimants were demanding.

24 So your Lordship will see the double standards that  
25 are being applied by the claimants. On the one hand

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1 they are standing on the orders, or rather the lack of  
2 orders, that have been made against them, but at the  
3 same time although no order has been made against  
4 Post Office either, they are demanding all manner of  
5 further documents.

6 Further requests for claimant-specific disclosure on  
7 4th February. Post Office responds on the 11th and  
8 provides disclosure on the 20th:

9 "The failure by [claimants] to provide their own  
10 claimant-specific disclosure suggests that they clearly  
11 intended disclosure to be a one-sided exercise."  
12 {A/6/386}

13 My Lord, there is a further observation I would  
14 respectfully make about that. The observation being  
15 Post Office are criticised for only producing documents  
16 on 20th February. My Lord, in my submission, the double  
17 standards explicit in that criticism takes the breath  
18 away.

19 On the one hand claimants refuse to give disclosure  
20 themselves or explain what disclosure has been given  
21 further to the few documents they have or provided. On  
22 the other hand they are demanding more and more  
23 documents from Post Office. And one can understand why.  
24 I'm not criticising them for that. What I'm criticising  
25 them for is for applying double standards between

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1 themselves and Post Office.

2 Then at 1187 the claimants write to Post Office  
3 indicating there is a document which is helpful to the  
4 claimants, Mr Tank's Yahoo -- what is it called? --  
5 Yahoo group forum document which he has found. He has  
6 found a post. The point is made just for consistency,  
7 notwithstanding the claimants' complaints about delay,  
8 it is pointed out in paragraph 1187 that there is no  
9 explanation of delay by the claimants. This is a double  
10 standards point, not a complaint point.

11 My Lord, there is then a series of paragraphs  
12 dealing with various documents that appear to exist. At  
13 page {A/6/387} there is a long part of the transcript of  
14 Mr Tank's cross-examination.

15 About halfway down the page, where Mr Tank says:

16 "Answer: I kept all my Post Office sort of related  
17 paperwork in a box file and that's -- when I was asked  
18 to look for evidence I went strictly to that box file  
19 and that's where I sourced all my information from."

20 So when asked "How do you know all this?" he says  
21 there is a box file that's got this information.

22 Similar points arise at the top of page {A/6/388}.  
23 A lot of reliance on this box file. Amongst other  
24 things, 1192:

25 "... it was Horizon generated receipts, print-outs,

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1 with hand-written dates and reference numbers on them."

2 My Lord, a similar summary of the evidence of  
3 Mr Latif where he discusses the records that he had  
4 access to to help him change his evidence. My Lord,  
5 that led to a request for disclosure which your Lordship  
6 will see on paragraph 1196 on page {A/6/390}.

7 My Lord, just to cut a long story short,  
8 your Lordship will see at paragraph 1198, {A/6/391}, the  
9 claimants refused:

10 "... to provide further disclosure of the requested  
11 documents on the basis that they were either outside Cs'  
12 control, no longer existed or were not relevant to the  
13 [Claimants'] evidence and not relied upon at trial."

14 My Lord, if one compares the approach that  
15 Post Office adopted to providing disclosure relevant to  
16 the allegations made by the claimants against them with  
17 the approach that the claimants have adopted in relation  
18 to the same issues, one does see distinct divergence, in  
19 my submission.

20 The claimants appear happy to stand behind the fact  
21 that no order has been made against them, whereas they  
22 won't for a moment countenance the possibility of the  
23 fact that no order has been made as being at all  
24 relevant to Post Office's position.

25 To be fair, Post Office hasn't stood on the orders

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1 either. Virtually all of the disclosure about which the  
2 claimants make so much complaint is actually all  
3 voluntary. But still Post Office is accused of lack of  
4 candour.

5 My Lord, before leaving the question of disclosure,  
6 and in particular disclosure by the claimants, I would  
7 respectfully submit that that reinforces the point that  
8 I hope your Lordship already has loud and clear from our  
9 submissions in relation to how inappropriate it would be  
10 for your Lordship to make findings that  
11 claimant-specific witnesses were the victims of  
12 undetected bugs or other defects in Horizon causing them  
13 trouble.

14 In principle --

15 MR JUSTICE FRASER: You mean in a Horizon Issues judgment?

16 MR DE GARR ROBINSON: Yes. My Lord, in principle that is  
17 a matter for --

18 MR JUSTICE FRASER: None of the Horizon Issues go to that  
19 at all.

20 MR DE GARR ROBINSON: Well, my Lord, the reason why  
21 I mention it is because your Lordship is invited to make  
22 all sorts of findings by the claimants and I'm quite  
23 anxious that your Lordship should understand, and  
24 I imagine you already do, that we say that would be  
25 an entirely inappropriate --

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1 MR JUSTICE FRASER: Well, I'm trying the Horizon Issues and  
2 I am answering the Horizon Issues. There will obviously  
3 be a lot of detail in the judgment prior to arriving at  
4 the answers to those issues. The idea that a specific  
5 finding could be made on the evidence before this court  
6 on a specific shortfall for a specific claimant in  
7 a specific amount allocating it to a specific bug seems  
8 to me to go outside the Horizon Issues.

9 MR DE GARR ROBINSON: I'm obliged to hear that from  
10 your Lordship.

11 MR JUSTICE FRASER: But I'm surprised it is a point of  
12 enormous difference between you given the orders, given  
13 the CMC orders about what the trial is about.

14 MR DE GARR ROBINSON: My Lord, I agree. It is surprising.

15 But if your Lordship were to go to the claimants'  
16 closing submissions, you will see that you are being  
17 invited to make all sorts of findings. And one of the  
18 most remarkable ones I think is in relation to Mr Latif.  
19 Your Lordship will recall there is said to be  
20 a difficulty about a stock unit transfer in or around  
21 July 2015.

22 MR JUSTICE FRASER: Yes.

23 MR DE GARR ROBINSON: The evidence demonstrates, in my  
24 submission quite clearly, if your Lordship were to make  
25 findings on it, which I say you shouldn't, the evidence

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1 demonstrates quite clearly that there was no such  
2 problem during the period identified by Mr Latif.

3 The claimants are suggesting your Lordship should  
4 make a finding that it happened at some other  
5 unspecified time that's not covered by any disclosure,  
6 it is not covered by any evidence, in circumstances  
7 where Mr Latif himself didn't say it happened at  
8 a different time.

9 There is an Alice in Wonderland reaction to those  
10 submissions, but it is right that your Lordship should  
11 understand -- I can see that your Lordship does -- our  
12 response to the submissions of that kind. In my  
13 submission, it would be entirely inappropriate.

14 MR JUSTICE FRASER: Well, the way in which I deal in the  
15 judgment with claimant-specific issues is obviously  
16 something I am going to have to consider carefully and  
17 deal with carefully. But so far as the findings on the  
18 Horizon Issues are concerned, it is very clear on the  
19 face of the order and the discussion that led to the  
20 order that they are not going to be claimant-specific.  
21 They are generic.

22 MR DE GARR ROBINSON: I'm grateful for your Lordship's  
23 indication.

24 MR JUSTICE FRASER: That's not to say that I have  
25 a concluded view now that I should ignore all of the

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1 claimant-specific factual evidence, but I'm fairly  
2 clear, as with the Common Issues in fact, that the  
3 answers arrived at in the judgment are the answers to  
4 the issues that I am trying. I would have thought  
5 that's a fairly elementary approach.

6 MR DE GARR ROBINSON: To the extent that -- the experts --  
7 Mr Coyne doesn't base any conclusions on the witness  
8 evidence, as far as I'm aware. He refers to the witness  
9 evidence as being consistent with his views. But  
10 nowhere -- I hope I'm correct, I am sure I am correct in  
11 saying. The fact that I'm saying I am sure I am correct  
12 in saying means I'm not sure. But I think I am correct  
13 in saying that nowhere does Mr Coyne conclude that  
14 a particular bug existed because a particular  
15 claimant-specific witness has said something.

16 At most, what he does is he says, well, I noticed  
17 Mrs Burke had problems with reconciliation, or I see  
18 that Mr Latif says this, that and the other. But he  
19 doesn't, first of all, base any conclusions on the basis  
20 of their evidence, nor should he. Secondly, nor does he  
21 suggest that their assertions flow from a bug that he  
22 has identified that could be the source of  
23 a particular -- I think I'm right in saying he doesn't  
24 specifically say bug 13. This was in existence at that  
25 time and that's when we had Mr Latif's problem.

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1 My Lord, that's not how his evidence is constructed,  
2 as I recall. In those circumstances it would be  
3 highly -- your Lordship as got my submissions. There  
4 hasn't been proper disclosure. If there were to be some  
5 findings about what the claimants did, what they  
6 suffered, there would need to be an investigation of  
7 wider issues about how the relevant branches were  
8 operated. One would need to go into the history. One  
9 would need to investigate all sorts of things.

10 These snapshot witness statements, most of which are  
11 almost impossible to understand because they are so  
12 short and bereft of detail, one would need to go into  
13 far more material in order to be able to be in  
14 a position to make findings at all. If your Lordship  
15 were to make findings, in my submission the only proper  
16 findings would be to dismiss the claims that are made.  
17 But my primary submission is that your Lordship should  
18 not entertain them in the first place.

19 My Lord, that completes my submissions on  
20 disclosure.

21 Let me now come as briefly as I can to the bugs that  
22 my learned friend addressed you on yesterday. What  
23 I would like to do as briefly as possible is to talk  
24 about bug 11, bug 12, bug 13 and bug 15.

25 Bug 11 is Girobank. Your Lordship will recall that

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1 Post Office contends that there's no evidence of  
2 financial impact from the relevant bugs. Your Lordship  
3 may or may not -- I suspect not -- be alive to this  
4 already, but bug 11 raised in appendix 2 raises six  
5 issues. My learned friend didn't deal with all of those  
6 six issues in his submissions yesterday. He only  
7 addressed Issues 1 and 2 and he referred to a principal  
8 PEAK which is at {F/25/1}, and perhaps I could ask  
9 your Lordship to go to that very briefly.

10 My Lord, this is opened on 5th May. The claimants  
11 argue that Post Office hadn't grappled with the concept  
12 of what a discrepancy is, and I'm informed that that's  
13 in the transcript at {Day21/101:1}. If that is their  
14 submission, in my submission it is not correct.

15 Post Office has grappled with what a discrepancy is,  
16 but the word "discrepancy" means more than merely  
17 a comparison between one thing and something else, as  
18 the claimants suggest.

19 The thing and the something else are relevant to the  
20 Horizon Issues. They can't be any two things. Here  
21 what's required is a discrepancy in branch accounts.

22 Now, the PEAK notes that there was a £505  
23 discrepancy between a branch's cash account, and the  
24 cash account at this period of time means its own  
25 accounts, and its daily reports.

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1 Your Lordship will see that from the bottom of  
2 page {F/25/1}. 5th May at 15:02:

3 "New evidence added - Full message store.

4 "... Response:

5 "This difference (£505.72) between the Cash Account  
6 and the Daily reports is explained by," a particular  
7 KEL.

8 MR JUSTICE FRASER: Yes.

9 MR DE GARR ROBINSON: The discrepancy there is not  
10 a discrepancy in the branch's accounts. It is  
11 a discrepancy between the accounts and the report that  
12 was sent to Girobank every night. The issues discussed  
13 in the PEAK are reporting issues, they are not account  
14 issues.

15 Indeed, Mr Coyne agreed the following in  
16 cross-examination, that the detection and investigation  
17 of Issues 1 and 2 in this PEAK demonstrated the good and  
18 effective operation of robustness countermeasures in  
19 Horizon. My Lord, that was at {Day17/52:1} to 56, and  
20 pages 63 to 64.

21 He also accepted that the PEAK was not evidence of  
22 a transaction correction or error notice being issued to  
23 the subpostmaster in such a way as to subject him to  
24 a risk of loss. That is {Day17/65:1}. My Lord, that  
25 summarises my submissions on bug 11.

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1 If we could move on to bug 12: counter replacement  
2 causing one-sided transaction. The claimants raise  
3 a specific issue, namely that the KEL at F421, that's  
4 J Ballantyne 5328R, does not make reference to issuing a  
5 transaction correction, or error notice, or a BIM  
6 report.

7 If we could go to that, it is at {F/421/1}. It is  
8 true that the KEL does not make reference to a BIMS or  
9 to an error notice or transaction correction. However,  
10 usually KELs don't do that. They don't include specific  
11 instructions in relation to BIMS or TCs. It is  
12 a standard process which goes beyond what's required in  
13 one specific KEL.

14 If a SPM needs to be made good it is a standard  
15 process, and in paragraph 12 of his third witness  
16 statement Mr Parker said:

17 "This process of identifying a bug, then identifying  
18 its effects and then remedying those effects is not  
19 special to Horizon. It is a standard part of any IT  
20 support practice." {E2/13/3}

21 Having said all that though, look at the bottom at  
22 page 1, just before "Evidence" {F/421/1}. About three  
23 lines from the bottom, it says:

24 "For a multi-counter outlet ... need to retrieve the  
25 messagestore from another counter, as well as the

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1 affected counter. For MCO (and SCO), transaction  
 2 numbers for the RiposteVersionString messages should  
 3 reveal the original transactions. When you have  
 4 identified any missing transactions attach the details  
 5 to the PinICL," that is an old name for PEAK, "and route  
 6 to MSU."

7 Now, the reference to MSU, there has been quite  
 8 a bit of evidence about it but for present purposes  
 9 I can simply rely on Parker 1. If I could ask  
 10 your Lordship to go to {E2/11/12}. It is paragraph 44.

11 Starting at the second sentence, Mr Parker says:  
 12 "There was (and is) a process run by the Management  
 13 Support Unit (MSU) which involves examination of various  
 14 system reporting and may result in Business Incident  
 15 Management Service (BIMS) entries going to Post Office.  
 16 An incident may also be raised by MSU with the SSC to  
 17 provide support to the MSU in resolution of the BIMS."

18 My Lord, the MSU is the body within Fujitsu which is  
 19 involved in the production of BIMS.

20 So the fact that the MSU was being involved by the  
 21 SSC here actually is an indication that what could end  
 22 up happening is that a BIMS report will go from MSU to  
 23 Post Office.

24 My Lord, secondly in the context of this very bug,  
 25 it is worth looking at {F/77.1/1}, one of the other

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1 PEAKs. Same phenomenon. If one goes over, this is  
 2 24th November 2000, so a similar period. One goes to  
 3 page {F/77.1/3} of that PEAK. The bottom green box  
 4 starts at 5th December 2000 at 10.43:

5 "Response:  
 6 "4/12/2000 ... By John Moran - MSU."  
 7 It is worth noting.

8 MR JUSTICE FRASER: I can't see where you are.

9 MR DE GARR ROBINSON: It is halfway down the page.

10 MR JUSTICE FRASER: Have you still got black and white or  
 11 have you got colour?

12 MR DE GARR ROBINSON: No, I have green now. It is the green  
 13 box. If I didn't make that clear, I do apologise.  
 14 5th December at 10.43.

15 MR JUSTICE FRASER: Yes, I've got that. Oh, I see, yes.

16 MR DE GARR ROBINSON: So MSU is involved.

17 MR JUSTICE FRASER: Yes.

18 MR DE GARR ROBINSON: "This incident has the same cause as  
 19 one to be recorded on the SIL ..."

20 I'm afraid I don't know what SIL means:  
 21 "... under BIM."

22 And there is a number. You see MSU is involved in  
 23 BIMS. Then if one goes down to the bottom of the box,  
 24 about two-thirds of the way down there is a line that  
 25 starts "These two credits". Does your Lordship see

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1 that?

2 MR JUSTICE FRASER: Yes, equal £167.12.

3 MR DE GARR ROBINSON: "As they were written over they were  
 4 not added to the cash account.

5 "Final BIM issued.

6 "Please close this call.

7 "Closing as Reconciliation resolved."

8 Here you have evidence first of all of BIMS being  
 9 sent in relation to precisely this bug, and second you  
 10 have evidence of the MSU being involved. So that  
 11 disposes of the submission made by my learned friend  
 12 about that.

13 Withdrawn stock next. That is bug 13. If I could  
 14 pick it up at {F/765/1}. Your Lordship may recall that  
 15 this is a problem where stock is withdrawn. It is no  
 16 longer being sold by Post Office. Branches are supposed  
 17 to rem out the relevant stock and send it back to  
 18 Post Office, but what sometimes happened is that they  
 19 don't rem it out, they just send it to Post Office and  
 20 the problem is Horizon doesn't actually have a pair of  
 21 eyes. If you don't record the rem, then Horizon doesn't  
 22 know that the stock has been removed, and then there is  
 23 a problem because you have stock which Horizon thinks is  
 24 held at the branch, and it is historic stock, it's stock  
 25 which Post Office no longer sells. And that creates

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1 problems in itself and what to do about that stock and  
 2 so on.

3 This was a case where the SPM did not follow the  
 4 correct procedure. The underlying issue explained of in  
 5 the PEAK is not a bug in withdrawn stock, but it is the  
 6 SPM not following correct procedure in remming out the  
 7 stock that's being withdrawn.

8 One gets that, my Lord, if one looks at page 1 of  
 9 this PEAK halfway down the big yellow box:

10 "This office physically held 137 £5 Post Office  
 11 stamps and did not rem them out before the date the rem  
 12 out icon disappeared."

13 That will be when, I presume, reference data ceased  
 14 to be applicable to in relation to that particular  
 15 stock:

16 "The office physically returned the stamps to  
 17 Transaction Processing as advised and the office then  
 18 did a Trading Period balance on 17 November 2010 and  
 19 showed this value as a loss."

20 Now, what my learned friend did yesterday was go  
 21 like a magnet to the second line and said: look, look,  
 22 transaction processing advised them to do what they did.  
 23 It must be a bug. I don't know if your Lordship recalls  
 24 that?

25 I think the quote from the transcript is:

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1 "So pausing there. We do not get from the PEAK  
2 itself the fact that the SPM failed to do what they were  
3 advised to do in terms of failing to rem them out."  
4 That is {Day21/110:14}. But your Lordship will see  
5 from this very sentence that the SPM had not done what  
6 he was supposed to do. He had not remmed out the stamps  
7 in the first place. So it is quite right that the SPM  
8 had been advised to return the stamps, but they had to  
9 also rem them out. That is fundamental to the way that  
10 the Post Office business works and it is commonsense  
11 really because, as it says, Horizon doesn't have eyes.  
12 So, my Lord, again, a very brief submission in  
13 relation to that.  
14 Phantom transactions is more complicated. There  
15 were three documents that my learned friend referred to  
16 yesterday. The first was -- well, a PEAK at F/97, then  
17 at PEAK at F/100.1 and then a PEAK at F/88.2. These  
18 PEAKs are relied on with a view to casting doubt on the  
19 conclusion set out in those PEAKs that the problems were  
20 not probably attributable to bugs in Horizon.  
21 If we go to {F/97/1} first, your Lordship may recall  
22 that I cross-examined Mr Coyne about this, who would  
23 only rely upon the Romec engineer point. Does  
24 your Lordship recall the Romec engineer point?  
25 MR JUSTICE FRASER: I do.

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1 MR DE GARR ROBINSON: That was the point he had referred to  
2 in his report and I had taken him to the end of the PEAK  
3 in which Patrick Carroll had set out his overall  
4 conclusion.  
5 My learned friend very fairly went to a different  
6 page of the PEAK, page {F/97/7}. Before going there, it  
7 is worth noting that this is a master PEAK that doesn't  
8 just relate to one particular branch, it covers a number  
9 of different incidents with different branches. And  
10 that's an important part of the context.  
11 If one goes to page {F/97/7}, that's relevant to  
12 what's said in the box that my learned friend referred  
13 to. It is 19th June, 15.17, about two-thirds of the way  
14 down. My learned friend understandably relies on the  
15 sentence:  
16 "This has been seen at Old Iselworth (OI) and Wawne  
17 ... with OI being the best site; when the PM has been  
18 asked to leave the screen on overnight I have observed  
19 system activity corresponding to screen presses  
20 happening with no corresponding evidence of either  
21 routine system activity or human interference, the way  
22 forward now is to correlate this with the Microtouch  
23 supplied monitoring software and to this ends Wendy is  
24 arranging for installation of Kit at OI on Friday ..."  
25 So it is the Old Isleworth site on Friday:

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1 " ... we can then, provided the PM agrees, leave  
2 screens on over the weekend and record what happens.  
3 Once these results have been analysed I feel sure that  
4 we will be in a position to move forwards at OI. All  
5 other cases should be considered on their individual  
6 merits ..."  
7 So this is 19th June, the installation took place on  
8 22nd June. This entry followed up on 20th July at  
9 13.40. That's at page {F/97/8}. It says:  
10 "Comtest readings have been correlated with perfmon  
11 stats and a recommendation to install resitive screens  
12 at Old Iselworth has been made."  
13 So that is the last entry relating to this site on  
14 this PEAK. But it is picked up in {F/100.1/1}, if  
15 I could ask your Lordship to go to {F/100.1/1}. I'm  
16 sorry to jump about like this. Your Lordship will see  
17 the last entry was 22nd July. This picks up at the top  
18 of the page, 25th July 2001 at 9.39.  
19 MR JUSTICE FRASER: 25, yes.  
20 MR DE GARR ROBINSON: Does your Lordship see that in the top  
21 green box?  
22 MR JUSTICE FRASER: Yes.  
23 MR DE GARR ROBINSON: Third line down:  
24 "24/07/01:  
25 "PM reports that he has been having phantom

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1 transactions ..."  
2 Over the page, here is Patrick Carroll's conclusion  
3 about all of this {F/100.1/2}. 5th September:  
4 "Following a significant amount of monitoring ..."  
5 Stopping there. That clearly is the case. Mr Coyne  
6 himself I think accepted that Fujitsu had worked quite  
7 hard to get to the bottom of what these reported  
8 problems were:  
9 "Following a significant amount of monitoring we  
10 have been unable to definitively link any  
11 equipment/environmental issues to any particular event.  
12 "There have been incidents which showed a possible  
13 correlation between system activity and phantom Txns,  
14 these pointed to a touch screen problem and as a result  
15 the screen was replaced with a Resitive model. As this  
16 produced no measurable improvement it has to be assumed  
17 that the problems were user related."  
18 So that's Mr Carroll's considered opinion having  
19 done all the tests and changed all the equipment that  
20 could be changed.  
21 If one goes back to the previous master PEAK at  
22 {F/97/9}, his overall conclusion at 12th November 2001  
23 at 9.48 at the bottom of the page:  
24 "Phantom Txns have not been proven in circumstances  
25 which preclude user error."

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1 "In all cases where these have occurred a user error  
2 related cause can be attributed to the phenomenon.

3 "I am therefore closing this call as no fault in  
4 product."

5 My Lord, that's the conclusion of Mr Carroll who is  
6 on site and who is the experienced Fujitsu operative.  
7 In my submission, that opinion should not be rejected.

8 So far as is relevant to the Old Isleworth site it  
9 is also worth noting something about the postmaster  
10 there. If one goes to {F/88.2/1}, this is  
11 15th February 2001. So we were in July 2002, weren't  
12 we? I'm so sorry, we were in September 2001. That was  
13 the last entry for Isleworth in the previous F/100.1,  
14 but this started in 15th February 2001.

15 If one goes to the green box at the top about  
16 halfway down:

17 "Outlet went live ... requested further training,  
18 the PM was referred to his RNM ... It would appear that  
19 there is a training issue here which needs to be  
20 addressed."

21 Then PON actions:

22 "Has PM completed and passed his training?"

23 "When, where and with whom did PM complete training?"

24 "Has further training been considered?"

25 One sees that the postmaster seems in need of help.

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1 Then at page {F/88.2/3}, 20th September, 12.07, the  
2 main box:

3 "PON have written to the RNM to address the training  
4 issue, see text below.

5 "From RNM - I spoke to training and Dev this  
6 afternoon and arranged 2 days training for next week,  
7 when I rang Mr Parker he told me that he did not need  
8 the extra training so I have now cancelled it. He also  
9 told me that the phantom transactions have stopped.

10 "PON to RNM: There seems to be no issues at this  
11 outlet if you are happy with the postmasters response.

12 "Is there anything else that needs investigating at  
13 the outlet proven to be directly linked with phantom txns  
14 (discrepancies?) as there are none recorded?"

15 "If not I would like your agreement to close down  
16 this problem as now resolved. I would like to make you  
17 aware though that the postmaster does seem to be making  
18 quite a few calls still to the HSH helpdesk, mainly  
19 around simple things such as reversals."

20 "RNM to PON: Thanks for making aware about the  
21 number of calls your still receiving, I don't think we  
22 will ever stop him from making these. I see no reason  
23 why this call cannot not be closed. As I said the  
24 Postmaster said he is no longer getting these  
25 transactions."

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1 So the changes made didn't seem to change anything  
2 but then miraculously the transactions stop. What's  
3 more, it seems that this postmaster is the kind of  
4 person that needs more support than perhaps you would  
5 expect for more postmasters.

6 MR JUSTICE FRASER: What does "PON" stand for?

7 MR DE GARR ROBINSON: My Lord, I would have to take  
8 instructions.

9 MR JUSTICE FRASER: Don't worry, I will give you a list of  
10 three-letter acronyms later on.

11 MR DE GARR ROBINSON: I shall look forward to that.

12 MR JUSTICE FRASER: I will give it to both of you so you are  
13 not the only person who has to ...

14 MR DE GARR ROBINSON: Unless I can assist your Lordship  
15 further, those would be my submissions on the PEAKs that  
16 my learned friend went through yesterday.

17 MR JUSTICE FRASER: Yes.

18 MR DE GARR ROBINSON: Then, with your Lordship's permission,  
19 I propose to deal with a number of miscellaneous points.

20 First of all, number of criticisms made of Mrs Van  
21 Den Bogerd's evidence. First of all, she was criticised  
22 for her treatment of the Helen Rose report and she  
23 accepted some criticism in her evidence, and my learned  
24 friend places some emphasis on that in his submissions.

25 In my respectful submission, her witness statement

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1 was clear and fair. It wasn't right to criticise her.  
2 If I could ask your Lordship to go to her witness  
3 statement. It is {E2/5/34}. This is to do with the  
4 Helen Rose report.

5 Your Lordship will recall that Mr Coyne in his first  
6 report made a number of criticisms based on the  
7 Helen Rose report, including the criticism that  
8 a transaction correction had wrongly been sent to the  
9 postmaster in that case.

10 At the bottom of page 34 Mrs Van Den Bogerd refers  
11 to paragraph 5.175 of his report. She says:

12 "The extracts taken from the report by Helen Rose  
13 ... are taken out of context and mistakenly claim that  
14 the relevant reversal was issued in error by Horizon,  
15 not the Subpostmaster. The Rose report makes it clear  
16 that:

17 "154.1. The concerns were based on the fact that  
18 reversals were not being shown on the particular data  
19 sets reviewed / reports typically run by Subpostmasters  
20 in branch on Horizon.

21 "154.2. Transaction reversal data can be extracted  
22 from Horizon;

23 "154.3. The issue was therefore surrounding how the  
24 transaction reversals were displayed / accessible in  
25 branch and that there was no issue with Horizon itself."

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1 Then 155:

2 "There is therefore no indication that the reversal  
3 was not notified to the subpostmaster. When recovery  
4 was carried out a discontinued session receipt would  
5 have been printed and messages would have been clearly  
6 displayed to the User in branch during the recovery  
7 process."

8 My Lord, in those paragraphs Mrs Van Den Bogerd is  
9 not saying that the postmaster reversed the transaction.  
10 She is saying that what happened in the branch was part  
11 of the reversal process and was correct. And she was  
12 saying that the SPM knew about it.

13 In my submission, the evidence shows that both those  
14 points were true.

15 MR JUSTICE FRASER: Both which points, sorry?

16 MR DE GARR ROBINSON: First of all, that the reversal was  
17 part of the recovery process operating normally, and  
18 secondly, the SPM knew that the recovery process was  
19 operating because he received the printed receipts.

20 MR JUSTICE FRASER: You are saying that's what's on the face  
21 of her witness statement? Are we at the point of her  
22 witness statement now rather than her cross-examination?

23 MR DE GARR ROBINSON: Yes, I'm talking about her witness  
24 statement. I'm not going to go to her  
25 cross-examination, my Lord. What I'm submitting to

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1 your Lordship is that there was no basis for criticising  
2 her --

3 MR GREEN: My Lord, I'm sorry to interrupt but she agreed  
4 that was wrong in her cross-examination.

5 MR DE GARR ROBINSON: What she said in her cross-examination  
6 was that she didn't intend to suggest that the SPM was  
7 responsible for the reversal and that's not what she  
8 says in this witness statement. So she was right to  
9 have that intention.

10 MR JUSTICE FRASER: All right.

11 MR DE GARR ROBINSON: So, my Lord, that's point 1 on Mrs Van  
12 Den Bogerd.

13 Point number 2, paragraph 183 of the same witness  
14 statement {E2/5/42}, she says:

15 "Before the change to Horizon Online, a cash check  
16 was completed in branch by the HFSOs. Branches were  
17 notified in advance that this cash check would be  
18 carried out. I recall that this mandatory cash check  
19 across the entire network caused a temporary spike in  
20 declared losses. I suspect that this was due to  
21 branches tidying up their accounts before the cash check  
22 and therefore losses coming to the surface that had  
23 previously been ignored or covered up."

24 My Lord, it's always dangerous for counsel to say  
25 this, but I don't understand what the criticism of

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1 Mrs Van Den Bogerd is here. She is speaking from her  
2 own recollection and she remembers a spike in declared  
3 losses during the period of the mandatory cash check,  
4 which of course is before the migration to  
5 Horizon Online.

6 She is not purporting to state a considered view  
7 that having investigated the matter this must be the  
8 cause. She specifically qualifies what she says by  
9 saying:

10 "I suspect that this was due to branches tidying up  
11 their accounts."

12 So she lived through the process and she suggests  
13 a possible reason. My Lord, that's not speculation on  
14 which she needed to be challenged by reference to  
15 Fujitsu documents to which my learned friend sought to  
16 take her.

17 My Lord, furthermore it is worth noting that  
18 Mr Coyne himself agreed, and had already agreed, that it  
19 was a likely factor in the spike along with a possible  
20 increase in bugs during migration to Horizon.

21 My Lord, that's in JC2, {D2/4.1/219}. Perhaps we  
22 could go to that.

23 Paragraph 5.345. Mr Coyne has referred to certain  
24 statements made by Dr Worden in the previous paragraph,  
25 you can see the end of it is in italics, and he says:

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1 "In my experience, a major change to a platform will  
2 almost always lead to an increase in bugs, errors and  
3 other issues. Therefore, I do not agree that the  
4 mandatory cash check was 'more likely' to be the cause  
5 of the spike in 2010. The most likely scenario is that  
6 both of these were factors."

7 So my learned friend's own expert says it was  
8 a factor.

9 Mrs Van Den Bogerd is talking about the period  
10 before migration when the mandatory cash checks were  
11 being done. My Lord, in those circumstances it was not  
12 necessary to take Mrs Van Den Bogerd to any documents to  
13 challenge her evidence. Her evidence was perfectly  
14 understandable and needn't have been challenged at all.  
15 And that's my very brief submission about that.

16 My Lord, a third point about Mrs Van Den Bogerd's  
17 evidence is that in paragraph 35 of the claimants'  
18 submissions there is a suggestion that she is basing her  
19 evidence on a document that she didn't actually have  
20 because it didn't come into existence until after her  
21 witness statement was made.

22 I don't criticise the claimants for doing this but  
23 they have done this quite a lot. I can tell  
24 your Lordship on instructions why it was that the cash  
25 declaration that they refer to in paragraph 35 -- it is

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1 not necessary to go to it -- was dated 1st March when  
2 her witness statement was dated the previous year, in  
3 November the previous year.

4 MR JUSTICE FRASER: 1st March this year then, you mean?

5 MR DE GARR ROBINSON: Yes. She couldn't explain that in  
6 cross-examination.

7 My Lord, on instructions I'm in a position to  
8 explain it now. During preparation for the  
9 cross-examination of Mr Patny, my instructing solicitors  
10 realised that they didn't have a copy of that particular  
11 declaration and so they requested it from Post Office.  
12 That was on 1st March. My Lord, that was the document  
13 that was then hyperlinked to Mrs Van Den Bogerd's  
14 statement. She doesn't specifically say "I refer to  
15 a cash declaration". The fact is she had seen a cash  
16 declaration. She had seen it a long time before, but it  
17 was the same data just obtained on a different date.

18 So the fact that the date on that particular  
19 document post-dates the date of her witness statement  
20 doesn't mean that she didn't have sight of the same  
21 information previously; she certainly did have. That's  
22 why one sees it. She makes a number of statements about  
23 it which are correct.

24 My Lord, a similar claim made in the claimants'  
25 written closings about the evidence of Mr Membery, who,

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1 as your Lordship is aware, was unable to give evidence.  
2 It is at paragraph 123(c) of their submissions. It is  
3 to the effect that Mr Membery refers to a document that  
4 has been produced to him by Mr Lenton but the metadata  
5 on the document suggests that the document was produced  
6 by someone called BH.

7 My Lord, I can tell your Lordship on instructions  
8 that the version of that document received by my  
9 instructing solicitors from Fujitsu recorded that it had  
10 last been modified by Mr Lenton. How BH's name got on  
11 it and who BH is they have no idea, and my instructing  
12 solicitors are happy to provide that document in native  
13 form if my learned friend would wish to see it.

14 My Lord, another miscellaneous point. Criticism is  
15 made of Mr Johnson in my learned friend's closing  
16 submissions. He is criticised because he didn't know  
17 the source of a screenshot. My Lord, it did not matter  
18 where the screenshot came from. What mattered was  
19 whether it was a true screenshot. It was not from the  
20 Horizon guide, but Mr Johnson did not claim that it came  
21 from the Horizon guide.

22 If I could ask your Lordship to go to {E2/4/2}. At  
23 paragraph 10 you will see that Mr Johnson says:

24 "The screenshots that appear in this statement are  
25 primarily taken from a document called Post Office

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1 Onboarding Counter Guide ... Where a screenshot has been  
2 taken from another document I refer to that document."

3 MR JUSTICE FRASER: Yes.

4 MR DE GARR ROBINSON: My Lord, Mr Johnson didn't know where  
5 the particular screenshot had come from but he did know  
6 that it was a proper screenshot, and that's the short  
7 point.

8 And indeed it was. My Lord, another criticism made  
9 of the claimants' witnesses relates to the  
10 cross-examination of Mrs Burke. It was suggested in the  
11 claimants' closing submissions that because Mrs Van Den  
12 Bogerd's witness statement was only amended shortly  
13 before she went into the box, that enabled my learned  
14 friend Mr Draper to criticise Mrs Burke on the basis of  
15 a false apprehension of the facts to be collected from  
16 the unamended witness statement.

17 My Lord, this related to the fact that in Mrs Burke  
18 had undertaken three transactions for several different  
19 customers all in one basket, which of course is not  
20 proper procedure. And she explained why. She very  
21 fairly explained why in her witness statement: it was  
22 because Horizon was playing up.

23 But what was suggested to her was, first of all,  
24 that was a breach of procedure as it evidently was, and  
25 secondly, it was suggested to her that by doing that she

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1 increased the risks of unfortunate things happening.  
2 For example, if there was a failure it might well be  
3 that the failure would relate to a transaction in  
4 relation to which the customer was long gone.

5 My Lord, that was all that was put. No criticism  
6 was made of Mrs Burke and, more importantly, no  
7 suggestion was put to her that her having undertaken  
8 a series of different transactions all within one  
9 basket, that had a causative effect on the issue that  
10 she then faced when there was a system outage on  
11 9th May.

12 My learned friend's suggestion that a false case was  
13 improperly put to Mrs Burke on the basis of an unamended  
14 witness statement of Mrs Van Den Bogerd's is simply  
15 unfounded, and it is an unfair criticism and  
16 I resist it.

17 My Lord, I'm going to finish with some very brief  
18 submissions in relation to audits. A number of  
19 submissions are made about audits in the claimants'  
20 closings. I can pick them up really at paragraph 620 of  
21 the claimants' closings, which is at page {A/5/217}.

22 Picking it up at (c) at page {A/5/220}:

23 "The purpose of these audits is to provide  
24 assurances to Post Office and its auditors about the  
25 risk of material misstatements in Post Offices

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1 financial statements. The audits themselves expressly  
 2 state that they 'should not be used by anyone other than  
 3 these specified parties '"  
 4 So there is a claim.  
 5 Your Lordship will recall that there were a number  
 6 of financial audits done by Ernst & Young for  
 7 Post Office, including in 2011 and 2013. They are the  
 8 documents that spring to my mind as being relevant.  
 9 MR JUSTICE FRASER: I think you just read from page 217 and  
 10 you said page 217, but I followed it perfectly  
 11 adequately.  
 12 MR DE GARR ROBINSON: I'm grateful. I read from page 220  
 13 and I may have given the wrong page number.  
 14 MR JUSTICE FRASER: No, you said 220 but in mine it is 217.  
 15 But that could be because I'm using the hard copy.  
 16 MR DE GARR ROBINSON: I see. My hard copy version seems to  
 17 be different, I'm so sorry.  
 18 MR JUSTICE FRASER: Don't worry. Just pause one second.  
 19 On the common screen we have got page 217, which  
 20 starts with paragraph (a) and runs down to (g) and has  
 21 621(a) and (b), which is what my version has. Have you  
 22 got a different version?  
 23 MR DE GARR ROBINSON: My version has page 220.  
 24 MR JUSTICE FRASER: I do not think it has come up before so  
 25 I do not think it is an issue. But I have got the right

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1 paragraph and I followed you reading it.  
 2 MR DE GARR ROBINSON: I'm grateful.  
 3 But in subparagraph (c) {A/5/217}, a factual claim  
 4 is made, which is that there are Post Office's financial  
 5 audits is one thing and then there are the service  
 6 audits that were done for Fujitsu. And the suggestion  
 7 is being made that the service audits were just about  
 8 Post Office's financial statements.  
 9 My Lord, in my submission that is demonstrably  
 10 wrong, and if we could look at the document referred to  
 11 in the submission, {F/1041/9}, please:  
 12 "Intended use.  
 13 "This report, including the description of tests of  
 14 controls and results thereof in the Description of Tests  
 15 and Results, is intended solely for the information and  
 16 use of Fujitsu, POL as the user of the IT support  
 17 processes and controls used by and on behalf of Fujitsu  
 18 to support the HNG-X and POLSAP applications during some  
 19 or all of the period ... and the independent auditors of  
 20 POL, who have a sufficient understanding to consider it,  
 21 along with other information including information about  
 22 controls implemented by user entities themselves, when  
 23 assessing the risks of material misstatements of user  
 24 entities' financial statements."  
 25 So your Lordship will see two things. First of all,

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1 the intended users are not just the auditors when  
 2 auditing. The intended users include Fujitsu itself and  
 3 Post Office as the user of the IT support processes  
 4 provided by Fujitsu. That's point 1, and point 1  
 5 demonstrates that the submission made in (c) that we saw  
 6 before was incorrect.  
 7 Point 2 is wider really, which is there is  
 8 an interesting, how can I put it, tension in the  
 9 claimants' attitude because on the one hand they are  
 10 very happy to trumpet the reliability of Ernst & Young's  
 11 financial audit when referring to the 2001 E&Y  
 12 management letter, but when it comes to a document which  
 13 is helpful to Post Office they suddenly say, well, it is  
 14 just financial misstatements, it's got nothing to do  
 15 with the price of fish.  
 16 So, my Lord, those are the two submissions I derive  
 17 from that page.  
 18 Finally, it is worth advertizing in this context to  
 19 the evidence which Mr Coyne gave on {Day16/188:1}. We  
 20 needn't go to it, but on that page Mr Coyne accepted  
 21 that the service audits are more specific than general  
 22 financial audits.  
 23 My Lord, if we can go back to the closings, that  
 24 will be at {A/5/217}, I believe, we see another claim  
 25 that's made by the claimants. (d):

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1 "The control objectives and controls are selected by  
 2 Fujitsu rather than the auditor ..."  
 3 What the claimants are trying to do here is they are  
 4 faced with a series of audits that essentially are very  
 5 positive about Fujitsu's approach to the IT support that  
 6 it is giving, all the way from 2012 through to 2017.  
 7 So here they are trying to think of points which  
 8 will somehow undermine the value of those audits. And  
 9 what they are suggesting in (d) is that somehow Fujitsu  
 10 is marking its own homework. It has self-developed the  
 11 test which it is to be inferred therefore has no real  
 12 value and cannot be taken as a justification for  
 13 anything.  
 14 But, my Lord, first of all, there is no proper basis  
 15 for suggesting that Fujitsu would have developed tests  
 16 that had no value in this context. Secondly, if one  
 17 goes back to the document, so this is {F/1041/8},  
 18 please -- I'm so sorry, I'm afraid I haven't marked up  
 19 this document. If your Lordship will give me a moment.  
 20 MR JUSTICE FRASER: Don't worry.  
 21 MR DE GARR ROBINSON: Yes. Top of the page. This is  
 22 Ernst & Young describing the work it was doing:  
 23 "An assurance engagement to report on a description  
 24 of a service organisation's system and the suitability  
 25 of the design and operating effectiveness of the service

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1 organisation's controls to achieve the related control  
2 objectives stated in the description involves performing  
3 procedures to obtain evidence about the fairness of the  
4 presentation of the description and the suitability of  
5 the design and operating effectiveness of those controls  
6 to achieve the related control objectives stated in the  
7 description."

8 My word, that is a six-line sentence:

9 "Our procedures included assessing the risks that  
10 the Description is not fairly presented and that the  
11 controls were not suitably designed or operating  
12 effectively to achieve the related control objectives  
13 stated in the Description."

14 So your Lordship will see the auditors weren't  
15 simply taking a test that was given by Fujitsu and  
16 blindly applying it, they were also assessing the risks  
17 involved in the relevant functions and assessing the  
18 suitability of the design of the controls.

19 Then it goes on:

20 "Our procedures also included testing the operating  
21 effectiveness of those controls that we consider  
22 necessary to provide reasonable assurance that the  
23 related control objectives stated in the Description  
24 were achieved. A reasonable assurance engagement of  
25 this type also includes evaluating the overall

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1 presentation of the Description, the suitability of the  
2 control objectives stated therein and the suitability of  
3 the criteria specified by the service organisation and  
4 described in the Assertion."

5 So what Ernst & Young are saying there is that not  
6 only did they audit the processes to ensure that the  
7 control objectives were met, but they also evaluated the  
8 suitability of the control objectives in the first  
9 place.

10 So this wasn't simply them jumping over a hurdle  
11 that Fujitsu had very conveniently placed for itself.

12 It was Ernst & Young evaluating the value of that very  
13 hurdle itself. I hope I put that point clearly.

14 MR JUSTICE FRASER: Yes. As I understand it, Fujitsu  
15 specify the control objectives and the service auditors'  
16 responsibilities, which actually start on the previous  
17 page, on page {F/1041/7}, are described in detail in  
18 those two full paragraphs?

19 MR DE GARR ROBINSON: Yes. Those functions include  
20 evaluating the objectives in the first place; in other  
21 words, making sure that the objectives that they have  
22 been told to test for are appropriate objectives to  
23 test for.

24 My Lord, that's my submission on the suggestion that  
25 appears to be made in paragraph (d) in paragraph 620 of

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1 the closing submissions, that there's something wrong  
2 with the objectives because Fujitsu selected them.

3 MR JUSTICE FRASER: Yes.

4 MR DE GARR ROBINSON: My Lord, (f) in paragraph 620 on  
5 page 217 of the closing submissions:

6 "Much of the content of these audits has been simply  
7 cut and pasted from one year to the next. (Eg for  
8 control objective 10, which Dr Worden relied upon, the  
9 tables within the audits for 2013 and 2014 are  
10 identical, and likewise for 2015 and 2016 ..."

11 My Lord, difficult to know what to make of that  
12 submission.

13 It is added to in (g), where it is said:

14 "Dr Worden said he had noticed that quite a lot of  
15 the wording was very similar or identical from one year  
16 to the next ..."

17 There appears to be an intention, I may be wrong,  
18 but so far as I can tell it may be intended to achieve  
19 the implication that somehow Ernst & Young weren't doing  
20 a proper job, it was simply repeating words it had said  
21 previous years. If that is the suggestion, there's  
22 absolutely no basis for it. Given that they were every  
23 year evaluating and assessing similar objectives it is  
24 not surprising to see them use the same language if  
25 their views remain the same.

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1 My Lord, if that's not being suggested I don't  
2 understand what the relevance of the submission is and  
3 I invite you not to understand it as well.

4 My Lord, that leaves a submission in (e), which is  
5 that:

6 "The audit expressly excludes the auditor giving any  
7 opinion on application processing and application  
8 controls."

9 My Lord, difficult to know what that submission  
10 means. In my submission, the control objectives and the  
11 conclusions drawn in relation to those control  
12 objectives mean what they say. It wouldn't be right to  
13 somehow construe Ernst & Young's opinions as somehow  
14 having no application to Horizon system or the like if  
15 that's the intended implication.

16 My Lord, finally, paragraph 621 {A/5/217}. This is  
17 where the claimants cut to the chase.

18 They say:

19 "The only one of the EY audits which significantly  
20 advances the parties' understanding of the issues in  
21 this litigation is in fact the 2011 EY audit ..."

22 My Lord, all these comments in relation to the  
23 service audits which actually are more specific than the  
24 financial audit in 2011, all these arguments are  
25 designed somehow to dismiss the value of the service

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1 audits. And in my submission it wouldn't be right to do  
2 that.

3 Secondly, it wouldn't be right also to suggest that  
4 all that matters is the 2011 EY audit. What should also  
5 be borne in mind, for example, is the 2013 EY audit.  
6 I needn't go to the document, but for your Lordship's  
7 note the reference is {F/1138/1}.

8 At page 4 of that document it records that  
9 management action has addressed many of the issues  
10 raised. At page 7 of that document it praises the  
11 efforts taken to strength the control environment.  
12 My Lord, in my submission, that advances the parties'  
13 understanding of the issues in this litigation.

14 My Lord, your Lordship may be really rather  
15 exhausted by the miscellaneous points/submissions that  
16 I have to make. I do have time to make one final  
17 submission and then I will stop, you will be pleased to  
18 know.

19 MR JUSTICE FRASER: I'm not remotely exhausted by them.

20 MR DE GARR ROBINSON: Perhaps it is just me.

21 My Lord, it is a criticism that's made quite  
22 forcefully in the closing to the effect that Post Office  
23 didn't behave with candour because when it had  
24 corrections for its witness statements it would produce  
25 a document setting out those corrections rather than

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1 producing a red-lined version, an amended witness  
2 statement.

3 I say this some trepidation because your Lordship's  
4 experience may be completely different from my own, but  
5 I have to tell your Lordship that neither I nor members  
6 of my team have ever encountered an amended witness  
7 statement that has been amended in the way the  
8 claimants' witness statements are amended. I have to  
9 say personally I feel a certain amount of discomfort,  
10 just because of habit, I think, of amending witness  
11 statements that way.

12 So suggesting that Post Office is at fault for not  
13 adopting a practice which to me is an innovation is, in  
14 my submission, rather unfair. It is inappropriate in my  
15 submission to make criticisms of Post Office because its  
16 legal team did things in the traditional way.

17 MR JUSTICE FRASER: Well, I have seen them done in three or  
18 four different ways and the way you have adopted was not  
19 unconventional.

20 MR DE GARR ROBINSON: I'm grateful.

21 My Lord, I would finish on this point by suggesting,  
22 by speculating really, what would Mr Roll's witness  
23 statement look like if it had been amended to reflect  
24 the evidence he gave in open court.

25 Unless I can assist your Lordship further, those are

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1 my submissions.

2 MR JUSTICE FRASER: Your closing submissions in toto rather  
3 than the end of the miscellaneous section?

4 MR DE GARR ROBINSON: Yes.

5 MR JUSTICE FRASER: All right. Well, I have got some  
6 questions for you. We have also got a bit of  
7 housekeeping, but it is not going to be very much.

8 MR DE GARR ROBINSON: Actually, on housekeeping matters,  
9 there has been some discussion between Mr Green and  
10 Mr Henderson about the suggestion that your Lordship  
11 made yesterday about a mechanism for identifying the  
12 source for various statements contained in appendix 2.

13 My Lord, we would suggest the simplest route would  
14 be for the claimants to provide us with a version of  
15 appendix 2 which marks in highlight particular passages  
16 for which they don't understand the support relied upon.

17 If that's provided by a certain date then my team  
18 can respond by a certain date by explaining the source  
19 with a footnote.

20 MR GREEN: My Lord, I did mention to my learned friend  
21 Mr Henderson that we are already partway through  
22 producing overnight, the efforts of the entire team,  
23 a table which is confined only to those points  
24 your Lordship mentioned, which is where no evidential  
25 support is identified.

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1 MR JUSTICE FRASER: All right, I'm not going to deal with  
2 this now. We are going to have a short break for the  
3 shorthand writers. We will come back, I won't deal with  
4 housekeeping straightaway because I have some questions  
5 on your submissions.

6 MR DE GARR ROBINSON: I should not have --

7 MR JUSTICE FRASER: Which I will deal with then and then we  
8 will deal with housekeeping.

9 There's that point plus another one and then we are  
10 going to deal with the rest of 2019.

11 MR GREEN: My Lord, we have a couple of references by way of  
12 factual correction only to hand up to the court.

13 MR JUSTICE FRASER: We do. Or I do, not using the royal  
14 plural -- these breaks are for the writers, they are not  
15 for me or for you, although I know most people look  
16 forward to them, particularly people who are not on  
17 their feet. But I don't think it is going to take  
18 longer than about 20 minutes. But I think out of  
19 fairness I will break for them and then we will have the  
20 20 minutes.

21 MR GREEN: Of course.

22 MR JUSTICE FRASER: In view of the fact we are so gloriously  
23 ahead of schedule, let's come back at 3.25 pm.

24 (3.15 pm)

25 (A short break)

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1 (3.25 pm)  
 2 Housekeeping  
 3 MR JUSTICE FRASER: The first point I actually confirmed  
 4 with you during your submissions. It was that the  
 5 Horizon Issues were drafted and agreed by the parties  
 6 and approved by me. I do not think they were imposed on  
 7 the parties. But you confirmed that this morning.  
 8 I'm fairly sure I know the answer to this question  
 9 but I just want to be very clear just because the nature  
 10 of the word might, or has been so contentious. Insofar  
 11 as the place I go for a benchmark definition of  
 12 robustness, I intend, unless you tell me I should go  
 13 somewhere else, to go to your pleading because you  
 14 define it in your pleading.  
 15 MR DE GARR ROBINSON: Sorry, I'm not sure I understand  
 16 your Lordship's question.  
 17 MR JUSTICE FRASER: Well, robustness, the experts have  
 18 agreed a particular meaning. I asked Mr Green where  
 19 I should go for his meaning yesterday and he told me,  
 20 made submissions.  
 21 I would ordinarily, and I have looked at your  
 22 pleading quite carefully. Where you do define  
 23 robustness?  
 24 MR DE GARR ROBINSON: Do you know, I'm afraid I need to  
 25 remind myself. Could we go to my pleading, my Lord?

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1 It is a slightly impertinent thing to ask the judge.  
 2 MR JUSTICE FRASER: I am sure it is your pleading, but  
 3 I might be wrong.  
 4 My private screen seems to have stopped working for  
 5 some reason. It will be in the C bundle somewhere.  
 6 MR DE GARR ROBINSON: {C3/3/1}. It will be referred to in  
 7 the Horizon Issues, won't it? I'm so sorry, my Lord.  
 8 MR JUSTICE FRASER: Not at all.  
 9 MR DE GARR ROBINSON: Mr Draper is suggesting paragraph 16  
 10 on page 5, so he'll get all the blame if he's wrong.  
 11 MR JUSTICE FRASER: So {C3/3/5}, paragraph 16.  
 12 MR GREEN: My Lord, yes.  
 13 MR JUSTICE FRASER: I didn't bring the reference to your  
 14 pleading with me but I did look at it very recently, so  
 15 I'm pretty sure that's likely to be right.  
 16 MR DE GARR ROBINSON: So what's pleaded in paragraph 16 is:  
 17 "Like any other IT system, Horizon is not perfect,  
 18 but Post Office maintains that it is robust and that it  
 19 is extremely unlikely to be the cause of losses in  
 20 branches. Its design and technical controls, when  
 21 supplemented by the various accounting and cash controls  
 22 applied in branches, make it very unlikely indeed that  
 23 an error in Horizon could affect a Subpostmaster's  
 24 financial position and go undetected."  
 25 Is that the paragraph your Lordship had in mind?

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1 MR JUSTICE FRASER: On the basis I haven't got that  
 2 paragraph you have just read in front of me on either  
 3 screen. Just to put your mind at rest, it is not  
 4 designed to be a trick question.  
 5 MR DE GARR ROBINSON: No, and I'm not trying to be clever  
 6 either, my Lord. Every time I do try I always come a  
 7 cropper.  
 8 MR JUSTICE FRASER: I have now lost it off the common screen  
 9 as well. Give me one second.  
 10 The short point is that the experts in different  
 11 places discuss robustness in more or less expert terms.  
 12 They also agree robustness in one of the joint  
 13 statements. I asked Mr Green the specific question  
 14 yesterday where I go for his benchmark definition of  
 15 what robustness is and I wanted just a similar reference  
 16 from you.  
 17 MR DE GARR ROBINSON: My Lord, I would not say that  
 18 paragraph 16 is a definition. I would submit that  
 19 a system that is robust is extremely unlikely to be the  
 20 cause of losses in branches.  
 21 MR JUSTICE FRASER: Quite.  
 22 MR DE GARR ROBINSON: It has the features referred to in the  
 23 rest of that paragraph {C3/3/5}.  
 24 My Lord, my submission would be that it is  
 25 consistent with the answers that Mr Coyne gave when

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1 I asked him to unpack what he meant by "relatively  
 2 robust" when he identified comparable systems, and then  
 3 he identified the condition under which comparable  
 4 systems needed to operate and he said Horizon compared  
 5 well with those conditions.  
 6 MR JUSTICE FRASER: I know, and I have gone through that in  
 7 some detail.  
 8 MR DE GARR ROBINSON: I'm grateful.  
 9 MR JUSTICE FRASER: In fact, probably the best thing to do,  
 10 and it is really just a request for a reference, I would  
 11 just be grateful for a reference from you for the best  
 12 place to go for -- I used the phrase loosely  
 13 yesterday -- a benchmark definition of robustness. If  
 14 one is describing robustness in specific terms this is  
 15 what it is.  
 16 MR DE GARR ROBINSON: My Lord, I will --  
 17 MR JUSTICE FRASER: It is just going to be a reference.  
 18 I do not think it is this passage in your pleading  
 19 actually because I was looking in your pleading, I was  
 20 looking in all the pleadings, and that is not the one  
 21 that jumped out at me. But I'm not going to tell you  
 22 where the best place is, that's rather why I was asking  
 23 the question.  
 24 MR DE GARR ROBINSON: My Lord, I will try to resist the  
 25 inevitable urge that barristers are subject to --

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1 MR JUSTICE FRASER: I don't want a fresh definition .  
 2 MR DE GARR ROBINSON: Exactly. I will try and avoid all of  
 3 that. But it may be I will be referring to a number of  
 4 different documents.  
 5 MR JUSTICE FRASER: That's perfectly in order, but I just  
 6 want somewhere to go to so when I'm explaining, probably  
 7 quite early on in the judgment, what robustness is,  
 8 I can explain by reference to a specific -- the way in  
 9 which the defendant construes the word "robustness",  
 10 because it is obviously different from what the  
 11 claimants are suggesting.  
 12 MR DE GARR ROBINSON: I need to remind myself of where the  
 13 claimants' definition is, but that's my problem.  
 14 MR JUSTICE FRASER: I do not think I got one, but I got  
 15 an explanation of why there wasn't one.  
 16 So that was supposed to be an easy starter, that  
 17 one. We will see about that.  
 18 The next point is essentially -- I suppose it could  
 19 be seen as an extension of the appendix 2 exercise, but  
 20 yesterday Mr Green took me to your closings at page 68  
 21 and paragraph 147.4.  
 22 MR DE GARR ROBINSON: 68?  
 23 MR JUSTICE FRASER: Yes. Paragraph 147.4.  
 24 MR DE GARR ROBINSON: My Lord, I have it. {A/6/68}  
 25 MR JUSTICE FRASER: Which what it says about the adoption of

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1 section 1.4 of the relevant document and when it was  
 2 adopted. I beg your pardon, when it was implemented.  
 3 Now, that's either evidence or it is a submission.  
 4 MR DE GARR ROBINSON: Yes.  
 5 MR JUSTICE FRASER: He says it is a submission, it wasn't in  
 6 any of the evidence.  
 7 MR DE GARR ROBINSON: My Lord, it is my instructions but,  
 8 my Lord, it is based upon a previous version of the  
 9 document and then an amended version of the document.  
 10 And I will undertake to give your Lordship the two  
 11 references.  
 12 MR JUSTICE FRASER: And the dates on documents.  
 13 MR DE GARR ROBINSON: Yes.  
 14 MR JUSTICE FRASER: If you could give me those references  
 15 that would be great.  
 16 MR DE GARR ROBINSON: If my understanding of those documents  
 17 is incorrect I will withdraw the --  
 18 MR JUSTICE FRASER: All right. That's helpful, thank you.  
 19 The next point is -- and you won't be able to give  
 20 me this now, but just if it could be added to the  
 21 references I'm going to be sent -- could I have  
 22 a reference, please, to the ruling that I made at the  
 23 PTR about Mr Henderson -- the witness, not counsel --  
 24 and the Second Sight report. Because within the  
 25 transcript of that hearing when one gets to my ruling

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1 there is just a bracket that says "see separate ruling".  
 2 I am sure it is there somewhere, I just don't know  
 3 where it is and I would like to know.  
 4 MR DE GARR ROBINSON: We will look for it.  
 5 MR JUSTICE FRASER: Appendix 2 we will come onto in  
 6 a moment.  
 7 There are the following acronyms I would just like  
 8 to know what they stand for. Two are from today, one is  
 9 yesterday. Yesterday's was RPOS. So R-P-O-S, RPOS.  
 10 Today's were SIL and the one this afternoon, PON.  
 11 I would just like to know what they are.  
 12 MR DE GARR ROBINSON: My Lord, yes. It will be something  
 13 like retail point of sale --  
 14 MR JUSTICE FRASER: I was tempted to guess and I decided  
 15 I wouldn't and I would like to know what they are,  
 16 please.  
 17 MR DE GARR ROBINSON: That will be done.  
 18 MR JUSTICE FRASER: Then the appendix 2 exercise, and this  
 19 again is not supposed to be controversial but I think  
 20 from your side, Mr de Garr Robinson, you said can they  
 21 highlight it with highlighter and they may have started  
 22 doing the exercise in a different way. Is that right,  
 23 Mr Green?  
 24 MR GREEN: Yes, we have a table just identifying roman  
 25 paragraphs.

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1 MR JUSTICE FRASER: I do not think anyone is going to go to  
 2 the stake on the difference .  
 3 MR DE GARR ROBINSON: If they want to do unnecessary work  
 4 I won't stop them. I was anxious that there shouldn't  
 5 be any hidden submissions, but my learned friend has  
 6 assured me that isn't the position so it is just  
 7 a matter of dates.  
 8 MR JUSTICE FRASER: Of dates, yes. Well, actually, there is  
 9 more than just dates, there's something I want to make  
 10 clear because I'm very anxious to do two things. One is  
 11 not to create unnecessary expensive work and the other  
 12 is not to lead to fresh rounds of submissions.  
 13 When you are responding to that, Mr de Garr Robinson  
 14 and your team, it seems to me there are one of three  
 15 available alternatives: a reference to a witness  
 16 statement; a reference to an expert's report; or just  
 17 the word "submission" to demonstrate that it is  
 18 a submission.  
 19 MR DE GARR ROBINSON: My Lord, what about a reference to  
 20 a document or a reference to commonsense?  
 21 MR JUSTICE FRASER: All right. Well, let's have a look at  
 22 appendix 2.  
 23 By reference to commonsense, do you mean a statement  
 24 of the blindingly obvious?  
 25 MR DE GARR ROBINSON: Yes. Or words to that effect.

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1 MR JUSTICE FRASER: All right. Well, then we will add the  
2 following alternatives : reference to a document and then  
3 in brackets it has to be said if that document was put  
4 to anyone or not.  
5 MR DE GARR ROBINSON: Okay.  
6 MR JUSTICE FRASER: And then the fifth one, I will adopt  
7 your nomenclature and we will say commonsense.  
8 MR DE GARR ROBINSON: I'm grateful.  
9 MR JUSTICE FRASER: So those are the five alternatives .  
10 MR DE GARR ROBINSON: I understand.  
11 MR JUSTICE FRASER: The ones we were shown yesterday, I'm  
12 not necessarily sure any of them jump out at me as  
13 commonsense, but as I said yesterday some of them, for  
14 example, the notion of slave units and a master unit,  
15 that is commonsense within the IT world and I have  
16 a degree of commonsense in that respect. And if,  
17 following the commonsense answers, I need any more  
18 information, then I will ask.  
19 MR DE GARR ROBINSON: I see. So, for example, slave and  
20 master, I am sure there are documents about that because  
21 I'm familiar with the concept, yes.  
22 MR JUSTICE FRASER: All right?  
23 MR DE GARR ROBINSON: Yes.  
24 MR JUSTICE FRASER: I would just like to make this clear for  
25 everyone's benefit. This is not designed to be a new,

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1 expensive, lengthy grinding exercise. It is just so  
2 I have everything marshalled in one place.  
3 Right, well, that's everything from me. Mr Green,  
4 you were proffering a piece of paper and I asked you to  
5 take your seat.  
6 MR GREEN: My Lord, just a couple of points of  
7 clarification .  
8 MR JUSTICE FRASER: Thank you.  
9 MR GREEN: Yesterday my learned friend said that the double  
10 trouble document references, he thought that many of  
11 them he hadn't seen at all before. So they are all the  
12 references to where they are in the evidence in these  
13 proceedings, including in the Post Office 's own  
14 submissions. That's the first page.  
15 MR JUSTICE FRASER: Yes.  
16 MR GREEN: Drafting of Horizon Issues 1 and 3, the short  
17 point is the words were carefully chosen. We were  
18 asking for caused as a separate issue, and potentially  
19 caused. That was resisted by the defendant. In the end  
20 we got a careful agreement on what the wording actually  
21 is and my learned friend 's speculation about potential  
22 being what he said is just not available when one looks  
23 at how that happened. And (c) is 18.7 should be million  
24 in shortfalls . We are not able to, at this stage,  
25 disaggregate the extent to which they were caused by

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1 bugs, errors and defects, erroneous TAs or TCs, helpline  
2 advice etc at this stage, but that is the figure in the  
3 SOCIs.  
4 And disclosure, my learned friend said regarding the  
5 disclosure issues, a dead letter from August to  
6 December, there are the intervening references and then  
7 we just added this afternoon in handwriting in relation  
8 to EY audits, Dr Worden, his understanding of  
9 application processing meaning SSC was out of scope and  
10 the reference to the transcript where he said that.  
11 MR JUSTICE FRASER: Yes.  
12 MR GREEN: In the ISAE audits and then over the page just to  
13 give the context to the KELs' complaint, the history of  
14 them said not to be in Post Office 's control. There are  
15 lots of other references, we only put four there. There  
16 was obviously an RFI about it as well. It was  
17 identified as an issue in the pleadings and maintained  
18 in the CMC in October 2017 when your Lordship was  
19 specifically asked about it .  
20 MR DE GARR ROBINSON: Why is my learned friend -- just going  
21 through this list , obviously I will need to look at the  
22 drafting of Horizon Issues 1 and 3, but your Lordship  
23 has my submissions on what the document means.  
24 My Lord, application processing. My submission  
25 about that is that what was excluded from the service

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1 audit was any kind of audit by Ernst & Young of the  
2 operation of Horizon itself , the software and how good  
3 Horizon itself was. What wasn't excluded was the  
4 controls that was applied by and on Fujitsu in relation  
5 to the support it provided in relation to Horizon.  
6 MR JUSTICE FRASER: Yes.  
7 MR DE GARR ROBINSON: It is important your Lordship has that  
8 submission. If it is suggested that my learned friend  
9 or that Dr Worden suggested otherwise, I will have  
10 a look at that. But I would be surprised if that's what  
11 he said .  
12 Then there is this paragraph (f). I don't know why  
13 my learned friend has even mentioned it. Is there some  
14 objective being achieved by it?  
15 MR GREEN: My Lord, it was just in relation to the  
16 disclosure history which was an issue my learned friend  
17 responded to.  
18 MR JUSTICE FRASER: Can one of you just give me the  
19 reference to the contract between Fujitsu and the  
20 Post Office which I know was produced and put to  
21 Dr Worden in re-examination?  
22 MR GREEN: My Lord, the contract itself is at {F/1659.2/868}  
23 I think is the one with paragraphs 25.8 and 25.10 and so  
24 forth about court assist . Court support.  
25 MR JUSTICE FRASER: I am sure if I consider it necessary to

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1 look at it I will look at it. If I consider I need any  
 2 submissions about it, I will ask for them in writing.  
 3 Does that seem a sensible way forward,  
 4 Mr de Garr Robinson?  
 5 MR DE GARR ROBINSON: My Lord, yes. If your Lordship is  
 6 minded to make some kind of finding on the basis of the  
 7 contract, I would welcome the opportunity to make  
 8 submissions, although I have no idea what those  
 9 submissions would be.  
 10 MR JUSTICE FRASER: All right.  
 11 MR DE GARR ROBINSON: If you understand what I'm saying.  
 12 MR JUSTICE FRASER: I do. In other words, if I'm going to  
 13 look at it for any material reason I should give you  
 14 both, I would give you both the opportunity to --  
 15 MR DE GARR ROBINSON: I'm grateful.  
 16 MR JUSTICE FRASER: Because the document is there, I have  
 17 looked at it on a speed read basis. Only one part of it  
 18 was put to Dr Worden in relation, I think, to the cost  
 19 of making ARQ requests.  
 20 MR DE GARR ROBINSON: That was by me.  
 21 MR JUSTICE FRASER: By you. Well, I think you said when you  
 22 introduced the document you had had it uploaded for that  
 23 purpose.  
 24 MR DE GARR ROBINSON: Yes.  
 25 MR JUSTICE FRASER: I didn't even know if it was in play

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1 before that, to be honest.  
 2 Right. Just remind me, Mr Green, what does TA  
 3 stand for?  
 4 MR GREEN: The transaction acknowledgements, which are the  
 5 automatic ones from National Lottery.  
 6 MR JUSTICE FRASER: Because TCs used to be called error  
 7 notes for the first four years.  
 8 MR GREEN: They did, and then they came in, and then TAs are  
 9 the ones that you can't do anything about at all.  
 10 MR JUSTICE FRASER: So far as Horizon Issues, other than the  
 11 fact that there's a judgment to be written, is that  
 12 everything?  
 13 MR DE GARR ROBINSON: My Lord, I do hope so.  
 14 MR JUSTICE FRASER: I think it is. Apart from obviously  
 15 appendix 2 and the reference point. That then brings us  
 16 onto the second part of 2019.  
 17 At the moment there are the following dates in 2019  
 18 which are in the diary and have already been subject to  
 19 orders by me. 23rd July; 18th September; they are both  
 20 the CMCs. The 17th October, which is down as  
 21 a pre-trial review, and then a trial starting on  
 22 4th November on the limitation issues.  
 23 It does not seem to me that those dates are  
 24 necessarily either should stay there or are achievable  
 25 certainly, so far as a limitation trial is concerned,

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1 because they were set when this trial was supposed to  
 2 finish at the very end of -- well, originally early  
 3 April and now it is obviously 2nd July, therefore,  
 4 I'll -- is this now your part of ship Mr Henderson?  
 5 Mr Green, what do you have to say about it, if  
 6 anything?  
 7 MR GREEN: I understand the solicitors on both sides have  
 8 discussed it and rather taken up your Lordship's  
 9 suggestion of maybe having a CMC in September rather  
 10 than July when we will know more, we are not sure how  
 11 much more, but we will know more and --  
 12 MR JUSTICE FRASER: When you say you will know more though,  
 13 the only piece of information I think you will know is  
 14 how far I'm on in writing the judgment because I do not  
 15 think I will have been able to finish the judgment by  
 16 the middle of September.  
 17 MR GREEN: My Lord, that's slightly why I am putting it  
 18 lightly in those terms.  
 19 MR JUSTICE FRASER: Right.  
 20 MR GREEN: We might have an idea of the timeline on that.  
 21 In those circumstances the parties solicitors ' have had  
 22 discussions and subject to obviously your Lordship's  
 23 view, are agreeable to the November listing coming out  
 24 if it can't be used for proportionality reasons.  
 25 Your Lordship should know there are also discussions in

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1 parallel about how holding a mediation --  
 2 MR JUSTICE FRASER: You don't need to tell me anything about  
 3 that. Well, at one point I think before the Common  
 4 Issues trial when we were scoping the group litigation  
 5 generally, you asked me for a three-month stay and  
 6 I told you I didn't have one.  
 7 MR GREEN: I think there may have been a slight  
 8 misunderstanding but I know what your Lordship means.  
 9 MR JUSTICE FRASER: When I say don't tell me about the  
 10 mediation what I mean is unless you are asking me to fix  
 11 a timetable around periods of time, you don't need to  
 12 trouble me with that.  
 13 MR GREEN: My Lord only to have in mind that it would be  
 14 helpful not to have anything too compressed happening in  
 15 late October, that we can get to that in September.  
 16 MR JUSTICE FRASER: All right. When you said the November  
 17 trial coming out.  
 18 MR GREEN: My Lord, yes?  
 19 MR JUSTICE FRASER: There is another trial date in 2020.  
 20 MR GREEN: Precisely, for which we can consider directions  
 21 in September.  
 22 MR JUSTICE FRASER: All right. Okay Mr Henderson?  
 23 MR HENDERSON: My Lord, I'm grateful for the indication in  
 24 relation to the November trial and certainly the parties  
 25 are agreed that that's not feasible really to use that

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1 date at the moment. The question really is when  
2 your Lordship lists the further issues trial, which is  
3 referred to in the orders.

4 If we are to use the current date which  
5 your Lordship has put aside for the fourth trial, which  
6 is four weeks commencing on 2nd March, the question that  
7 really arises is: what steps need to be taken in advance  
8 of that? Can I just ask your Lordship, I appreciate  
9 your Lordship is, in light of the dates your Lordship  
10 has just recounted to the court, you have probably  
11 already looked at the seventh CMC order, but if I could  
12 just ask your Lordship briefly to look at it. It is at  
13 {C7/39/1}.

14 What your Lordship will see is the various steps  
15 from paragraph 3 of that order. Does your Lordship have  
16 that on the screen now?

17 MR JUSTICE FRASER: I have page 1. Is that what you are  
18 asking me?

19 MR HENDERSON: Actually if you go to step 2 you will see the  
20 steps that have been ordered. 3.1 and 2 have taken  
21 place, but from 3.4 all the way up to 20.2 is currently  
22 the subject of a stay. So where we --

23 MR JUSTICE FRASER: And that's the stay that was agreed  
24 I think in the interregnum period?

25 MR HENDERSON: Exactly so my Lord, on 12th April. If

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1 your Lordship casts an eye down that you will see that,  
2 absent that stay, we would now be in the position of  
3 having completed the first round of disclosure;  
4 pleadings would be very nearly completed; principal  
5 pleadings would be incompleting; we would have particular  
6 claims and defences; replies would be shortly due and we  
7 would also be about to embark upon the second round of  
8 disclosure referred to as extended disclosure.

9 We would also be about to convene a costs and case  
10 management conference on 23rd July. So there is a great  
11 deal of activity and you will see that if you carry on  
12 in those directions you will also see -- I appreciate  
13 your Lordship has these points in mind -- that there is  
14 also a directions for the identification of the issues  
15 that would form part of the fourth trial and that's in  
16 paragraphs 13 to 17.{C7/39/4}

17 All of that is currently stayed. We would  
18 respectfully support the suggestion that the further  
19 issues trial be vacated and re-listed for the 2nd March,  
20 which is currently the slot that's being held for the  
21 fourth trial, so in other words we use that slot for the  
22 third trial.

23 The only question is as to how we arrive at detailed  
24 alternative, updated directions for all of this. My  
25 concern -- our concern is that if we use the

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1 18th September CMC we might not be leaving ourselves  
2 enough time because if nothing has happened and the stay  
3 remains in place and nothing has happened and we come  
4 before your Lordship on 18th September, we have only got  
5 a relatively compressed period to do an enormous amount  
6 of work; and my respectful suggestion would be that the  
7 parties liaise now, try to agree those steps, but in  
8 default of agreement or in default of the court's  
9 approval of any such agreement that we arrive at, we use  
10 the 23rd July appointment to try and --

11 MR JUSTICE FRASER: At the moment everything is stayed  
12 except the Horizon Issues. You are not asking me to  
13 lift the stay?

14 MR HENDERSON: I'm not asking you to lift the stay.

15 MR JUSTICE FRASER: But you would like the 23rd July kept  
16 in?

17 MR HENDERSON: I am only asking that the November trial be  
18 vacated and re-listed for 2nd March; that the parties be  
19 directed to liaise to try and agree directions leading  
20 up to that trial and in default of agreement, we come  
21 back on 23rd July so that we can have a timetable in  
22 place in July rather than in September leading up to  
23 that --

24 MR JUSTICE FRASER: You mean have a timetable ordered in  
25 July to cover the period July to March rather than wait

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1 until September?

2 MR HENDERSON: Indeed so, my Lord.

3 MR JUSTICE FRASER: By definition, therefore, one of the  
4 things you are going to be seeking either on 23rd July  
5 by asking me or before that by seeking agreement of the  
6 claimants is the lifting of the stay?

7 MR HENDERSON: Yes, I think it would be part of the  
8 agreement.

9 MR JUSTICE FRASER: Unless I suppose you could both decide  
10 that the stay will be lifted on date X and this  
11 direction will start after that date?

12 MR HENDERSON: Absolutely. My learned friend has already  
13 indicated that there is discussion of a possible  
14 mediation, that needs to be borne in mind. There are  
15 other things happening. Your Lordship obviously is  
16 going to be preparing the Horizon Issues judgment.  
17 There is the application for permission to appeal in  
18 front of the Court of Appeal. The Court of Appeal has  
19 indicated we won't get a decision on permission until  
20 September/October probably.

21 MR JUSTICE FRASER: But that doesn't factor into anything  
22 that is happening at first instance.

23 MR HENDERSON: I'm not suggesting that it does certainly for  
24 the time being. So we need to get directions in place,  
25 in our submission, leading up to, if your Lordship

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1 approves, the 2nd March. Really I think the only point  
 2 of difference, and it is a slight one, is that we think  
 3 that using the September date rather than the July date  
 4 may be to save up problems for ourselves.  
 5 MR JUSTICE FRASER: Mr Green.  
 6 MR GREEN: My Lord, the only thing, the parties' solicitors  
 7 have agreed, subject to your Lordship's view, that it is  
 8 sensible for the pleadings for the further issues trial  
 9 to be done with the benefit of receipt of the Horizon  
 10 Issues judgment for obvious reasons.  
 11 There's also the question of whether the Court of  
 12 Appeal grants permission on the obligations, breach of  
 13 which and concealment of a breach of which --  
 14 MR JUSTICE FRASER: But that is from the Common Issues you  
 15 are talking about?  
 16 MR GREEN: My Lord, yes. Just highlighting what feeds into  
 17 what will have to be pleaded. For that reason the only  
 18 actual step --  
 19 MR JUSTICE FRASER: I don't follow that point at all but it  
 20 doesn't matter for the moment. Go on.  
 21 MR GREEN: Rather than trying to get the parties to agree  
 22 everything going forward between now and March now,  
 23 we'll come back on the 23rd --  
 24 MR JUSTICE FRASER: I'm not going to ask you to agree  
 25 anything now. I'm not going to make any orders now

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1 other than varying any dates I have to order.  
 2 MR GREEN: I mean prior to the 23rd, my Lord. The only  
 3 actual substantial step, I think, prior to the pleadings  
 4 being done is the giving of stage 4 disclosure by  
 5 Post Office, which was to be done prior to the  
 6 pleadings. So if that can be completed in good time  
 7 prior to --  
 8 MR JUSTICE FRASER: All right, I think --  
 9 MR GREEN: It just avoids us coming back on the 23rd.  
 10 MR JUSTICE FRASER: Mr Henderson has got a valid point which  
 11 is, if you can't agree everything sensibly and you wait  
 12 until 18th September, you have only given yourself six  
 13 months.  
 14 MR GREEN: My Lord, the only problem on my learned friend's  
 15 submission, with respect, is that there's giving stage  
 16 four disclosure and then the pleadings start, which the  
 17 parties have agreed in discussions between solicitors  
 18 shouldn't happen until after the Horizon judgment.  
 19 MR JUSTICE FRASER: But Mr Green if it is as straightforward  
 20 as that and you can agree all of those directions  
 21 between the two sides in the next week or so, you do not  
 22 even have to come on the 23rd July.  
 23 MR GREEN: I was just trying to short cut it, my Lord. I'm  
 24 in your Lordship's hands.  
 25 MR JUSTICE FRASER: I'm going to tell you what orders I'm

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1 going to make now and then each of you can tell me if  
 2 I have missed anything else and then there's another  
 3 point I have to address.

Order

4 The pre-trial review on 17th October for the further  
 5 issues trial has to be vacated. The trial date on 4th  
 6 November for the further issues trial has to be vacated.  
 7 The further issues trial will be tried in the current  
 8 time set aside starting on 2nd March with the same time  
 9 estimate as it currently has. The parties are to seek  
 10 to agree directions for the further issues trial by noon  
 11 on 21 July and failing agreement they are to attend for  
 12 a CMC at 10.30 on 23rd July.

13 I would like to hope that that is not going to be  
 14 necessary. It would be far cheaper for everyone if it  
 15 were not needed. Right. So is that 2019 tidied up?

16 MR HENDERSON: I think the only outstanding matter is the  
 17 18th September hearing.

18 MR JUSTICE FRASER: I'm leaving that in because until I know  
 19 what's happening on 23rd July -- I assume one of the  
 20 directions you might seek to agree between yourselves,  
 21 if you can agree everything else, is that the 18/9 can  
 22 come out but I am going to leave it in for the moment.

23 Right. The only other point which goes to or arises  
 24 from judgment number 5 is, as the managing judge and as  
 25

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1 the parties have got cost management orders, I made  
 2 certain observations about costs and also said it would  
 3 have to be revisited at the end of the Horizon Issues  
 4 trial. Since then there has been one further  
 5 notification on costs which was from the Post Office,  
 6 who I think notified in a sum of 13.9 million it is now,  
 7 which is about £1 million more than it was when I made  
 8 the comments that I did in judgment no. 5.

9 I'm not going to make any orders or anything like  
 10 that but I would like the two of you, please, when  
 11 discussing and considering your draft directions in  
 12 advance of 23rd July to direct your minds to what, if  
 13 any, further costs in case management conferences and/or  
 14 costs management orders you might be considering and the  
 15 point at which this year that can be addressed in the  
 16 absence of agreement. Because obviously if there is  
 17 going to be a contested CCMC there are certain steps you  
 18 have got to take in advance for 28 days, 14 days, etc.

19 Right. Is that everything?

20 MR GREEN: Yes.

21 MR JUSTICE FRASER: Is that everything?

22 MR HENDERSON: I believe so. Two minor points. We have  
 23 agreed between counsel dates for the bug appendix point.

24 I do not think that needs to be subject to an order  
 25 but my learned friend has indicated he will serve his

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1 comments by 9th July, a week today, and we are going to  
 2 aim to respond to that by 19th July. But I do not think  
 3 that needs to be in any order.  
 4 MR JUSTICE FRASER: No, but thank you for telling me, it  
 5 means I know when I'm going to get it.  
 6 MR HENDERSON: Presumably on the order that your Lordship  
 7 has just made it would be the usual common costs in case  
 8 and liberty to apply?  
 9 MR JUSTICE FRASER: Yes. Although they would be Horizon  
 10 Issue costs anyway given it has only been 25 minutes,  
 11 but by all means and could someone draw up the order  
 12 please. I hadn't seen Mr Warwick appear from behind the  
 13 screen.  
 14 Right. Is that everything?  
 15 MR GREEN: My Lord, it is.  
 16 MR JUSTICE FRASER: Mr de Garr Robinson, does that seem to  
 17 be everything?  
 18 MR DE GARR ROBINSON: It is.  
 19 MR JUSTICE FRASER: Mr Henderson, so far as the directions  
 20 are concerned I think that's everything?  
 21 MR HENDERSON: My Lord, yes.  
 22 MR JUSTICE FRASER: Thank you all very much.  
 23 (4.00 pm)  
 24 (The court adjourned)  
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