"However, be that as it may, the question arises whether Mr Ablyazov's failure to request recusal at all times from the February judgments down to 19 October 2012, and in particular as late as the pre-trial review of 2 October 2012, while still participating in the proceedings, is consistent with a subsequent request for recusal based in essence on the February judgments."

70. The passage continued, analysing what Mr Ablyazov had done and how he had continued to behave in the litigation:

"[89].......In the present case, there was no mere silence, but participation in proceedings before a judge whom it was known, on Mr Ablyazov's own case, had conducted himself in such a way as to give rise to the appearance of bias. Moreover, there was a duty to speak, arising out of Mr Ablyazov's duty to help the court to further the overriding objective (CPR 1.3). It was contrary to that duty to allow the court and the other parties to waste time and resources in preparing for a trial which, if the judge of trial had to be replaced, could not start on the fixed date, but would have to be adjourned, in all probability into the following year with uncertainty as to when it could be re-fixed. The situation was similar to the familiar case where some disclosure is made to the parties by the judge, and there is no request to the judge to recuse himself. In the present case the disclosure, on Mr Ablyazov's own analysis, came at latest with the judge's three judgments of February 2012 in the committal proceedings. It may be asked, what more was required of the judge, by way of disclosure, in the light of Mr Ablyazov's own grounds for alleging apparent bias? It is unrealistic to suggest that the judge had to go on to ask whether there was any objection to him remaining the judge of trial.
[90] Mr Béar submits that the watershed moment had not yet arrived, before the start of the trial itself. There is no authority to that effect. It may often happen, of course, that some disclosure is made at the start of a trial. But equally often, some disclosure is made in advance of trial, as soon as the judge realises from reading the papers that there is something which he considers needs to be disclosed. In the present case, however, the relevant disclosure, on Mr Ablyazov's own case, came at latest in the judge's February judgments. It was then for Mr Ablyazov to state his position."
(emphasis added)

71. A similar question could be posed in the instant case. The Post Office relies squarely upon the contents of Judgment No.3. That was provided to the Post Office in draft on 8 March 2019. The Post Office has different counsel teams acting on the Horizon Issues trial, and the Common Issues trial. There was not merely silence from the Post Office, but there was silence combined with active participation in the Horizon Issues trial. That active participation continued up to, and indeed during the day of, 21 March 2019 when the recusal application was issued.

72. A further passage in the authorities that deal with waiver occurs at [17] in ***Steadman-Byrne v Amjad.***
"We would, however, stress that the time to draw the attention of a tribunal to a clear manifestation of bias on its part is ordinarily when it occurs. There is no reason why a judge to whom it is courteously pointed out that he or she may have overstepped the mark should not accept that it may be so and stand down. Equally, however, it is only in a clear case that an advocate can responsibly take this course and a judge accede to it, both because such applications have been known to be made opportunistically and

£1.4 million more than they were prepared to provide. This would be taken into account by the fair-minded observer.

291. Turning to the dicta of Longmore LJ at [18] in ***Otkritie***, I am not aware of the Post Office seeking to appeal any of my interlocutory decisions.

292. I have also been directly critical of both parties in this litigation. At [13] of Judgment No.2 "Strike Out Application" [2018] EWHC 2698 (QB) I said:
"I have now had a total of 10 separate interlocutory hearings with these parties in a 12 month period prior to the trial of even the first issues. The legal advisers for the parties regularly give the appearance of taking turns to outdo their opponents in terms of lack of cooperation. Behaviour from an earlier era, before the overriding objective emerged to govern all civil litigation, has appeared to become almost the norm, at least from time to time. One would have thought that *all* of the parties involved in this litigation would wish to resolve the many different issues between them – which are highly controversial – fairly, speedily and with as much cost-efficiency as possible. I am making no findings about this at this stage, and which party is primarily responsible for this state of affairs is only likely to be considered, if at all, at the final costs stage of the litigation, far in the future. However, it appears to me that extremely aggressive litigation tactics are being used in these proceedings. This simply must stop. It is both very expensive, and entirely counter-productive, to proper resolution of what is so far an intractable dispute. I made similar comments in Judgment No.1. These must have fallen on deaf ears, at least for some of those involved in this case."

293. I also said at [16] in the same Judgment No.2:
"However, this application regrettably falls into a pattern that has, in my judgment, clearly emerged over the last year at least. Attempts are being made to outmanoeuvre one another in the litigation, and tactical steps have led to constant interlocutory strife. This is an extraordinarily narrow-minded approach to such litigation."

294. The claimants originally did not want the next substantive trial (which is currently called Round 3) to take place in 2019 at all. Time was requested for a period following the Horizon Issues in order to hold a mediation. I was prepared to provide some time, but ruled against having Round 3 in 2020 and set it down for the autumn of 2019. The claimants did not wish me to do this.

295. I have already identified that the findings in Judgment No.3 on the Common Issues were not wholly in the claimants' favour. There were 23 different issues and two of them, 17 and 18, did not arise (these related to what was called the "true agreement" or ***Autoclenz*** issue). These issues were advanced by the claimants in the alternative, which meant effectively that the claimants' case on this alternative approach was not preferred. Of the other 21 Common Issues, the Post Office's case was preferred in five (those numbered 10, 11, 15 (in part), 21 and 22). The Post Office's case was also preferred, in part, in some of the others. For example, in Common Issue 5, 33 separate express terms were alleged by the claimants to be onerous and unusual. I found that only 8 were, with the potential of another three (if my finding on relational contracts were wrong) and another two (if my construction that termination provisions without notice were to be construed as applying to repudiatory breaches) also being onerous and unusual in those alternatives. This therefore meant that the maximum number of terms that could be classified as being found in the claimants' favour was 13 out of 33

in total, but this number is in reality only 8 out of 33, if my findings on relational contracts and repudiation were correct. Termination without notice provisions being construed as relating to repudiatory breaches was the Post Office's case.

296. I also found (in relation to Common Issue 2(t)) that there was no requirement upon the Post Office to take care in performing its functions which could affect the business, health and reputation of the claimants, and that this requirement extended only to matters that could affect the branch accounts. I also found in relation to Common Issues 5 and 6 that due to the signature of SPMs on the NTC contract form, and the recommendation to those SPMs to seek legal advice, for those who had contracted upon the NTC, all of the clauses in the NTC were incorporated, even those that were onerous and unusual, due to the law on incorporation. I also did not accept all of the Lead Claimants' evidence of fact. For example, I found that Mr Trotter had not told Mrs Dar in interview that she did not need to get legal advice. To portray the outcome of Judgment No.3 as an unqualified victory for the claimants on all the Common Issues would not be accurate.

297. I have already stated, in Judgment No.2, that the court is not concerned with either marketing or public relations for any litigants, and the guiding principle is that of open justice. This arose in the context of the Post Office expressly stating that one of the reasons why it sought to strike out some of the claimants' evidence was for reasons of adverse publicity.

"55. Mr Parsons gave evidence at paragraph 36 of his 9th witness statement in support of the application stating that the defendant was concerned that "advance allegations of misconduct by Post Office at the Common Issues Trial" would be made by the claimants for "prejudicial reasons or to generate adverse publicity for Post Office". (The defendant does not use the definite article when referring to itself.) It seems to me that this narrow passage in the witness statement of Mr Parsons, expressly supporting the application, might contain the origin of the expenditure of time, resources and money by the defendant on restricting the claimants' evidence, that has been the subject matter of this application. It certainly must have had some bearing upon the application in the defendant's mind, otherwise Mr Parsons would not have included it in his witness statement. Such concerns would be pertinent if the challenged passages constituted the airing of "irrelevant grievances", to use the expression of Harman J in ***Re Ubisoft***, quoted by Mann J in the passage quoted above at [4] of ***Wilkinson v West Coast Capital*** at [22] above.

56. However, they do not, in my judgment. I consider that the challenged evidence is relevant to the Common Issues trial for the reasons that I have explained, is therefore admissible, and ought not to be struck out. This conclusion has been reached having considered the principles applicable to an application such as this, and the Common Issues to be tried. Whether this "generates adverse publicity" for the defendant is not a concern of the court, as long as the evidence is properly admissible under the CPR, which I have found it is. The court is not a marketing or PR department for any litigant, and the principle of open justice is an important one."

These statements also equally apply in terms of how litigants may seek to portray the outcome of any judgment. The reasonable and fair-minded observer will neither make his or her "judgment after a brief visit to the court" (to adopt the phrase of Sir Thomas

Bingham MR in ***Arab Monetary Fund v Hashim (No.8)***), nor will they skip through a judgment of 1122 paragraphs (excluding appendices) or rely upon isolated extracts. They will be aware of the detail of the judgment, and also be aware of the history of the litigation.

298. There was no appeal from Judgment No.2 on the Post Office's application to strike out the claimants' evidence of fact, and indeed, the Post Office did not even ask me for permission to appeal. The application to strike out the claimants' evidence was heard on 10 October 2018 and the judgment was handed down on 17 October 2018. The Common Issues trial commenced on 7 November 2018, and there was ample time for the Post Office to have mounted an appeal against the dismissal of that application, if so advised. The evidence sought to be struck out by the Post Office was therefore admitted as evidence for the Common Issues trial, and it was cross-examined upon by the Post Office extensively. I do not consider that I have relied upon irrelevant matters in arriving at my conclusions on the answers to the Common Issues, but if I have, then the correct route to remedy that would by way of an appeal. Permission has not yet been sought by either party to appeal any part of Judgment No.3.

299. Miss Philips, in her evidence for the Post Office in the Horizon Issues trial, readily confirmed what had been in dispute for so long during the Common Issues trial, namely that SPMs had no option but to accept the figures provided to them, even though amounts may have been "settled centrally". This is notwithstanding that her original terminology in her witness statement said that SPMs "chose to accept" TCs. She accepted that SPMs did not have a choice. It had been necessary for me to make findings on this very point in the Common Issues trial, and all the Lead Claimants in that trial (but particularly Mr Abdulla) had been directly challenged on this very point in their cross-examination. Mr Godeseth also gave evidence in the Horizon Issues trial that the lack of any ability on the part of a SPM to dispute an item in Horizon was "by design". All a SPM could do was to telephone the Helpline. This shows that the Post Office had been advancing a case, at least for a substantial part of the Common Issues trial, which was directly contrary to the evidence of its own witnesses of fact in the Horizon Issues trial.

300. I do not consider that what has occurred in the Horizon Issues trial can be entirely irrelevant to the recusal application. However, I consider that great care must be taken to ensure that forensic developments in the ongoing trial are not allowed to become any part of the focus on the recusal application. The reason for identifying the point in [299] is it shows that the Post Office has, to date, put in issue matters that ought not to have been put in issue. In resolving those matters, hearing contested matters of fact and making the necessary findings, it was necessary to go somewhat wider than my initial comments at earlier case management hearings about the expected scope of evidence for the Common Issues trial, when I (perhaps over-optimistically) assumed that the parties would agree non-contentious matters. This would have left the real battleground as those areas of fact, and law, that were truly contentious, so that cost-effective and proportionate resolution of the litigation could occur.

301. Finally, the role of Managing Judge in Group Litigation in particular, is such that some litigants may be extremely unhappy with what occurs at different points throughout. Possibly all of the litigants will be extremely unhappy with what occurs at

some stage or another during what is already (in this case) about three years since the first claim form was issued. Effective case management is required to move the litigation forwards, and this may cause discontent to some, or even all, as well as the substantive findings themselves. Substantive issues cannot all be resolved in one trial, so answers on some substantive issues will inevitably be provided before others. To deal expressly with the point raised at [32] in ***Otkritie International Investment Management Ltd and others v Urumov*** [2014] EWCA Civ 1315, I do not feel any embarrassment or difficulty in proceeding with this group litigation, either as a result of the contents of Judgment No.3 or of the recusal application itself.

302. I intend to continue with the Horizon Issues trial, and I intend to continue as the Managing Judge. I am confident that I can resolve all the existing and future issues in this litigation in a wholly impartial and judicial manner. However, the timetable going forward for the resumed Horizon Issues trial must take account of the significant disruption to that trial already caused by the recusal application; the possibility that the Post Office may seek to obtain permission to appeal this decision on my recusal; as well as the effect of the impending Easter break. I will now deal with this with counsel.