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Neutral Citation Number: [2024] EWHC 1722 (Ch)

Case No: BR-2023-001062

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF SUZANNE PALMER
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

The Rolls Building
7 Rolls Buildings
London, EC4A 1NL

Date: 5 July 2024

Before:

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

THE SECRETARY OF STATE FOR BUSINESS AND TRADE	**Applicant**
- and -	
(1) MUSTAFA HASSANALI ABDULALI	
(2) JAMES DINGLEY	**Respondents**

- -
- -

Gareth Tilley (instructed by **Government Legal Department**) for the **Applicant**
Thomas Grant KC (instructed by **Moore Recovery Limited**) for the **Respondents**

Hearing date: 18 June 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 5 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ CAWSON KC:

Introduction

1. By her application dated 16 October 2023 ("**the Application**"), the Applicant, the Secretary of State for Business and Trade, seeks directions from the Court with regard to how compensation payable to postmasters[1] under the Group Litigation Order (GLO) Compensation Scheme ("**the GLO Scheme**"), available to postmasters who were parties to group litigation ("**the GLO Litigation**") against Post Office Limited ("**POL**") ultimately compromised by a Settlement Deed dated 10 December 2019 ("**the Settlement Deed**"), ought to be paid and applied.

2. The Application specifically concerns those postmasters who had been made bankrupt (albeit subsequently discharged from bankruptcy), and who participated in the GLO Litigation having taken assignments of the relevant causes of action from their respective trustees in bankruptcy.

3. Issues have arisen as to whether, in such cases, the trustees in bankruptcy of the postmasters are entitled to all or some of the compensation payments payable under the GLO Scheme for the purposes of the bankruptcies on the basis either that the relevant bankrupt's right to apply for or receive such compensation represents "property" forming part of the bankrupt's estate, or because the trustees in bankruptcy are contractually entitled to recover a proportion thereof under the terms of the relevant assignments of the causes of action to the bankrupts.

4. The Respondents are the trustees in bankruptcy of Ms Suzanne Lesley Palmer ("**Ms Palmer**") and eight others of the relevant postmasters now discharged from bankruptcy. On the basis of legal advice, the Respondents have adopted the position that the entitlement to apply for or receive compensation does constitute "property" falling within the bankruptcy estate, alternatively that the effect of the assignments is that the bankruptcy estate is entitled to 49% of any sums received by way of compensation.

5. The Applicant disputes each of these propositions. In short it is the Applicant's case that:

   i) Neither as a matter of construction of the Insolvency Act 1986 ("**IA Act 1986**"), established precedent, or general principle, is there any basis to say that the proposed post-discharge GLO Scheme compensation payments would form part of the bankruptcy estate; and

   ii) On the proper construction of the relevant assignments, the Respondents have no entitlement to share in the compensation proposed to be paid by the Applicant under the GLO Scheme.

6. It has been agreed between the Applicant and the Respondents that the appropriate way to resolve these issues is for the Applicant, as an interested party, to apply to the Court pursuant to s.303(1) and s.363 IA 1986 for directions/declarations in relation thereto, with the bankruptcy of Ms Palmer being taken as the lead or test case. The directions/declarations sought, if granted, would enable the Applicant to make the

[1] The correct description may in many instances be "sub-postmasters" rather than "postmasters", but I refer to them collectively as postmasters.

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proposed payments free from any claim by the Respondents or other trustees in bankruptcy.

7. The application is supported by:

   i) The First Witness Statement of Robert Brightwell;

   ii) The Second Witness Statement of Robert Brightwell; and

   iii) The Second Witness Statement of Antony Nwanodi.

8. The Respondents rely on the Witness Statement of the First Respondent, Mustafa Hassanali Abdulali ("**Mr Abdulali**").

9. In the light of the troubling, controversial and sensitive circumstances in which the GLO Scheme has been established, the Respondents were, at the hearing before me, at pains to make clear through Mr Thomas Grant KC, who appears on their behalf, amongst other things, that:

   i) As trustees in bankruptcy, they owe duties and responsibilities to the creditors within the relevant bankruptcies who have, themselves, suffered financially in consequence of the events in question. A number of these creditors are, it is said, themselves, small businesses.

   ii) Whilst POL is a creditor in a number of the bankruptcies, it has agreed to waive any claim therein and therefore does not stand to benefit from the position adopted by the Respondents.

   iii) The parties are agreed that the effect of this decision will not affect the amount actually received by way of compensation by the relevant postmasters. In financial terms, the question is as to whether, in addition to paying the sums that might otherwise be payable under the GLO Scheme, the Applicant will have to pay any additional sums required to pay off the bankrupts' creditors in full, and bankruptcy costs and expenses.

   iv) It is the Respondents' position that it was only because they were prepared to assign the relevant causes of action that Ms Palmer and the other relevant postmasters were able to participate in the GLO Litigation. The Respondents express a concern that the stigma of bankruptcy will continue to attach to the relevant postmasters unless their bankruptcies can be annulled, and they maintain that annulment is more likely to be obtained (through the payment in full of bankruptcy debts and costs and expenses) if the relevant compensation payments are made into the bankruptcy estate.

   v) The Respondents have fully cooperated in ensuring that the Application has been dealt with on an expedited basis as "friendly" litigation designed to resolve the issues that have arisen.

10. Notice of the Application has been given to the relevant postmasters, and they have been given the opportunity to intervene should they wish to do so. None has done so.

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11. Mr Gareth Tilley appeared on behalf of the Applicant, and Mr Thomas Grant KC appeared on behalf of the Respondents. I am grateful to them both for their extremely helpful written and oral submissions.

Factual background

12. POL is a limited company owned by the Applicant.

13. In the early 2000s, POL began to introduce various iterations of a software system called "Horizon".

14. Thereafter, the Horizon system identified multiple instances of apparent shortfalls/losses on post office branch accounts for which postmasters were held contractually liable. POL pursued both civil claims and prosecutions in relation to such shortfalls.

15. Many affected postmasters were made bankrupt over this period, and indeed for many years afterwards. In respect of the postmasters in respect of which the Respondents were appointed trustees in bankruptcy, the dates on which they were made bankrupt fall between 2007 and 2015. In many cases insolvency practitioners such as the Respondents were appointed as trustees in bankruptcy in place of the Official Receiver, although often not until several years after the making of the relevant bankruptcy orders.

16. So far as the shortfalls in branch accounts were concerned, many postmasters attributed the same to "bugs" in the Horizon System. In or around 2009, a number of postmasters formed the Justice for Subpostmasters Alliance ("**JFSA**"). The efforts of the latter led, in 2012, to the setting up of an independent forensic investigation into the Horizon system by forensic accountants, Second Sight.

17. In the light of reports from Second Sight, in 2013 POL announced an independent mediation scheme for postmasters, known as "the Complaint Review and Mediation Scheme" ("**the CRMS**"). An "Overview" of the CRMS has been produced in evidence that shows that the CRMS provided for a process somewhat similar to what one might expect from a pre-action mediation process in an adversarial dispute between postmasters on the one hand and POL on the other hand. In principle, thereunder, postmasters could submit individual applications to the CRMS and there was a set procedure with a view to reaching a binding compromise of each dispute.

18. The Respondents first became involved in postmaster bankruptcies in 2014, having been approached by an advisor to the JFSA. In the context of the CRMS, an issue had been identified that postmasters who had been made bankrupt and had claims against POL required assignments of those claims back to them if they were to apply to the CRMS because their causes of action had vested in the bankruptcy estate. Insolvency practitioners such as the Respondents were thus sought who would be willing to be appointed as trustees in bankruptcy in order that they could enter into suitable assignments with the bankrupt postmasters so that the latter could participate in the CRMS.

19. In the circumstances, the Respondents agreed to be and were appointed as trustees in 34 postmaster bankruptcies between 2014 and 2017. In each case, having been

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appointed as trustees in bankruptcy, the Respondents entered into a deed of assignment with the relevant postmaster.

20. The effect of these deeds of assignment was to assign the trustees' interest in "the Action" back to the postmaster by way of a deed of assignment in consideration for £1 plus a 49% share of the (net) proceeds of "the Action", capped at the amount required to satisfy the claims of creditors, interest and the costs and expenses of the bankruptcy.

21. The deeds of assignment, or at least those executed prior to the termination of the CRMS and the subsequent GLO Litigation are in similar terms. They defined "the Action" in a Schedule thereto in the following terms:

> "… the proceedings in respect of the Post Office Limited Initial Complaint Review, presently in the Case Mediation Scheme under reference […] and in all or any connected proceedings going forward, whether in the Assignee's sole name or in conjunction with other parties between POST OFFICE LIMITED and [name of bankrupt]."

22. By early 2015, if not earlier, serious concerns had arisen as to whether the CRMS was operating as anticipated so as to provide a meaningful remedy for postmasters. These concerns were highlighted by written evidence submitted by the Rt. Hon. James Arbuthnot MP (now Lord Arbuthnot), an MP who had taken up the cause of the postmasters, on 20 January 2015. Further, in 2015 a forensic accountant's report by Second Sight described the Horizon system as being, at least in some circumstances, "not fit for purpose and 'systematically flawed from a users' perspective'".

23. In February 2015, POL unilaterally terminated the CRMS.

24. Ms Palmer was made bankrupt by a bankruptcy order dated 11 May 2015.

25. On 11 March 2016, a significant number of postmasters ("**the GLO Claimants**") commenced the GLO Litigation against POL. By October 2017 there were over 500 claimants and ultimately some 555. Not all of the postmasters who had been made bankrupt and over whose estates the Respondents were appointed were joined as GLO Claimants. Ms Palmer did participate as a GLO Claimant.

26. The GLO Claimants were funded in respect of the GLO Litigation by Therium Litigation Funding ("**Therium**"). In light of the funding arrangements with Therium, it was necessary for those postmasters who had already entered into an assignment with their trustees in bankruptcy assigning the relevant causes of action against POL to them to enter into a deed of variation. These deeds of variation varied the assignments to provide for the bankrupt postmasters to pay £11,000 "from their Proportionate Share" and, in addition, "49% of the Proportionate Share" to the Respondents, subject to the same cap as in the original assignment. The deeds of variation did not, in terms, define the expression "Proportionate Share", but they did contain a recital referring to the fact that the assignee proposed to enter into a "Litigation Funding Agreement" and "Priorities Agreement" with Therium which were described as together governing: "the apportionment and distribution of any net proceeds from the Action. Pursuant to the Funding Agreements, the Assignee's share of any net proceeds of the Action is defined as their 'Proportionate Share' of the net proceeds."

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27. Further deeds of assignment assigning the relevant causes of action to postmasters who had been made bankrupt were entered into after the GLO Litigation commenced. These were in similar terms to the prior deeds of assignment, but reflected the variations provided for by the deeds of variation.

28. Having been made bankrupt on 11 May 2015, Ms Palmer was automatically discharged from her bankruptcy on 11 May 2016.

29. A Group Ligation Order ("**the GLO**") was made in respect of the GLO Litigation on 21 March 2017 by Senior Master Fontaine. Fraser J (as he then was) was nominated as the managing judge shortly thereafter.

30. On 31 October 2017, the Respondents were appointed joint trustees in bankruptcy of Ms Palmer. On 15 November 2017 they entered into a deed of assignment with her in the form described in paragraph 27 above ("**the Assignment**"). This enabled Ms Palmer's continued participation as a claimant in in the GLO Litigation.

31. Following a trial in the GLO Litigation in 2018, on 15 March 2019, Fraser J gave judgment (favourable to the postmasters) on the "GLO Common Issues": *Bates v Post Office Limited (No 3) (Common Issues)* [2019] EWHC 606 (QB). There was a further trial to determine factual questions about the operation and functionality of Horizon, which took place in mid-2019. A draft judgment was circulated to the parties on 28 November 2019, and judgment was handed down by Fraser J on 16 December 2019: *Bates v Post Office Ltd (No.6: Horizon Issues)* [2019] EWHC 3408 (QB).

32. In the meantime, on 10 December 2019, the parties to the GLO Litigation entered into a Settlement Deed settling the latter. The Settlement Deed provided, so far as is relevant, for cash payments (totalling £42m) to be made to the GLO Claimants (clause 2), contained a carveout for malicious prosecution claims (clause 4.2.2), required POL to establish a scheme to pay compensation to postmasters who were not members of the GLO (known as the Historic Shortfall Scheme ("**the HSS**")): (clause 9 and Schedule 6), and required POL to withdraw its proofs of debt in relation to bankrupt postmasters (clause 11).

33. The Respondents received payments from the settlement proceeds in respect of those of the GLO Claimants whose bankruptcy estates they were administering in accordance with the terms of the assignments (i.e. £11,000 plus 49%). As a result of the receipt of payments from the settlement with the POL, 9 of the 34 bankruptcies in respect of which the Respondents were appointed were annulled, but not that of Ms Palmer.

34. In total, of the £42m damages payable pursuant to clause 2 of the Settlement Deed, a consequence of the operation of the terms of the relevant funding arrangements was that approximately £31m thereof required to be paid to Therium, thus leaving only about £11m for the GLO Claimants and meaning that they were not fully compensated. On the other hand, those postmasters who had not been parties to the GLO Litigation and who were able, as provided by clause 9 of and Schedule 6 to the Settlement Deed, to claim compensation under the HSS set up pursuant thereto, had no obligation to meet the funding costs of the GLO Litigation. This gave rise to the unfair result that those being compensated under the HSS would end up significantly better off than those who had pursued the GLO Litigation and who had secured for their non-participating peers, through the Settlement Deed, the establishment of the HSS.

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35. In light of this perceived unfairness, on 22 March 2022, the Government announced the decision to make funding available to GLO Claimants to enable them to receive "fair compensation", similar to that being received by those who had not participated in the GLO Litigation and could claim as against the HSS set up and operated by POL.

36. The GLO Scheme and the funding for it was originally authorised by the Supply and Appropriation (Main Estimates) Act 2023 (s.3(2) and Schedule), and subsequently by the Post Office (Horizon System) Compensation Act 2024.

37. It was announced in Parliament on 30 June 2022 that it was intended to make interim payments under the GLO Scheme in the sum of £19.5m notwithstanding that the detail of how the GLO Scheme would operate and be administered had yet to be finalised. In making the announcement, the Minister, Mr Paul Scully MP, said: "Together with the share of the December 2019 settlement that we understand was distributed to the GLO postmasters, this brings the total of compensation to approximately £30m." He also stated that under the final GLO Scheme, which was in the course of being developed, the sums to be paid were to be distributed in accordance with the same methodology used to distribute the settlement proceeds of the December 2019 Settlement.

38. Freeths, who had acted as solicitors for GLO Claimants in the GLO Litigation, were appointed by the Applicant to assist with the administration of the GLO Scheme.

39. The Respondents refer in evidence to a video call between Freeths and the Respondents on 4 July 2022 during which the Respondents were requested to provide payment in full calculations for each of the bankruptcy estates they were appointed on. They say that it was their understanding, at that stage, that Freeths at least accepted that funds paid under the GLO Scheme would fall within the terms of the assignments. It was on this basis that the Respondents, on 3 August 2022, wrote to the relevant postmasters saying that: "the interim payment will fall under the terms of the original assignment; which allows for a percentage of the 'proportionate share' to be payable to your bankruptcy estate."

40. The Respondents say that it was only later in August 2022 that they become aware that the Applicant differed in understanding as to the proper analysis regarding the distribution or allocation of payments under GLO Scheme.

41. Interim payments were made under the GLO Scheme commencing in late 2022. Of the 16 bankruptcy estates being administered by the Respondents, the payments received enabled a further 7 bankruptcies to be annulled. For the purposes of the interim payments, following negotiation and discussion in the context of the payments being required to be made as soon as possible, the interim payments were made on the basis of the Respondents' understanding as to the proper analysis as to the allocation of payments under GLO Scheme, i.e., that they would, as trustees in bankruptcy, be entitled to a 49% share of those payments.

42. As regards the remaining 9 bankruptcy estates being administered by the Respondents as trustees in bankruptcy, including that of Ms Palmer, although the bankruptcies have now been discharged, there remain amounts outstanding in respect of creditor claims and bankruptcy fees and expenses.

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43. On 23 March 2023 the full details of the GLO Scheme were published, as set out in the GLO Compensation Scheme Guidance and Principles ("**the GLO Scheme Guidance**"). The parties have identified the following provisions thereof as being of particular relevance:

i) Paragraph 1.1.1 refers to the Government having announced the "ex gratia" GLO Scheme on 22 March 2022 "with the objective of ensuring postmasters who were part of the GLO and not eligible to receive compensation from POL have access to fair compensation for their Horizon-related losses."

ii) Paragraph 1.1.2 refers to the fact that in awarding compensation to postmasters, the GLO Scheme will be guided by considerations of fairness, in addition to applying established legal principles and findings from the Common Issues Judgment and the Horizon Issues Judgment. Further, it is therein stated that the GLO Scheme "aims to restore postmasters back into the position they would have been in had it not been for the breach of Post-Office's contractual obligations … Claims can be made for Horizon Shortfalls and for consequential losses resulting from them".

iii) Paragraph 2 provides that, in order to make a claim, it is necessary to have been a claimant in the GLO Litigation and a party to the Settlement Deed. However, paragraph 2.1.4 provides that applications can be made on behalf of a deceased GLO postmaster or a GLO postmaster who is suffering from capacity issues. Further, paragraph 2.1.5 provides that shareholders or directors of companies that no longer exist, or partners of partnerships that no longer exist, are able to make a claim "as the linked individual".

iv) The process involved in making a claim is set out in paragraph 3.

v) Paragraph 4 sets out the "Key Principles" involved in making a claim including as to burden of proof, and the application of established legal principles in relation to matters such as causation, remoteness, mitigation and quantum.

vi) Paragraph 5 sets out what can be claimed. It is of note that paragraph 5.7 deals specifically with bankruptcy or other insolvency, and losses suffered if the postmaster underwent bankruptcy or insolvency proceedings as a result of a Horizon Shortfall, providing, at paragraph 5.7.1, that the same might be claimed as a "Consequential Loss". Paragraph 5.7.2 then set out what evidence would be required for such a claim to be successful, including that the bankruptcy/insolvency was due to the Horizon Shortfall rather than intervening events/general financial hardship/other factors. Paragraph 5.7.3 sets out the types of documents that should be provided in respect of such a claim including details of all creditors at the time of bankruptcy/insolvency, and if the bankruptcy/insolvency process had concluded, details of payments made to creditors. Paragraph 5.7.4 specifies that if the postmaster was made bankrupt as a result of the Horizon Shortfall, then he/she may be able to claim for, amongst other things, diminution in value to their estate or assets because of the bankruptcy, financial losses as a result of harm to credit and reputation by reason of the bankruptcy, and the expenses of the bankruptcy (including annulment costs already incurred). Paragraph 5.7.7 provides that if the postmaster wishes

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to seek an annulment, the GLO Scheme would cover the reasonable legal fees associated with doing so.

44. The Applicant's position is and has always been that in relation to discharged bankrupts such as Ms Palmer payments made under the GLO Scheme would be property acquired by, or devolving upon, the bankrupt after discharge, and therefore not falling within the bankruptcy estate pursuant to s.283(1) IA 1986, and being beyond the reach of any trustee in bankruptcy under s.307(2) IA 1986. This is a view that is, for what it is worth, said to be shared both by the Official Receiver and other insolvency practitioners other than the Respondents.

45. The Applicant seeks to draw a distinction with the HSS, under which POL itself deals with claims by those postmasters who were not GLO Claimants. Under the HSS those postmasters who still have causes of action against POL, because they were not compromised by the Settlement Deed, can make a claim for compensation to POL itself. It is common ground that in respect of those postmasters, if they had been made bankrupt, then the relevant causes of action and thus their ability to make a claim under the HSS will have vested in their trustees in bankruptcy, and thus the entitlement to make a claim and compensation payable pursuant thereto does fall within the relevant bankruptcy estate.

46. As already identified, the Respondents' position is that payments under the GLO Scheme, or the ability to claim the same, constitute "property" belonging to or vested in Ms Palmer and the other bankrupts at the commencement of their bankruptcy, alternatively that any payments made under the GLO Scheme fall within the scope of the Assignment and the other assignments as a matter of the proper construction thereof.

The Assignment

47. It is necessary to set out in rather more details the terms of the Assignment (dated 15 November 2017) whereby the Respondents assigned the relevant causes of action to Ms Palmer:

    i) The "Assignor" is expressed to be Ms Palmer acting by the Respondents, as her Joint Trustees in Bankruptcy, and recital 2 to the Assignment states that the Respondents are joined as a party to the deed "merely for the purposes of receiving the benefit of the waivers and exclusions in this Deed." This is, as I see it, an odd way of expressing matters if, as appears to be common ground, the relevant causes of action had vested in the Respondents as Ms Palmer's trustees in bankruptcy and were to be assigned by them on terms under which they were to receive a proportion of the fruits. However, it is not sought to be contended that the Assignment did not have the effect of assigning the relevant causes of action back to Ms Palmer on the terms provided for.

    ii) The "Assignee" is expressed to be Ms Palmer.

    iii) At recital 3 it is stated that:

> "Details of the action the Assignor was a party to prior to the bankruptcy is attached to the Schedule to this Deed (hereafter 'the Action'). The Action contained within the Schedule

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> represents the proceedings conducted in respect of the Post Office Limited Initial Complaint Review and in all or any connected proceedings going forward whether in her sole name or in conjunction with other parties."

iv) The Schedule referred to reads as follows:

> "The proceedings in respect of the Post Office Limited Initial Complaint Review and in all or any connected proceedings going forward whether in the Assignee's sole name or in conjunction with other parties between POST OFFICE LIMITED and SUZANNE LESLEY PALMER."

v) At recital 4 the Assignor, "acting by her Joint Trustees in Bankruptcy", is expressed as assigning "whatever right interest or title it has in the Action to the Assignee ('the Assignment')."

vi) Recital 5 provides that in the event that the Assignee was successful in recovering any sums from "the Action":

> "… the Assignee shall immediately account to the Assignor for the sum of £11,000 from their Proportionate Share in respect of the Assignor's costs. Of the remaining Proportionate Share the Assignee shall immediately account to the Assignor for a further sum (i.e. in addition to the £11,000) up to an aggregate total of [49] per cent of the Proportionate Share, subject to a cap of the amount required in order to satisfy, in full the total creditors (and, if applicable, statutory interest) in the bankrupt estate and bankruptcy costs and disbursements. The Assignee shall retain [51] per cent of the Proportionate Share."

vii) Clause 2.1 provided that: "The Assignor assigns to the Assignee such rights and interest it has in the Action with power to sue for and give a valid receipt."

viii) Clause 3 provides that: "The Assignor will give credit to the Assignee for any sums received by the Assignor in respect of the Action prior to completion of the Action or following completion of the Action subject to the 49:51 division of proceeds."

48. Although recital 5 of Assignment referred to the "Proportionate Share", the Assignment contained no definition of this expression. However, it is the same expression as used in the deeds of variation executed so as to vary the original deeds of assignment following the termination of the CRMS, and the obtaining of litigation funding for the GLO Litigation. The deeds of variation refer to the expression deriving from the relevant funding agreements.

49. The Application is strictly concerned with the proper construction of the Assignment. However, I do not understand it to be suggested that a different result would apply in relation to the original deeds of assignment bearing in mind that they require to be

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construed by reference to, and so as to give effect to the deeds of variation relating thereto.

Relevant provisions of the IA 1986

50. It is common ground that the following provisions of the IA 1986 are of particular relevance for present purposes:

i) Section 283 IA 1986, so far as relevant, provides:

> "(1) Subject as follows, a bankrupt's estate for the purposes of any of this Group of Parts comprises—
>
> (a) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy, and
>
> (b) any property which by virtue of any of the following provisions of this Part is comprised in that estate or is treated as falling with the preceding paragraph.
>
> (2) Subsection (1) does not apply to—
>
> (a) such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation;
>
> (b) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his family…"

ii) "Property" is defined in s.436(1) IA 1986 in the following terms:

> ""property" includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property".[2]

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[2] For what it is worth, it is to be noted that the s.167 of the Bankruptcy Act 1914 had defined "property" as including:

> "… money, goods, things in action, land and every description of property, whether real or personal, and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest and profit, present and future, vested or contingent, arising out of or incident to property as above defined."

The Bankruptcy Act 1869 was in the same terms, but without the words "whether situate in England or elsewhere."

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iii) Section 306 IA 1986 provides that:

> "(1) The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee.
>
> (2) Where any property which is, or is to be, comprised in the bankrupt's estate vests in the trustee (whether under this section or under any other provision of this Part), it shall so vest without any conveyance, assignment or transfer."

iv) Under s.307(1) IA 1986, the trustee in bankruptcy can by notice "claim for the bankrupt's estate any property which has been acquired by, or has devolved upon, the bankrupt since the commencement of the bankruptcy", but not "any property which is acquired by, or devolves upon, the bankrupt after his discharge".

v) As to "discharge", s.279(1) IA 1986, provides that: "A bankrupt is discharged from bankruptcy at the end of the period of one year beginning with the date on which the bankruptcy commences."

Relevant case law

51. As to the question as to what constitutes "property" falling within the definition thereof in s.436(1) IA 1986 that vests in a trustee pursuant to s.283(1) IA 1986, it will be necessary to go into the relevant case law in more detail in due course. However, it is common ground that a helpful analysis as to the relevant principles is provided in the judgment of Newey LJ in *Gwinnutt v George* [2019] Ch 471, a case concerned with whether non-contractual barristers' fees constitute "property" for the purposes of s.436(1). At [10], Newey LJ said as follows:

> "10. The following can, I think, be derived from the case law in respect of the 1986 Act and its predecessors:
>
> (i) It is "legitimate and necessary to bear in mind the statutory objective" when interpreting the 1986 Act, albeit that "however desirable it may be to construe the Act in a way calculated to carry out the parliamentary purpose, it is not legitimate to distort the meaning of the words Parliament has chosen to use in order to achieve that result": see *Bristol Airport plc v Powdrill* [1990] Ch 744, 758–759, per Browne-Wilkinson V-C.
>
> (ii) "[T]he statutory objective of the provisions of the 1986 Act" is that, "subject to certain specific exceptions, all a debtor's property capable of realisation should be vested in the trustee for him to realise and distribute the proceeds among the creditors": *Patel v Jones* [2001] BPIR 919, para 39, per Mummery LJ. In a similar vein, Mummery LJ had noted in *Dear v Reeves* [2002] Ch 1, para 39, a couple of months earlier:

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> "The purpose of divesting the bankrupt of his property, with certain express statutory exclusions, and vesting the bankrupt's title to it in the trustee is to enable the trustee to realise the bankrupt's estate for the benefit of the creditors and to distribute it among the bankrupt's creditors in accordance with the statutory scheme contained in Chapter IV of Part IX of the 1986 Act."

(iii) That approach accords with the "principle of public policy" that:

> "in bankruptcy the entire property of the bankrupt, of whatever kind or nature it be, whether alienable or inalienable, subject to be taken in execution, legal or equitable, or not so subject, shall, with the exception of some compassionate allowances for his maintenance, be appropriated and made available for the payment of his creditors": *Hollinshead v Hazleton* [1916] 1 AC 428, 436, per Lord Atkinson.

(iv) In keeping with that policy, "in successive statutes dealing with bankruptcy and insolvency the definition of 'property' has been progressively extended": *In re Celtic Extraction Ltd* [2001] Ch 475, 486, para 26, per Morritt LJ[3].

(v) The word "property" "is not a term of art but takes its meaning from its context": *In re Celtic Extraction Ltd*, at p 486, para 26, per Morritt LJ.

(vi) The explanation of "property" given in section 436 "is not in truth a definition of the word 'property'" since the section "only sets out what is included": *Ord v Upton* [2000] Ch 352, 360, per Aldous LJ.

(vii) Section 436 is very wide in its scope. In the *Bristol Airport* case [1990] Ch 744, Browne-Wilkinson V-C observed, at p 759, "It is hard to think of a wider definition of property".

(viii) There are, however, limits. Thus, the fact that a possibility has a realisable value will not necessarily render it "property": "The chance of receiving a legacy from a relative a man might sell before his bankruptcy, but still, if not sold by him, that chance would not pass to his assignees": *Johnson v Smiley* (1853) 17 Beav 223, 230, per Romilly MR. *In Ex p Dever; In re Suse and Sibeth* (1887) 18 QBD 660, a "mere spes" was held not to have

[3] See however, footnote 2 above.

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vested in a trustee in bankruptcy. A wife had taken out an insurance policy on the life of her husband on terms that entitled her to opt to withdraw money after ten years if the policy had not previously been terminated by lapse or death. The husband became bankrupt during the currency of the policy, but it was not until after he had obtained his discharge that the wife became able to exercise the right of withdrawal and did so. The Court of Appeal held that any interest that the husband might have in the money paid by the insurance company did not pass to his trustee in bankruptcy. Fry LJ, for example, said, at p 670:

> "How could the interest of the husband be 'property', when it was something which could only accrue in the event of the exercise of the wife's option on a double contingency, which had not happened at the time when he obtained his discharge? How could it be said that any 'property' was vested in him at the time of his discharge? It was the mere hope of a hope that something might come to him by reason of his surviving the ten years and of his wife's exercising her option in that particular manner. It was a mere spes, and there was nothing which could vest in the trustee in the bankruptcy."

In *In re Rae* [1995] BCC 102, 113 Warner J said that he was:

> "not persuaded that one can, merely from a consideration of the purposes of the Insolvency Act and the non-exhaustive nature of the definition of 'property' in section 436, reach the conclusion that any asset of the bankrupt which can be realised or turned to account is 'property' within the meaning of the Act."

More recently, Chief Registrar Baister considered it "trite law that a beneficiary under a discretionary trust has no beneficial interest and nothing to which a trustee in bankruptcy can succeed under sections 283(1) and 306 Insolvency Act" (*Agarwal v Canara Bank* [2017] BPIR 842, 864, para 98) even though such a beneficiary may be said to have "an interest of sorts" (*JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2016] 1 WLR 160 , para 13, per Lewison LJ) and "more than a mere spes": *Gartside v Inland Revenue Comrs* [1968] AC 553, 618, per Lord Wilberforce."

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The Applicant's case

Property vesting in the bankruptcy estate?

52. Mr Tilley submits that, for the purposes of s.283(1)(a) IA 1986 and in considering the scope of what falls within the bankrupt's estate, it is clear from the wording thereof that there are two criteria, each of which requires to be established in respect of the entitlement to seek compensation under the GLO Scheme, namely: (a) that it is "property"; and (b) that it belonged to or was vested in the bankrupt at the commencement of the bankruptcy. It is submitted that neither of such criteria is established in relation to entitlement to GLO Scheme compensation.

53. As to "property", and the definition thereof in s.436(1), it is submitted that this comprises two distinct limbs, namely:

    i) "money, goods, things in action, land and every description of property wherever situated"; and

    ii) "obligations and every description of interest whether present or future or vested or contingent, arising out of, or incidental to, property."

54. Albeit that the Respondents' case (see paragraph 25 of Mr Grant KC's Skeleton Argument) relies upon any entitlement to GLO Scheme compensation falling within the second limb of the definition in s.436(1) and not the first limb, Mr Tilley submits that it is instructive to consider whether it might fall within the first limb of s.436(1), if only to see why it does not do so.

55. As to whether any such entitlement might fall within the first limb of the definition in s.436(1):

    i) Mr Tilley referred to *Re Rae* [1995] BCC 102, where Warner J, at p.110C-D said in relation to the first limb that the word "property" must connote anything which is capable of being owned and which ownership can be asserted or defended in legal proceedings, and on that basis that the second limb must go "wider". The point is made that an entitlement to ex gratia GLO Scheme compensation could hardly be said to be capable of being owned, such that such ownership could be asserted or defended in legal proceedings so as to fall within the first limb of the definition at least.

    ii) Further, Mr Tilley referred to how the Court in *Ward v Official Receiver* [2012] BPIR 1073 dealt with a right to complain in respect of mis-sold payment protection insurance ("**PPI**") leading to the potential receipt of compensation after discharge of bankruptcy. In finding that the right to complain fell within the definition of "property" in s.436(1), District Judge Khan analysed the same in terms of an interest incidental to property, i.e. as falling within the second limb of the definition. Whilst District Judge Khan did also identify a "thing in action" falling within the first limb, this related not to the right to complain but a potential cause of action in damages for misrepresentation which would clearly have fallen within the first limb of the definition of property in s.436(1). Although Mr Tilley seeks to draw a distinction between the present case and the right to complain in *Ward v Official Receiver* because that case involved a

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complaint against the obligor rather than an ex gratia compensation scheme provided by the Government, Mr Tilley makes the point to the extent that there is any analogy with the present case, it provides no support for the first limb of s.436(1) definition being applicable on the present facts.

iii) To similar effect, Mr Tilley relies upon what was said by Singh LJ in *Shop Direct Finance Co v Official Receiver* [2023] EWCA Civ 367 at [56], another case involving a claim for compensation in respect of mis-sold PPI, again against the obligor/provider of the PPI. At [56], Singh LJ said that he was prepared to accept that the right to make a complaint under the relevant scheme (providing for compensation to be paid by the provider of the payment protection insurance) did fall within the definition of "property" in s.436(1), as he put it: "certainly because it is an interest "incidental to" property, i.e. the PPI policy." He then went on to say that it was unnecessary to go further and decide whether it also fell within the definition of "thing in action", but he did say that he could see force in the argument that such a right has to be transferable for it to qualify as such, referring to what Mummery LJ had said in *Dear v Reeves* [2002] Ch 1 at [40]. This latter case was concerned with rights of pre-emption, and Mummery LJ said therein that a distinguishing feature of a right of property, in contrast to a purely personal right, was that it was transferable, and that it might be enforced by someone other than the particular person in whom the right was initially vested. Entitlement to compensation under the GLO Scheme is, it is submitted, clearly not such a right.

iv) Relying upon these authorities, it is submitted that the entitlement of a GLO Claimant to seek compensation payable pursuant to the GLO Scheme could not, on any view, be said to be property falling within the first limb of the definition in s.436(1), as it lacks the distinguishing features of a right of property as identified in *Dear v Reeves* (supra) at [40] per Mummery LJ.

56. Turning to the second limb of s.436(1) IA 1986, Mr Tilley submits that this limb of the definition imposes two gateways, namely:

i) A necessity to show that there is an obligation or interest that "arises out of", or is incidental to "property" falling within the first limb; and

ii) A necessity to show that the interest or obligation in question existed, and so belonged to or was vested in the bankrupt, at commencement of their bankruptcy.

57. Dealing with the first of these gateways, Mr Tilley submits that it cannot properly be said that the entitlement to compensation under the GLO Scheme arose out of, or is incidental to any property falling within the first limb, i.e. in the present case, the cause or causes of action as against POL vested in the bankrupt as at the commencement of bankruptcy. Mr Tilley submits that there are, essentially, four reasons as to why this is the case:

i) Firstly, the GLO Scheme relates to the making of ex gratia payments that the Government was under no legal obligation to make. It is submitted that this is sufficient in itself to break or cut any connection with the underlying causes of action behind the GLO Litigation.

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ii) Secondly, it is submitted that if the entitlement to claim compensation under the GLO Scheme had truly "arisen from" the causes of action behind the GLO Litigation, or were truly "incidental" thereto, then the GLO Scheme would not have been structured in such a way as to disconnect the ability to claim from the pursuit of the underlying causes of action as it is submitted has been done by the provisions of paragraph 2 of the GLO Scheme Guidance. Particular reference is made to paragraph 2.1.5, which makes provision for individuals linked to companies or partnerships that have ceased to exist to be able make a claim.

iii) Thirdly, reliance is placed on what was said by Warner J in *Re Rae* (supra) at p.114B-C. In that case, the bankrupt, at the commencement of his bankruptcy, owned four fishing vessels with the benefit of fishing licences under the Sea Fish (Conservation) Act 1967. The vessels clearly constituted property (falling within the first limb of the definition in s.436(1)) that vested in his trustee in bankruptcy. The licences were invalidated by the bankruptcy and therefore did not vest in the trustee. However, the Ministry of Agriculture, Fisheries and Foods, by whom the licences were granted, recognised the entitlement of the bankrupt, and that of any person in whose favour the bankrupt waived the entitlement, to apply for a new licence. The trustee contended that the entitlement fell within the second limb of the definition of "property", being an interest incidental to the bankrupt's ownership of the vessels. It was argued on behalf of the bankrupt that the entitlement was not incidental to the ownership of the vessels because it was the creature of the minister and only existed because of an intimation by her as to the way in which she would generally exercise her discretion to grant licences. At p114B-C, Warner J said that he would have found this argument "compelling and conclusive" were it not for the terms of the ministry's letter dated 29 April 1994 in which it had been stated that it was for the court and not the ministry to assess the competing insolvency interests and to adjudicate accordingly. Mr Tilley draws an analogy with the GLO Scheme being the creature of Government intervention, but in the present case, he submits, entirely so and without a qualification of the kind found in the letter dated 29 April 1994 that was held to be significant in *Re Rae*.

iv) Fourthly, Mr Tilley relies upon the gap in time between the conclusion of the GLO Litigation as compromised by the Settlement Deed, and the setting up of the GLO Scheme sometime thereafter once the disparity in effect between the entitlement of the GLO Claimants under the Settlement Deed, and that of other postmasters entitled to compensation from POL under the HSS, had come to light. Mr Tilley submits that it is an important consideration that the relevant causes of action the subject matter of the assignments by the trustees in bankruptcy, and that were pursued by the GLO Litigation, were compromised by, and thus brought to an end by the Settlement Deed. Consequently, a claim to compensation under the GLO Scheme can hardly be said to have arisen out, or to be incidental to something that had been brought to an end before the GLO Scheme was established. On this point, Mr Tilley submits that *Barclays Bank Plc v Marsden* [2013] EWHC 3741 (Comm), a case referred to by Mr Grant KC on behalf of the Respondents in paragraph 29 of his Skeleton Argument, is to be distinguished. This latter case involved an entitlement to complain under an FCA redress scheme in respect of an interest rate swap. It followed on from an earlier compromise of "complaints, claims and causes of action" between the

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bank and customer that had been re-opened by a subsequent FCA review. It was argued that there could have been no contingent claim in respect of the claim for compensation to vest in the bankruptcy estate because the claim had been compromised. The argument was rejected on the facts of the case. However, Mr Tilley submits that this case is to be distinguished from the present because the FCA's powers that led to the review that re-opened the claim to compensation in that case existed at the time of the relevant bankruptcy, unlike the GLO Scheme. Further, the entitlement to complain under the FCA's redress scheme in that case would have involved the payment of compensation by the original obligor against whom the original claims that led to the compromise had been pursued. In short, the mechanism that enabled the claim for compensation was already in place at the commencement of the bankruptcy.

58. Turning to the second gateway in respect of the second limb of the definition in s.436(1), Mr Tilley submits that even if, contrary to the above, the entitlement to claim compensation under the GLO Scheme could properly be said to "arise out of", or to be "incidental" to the causes of action behind the GLO Litigation, this second gateway cannot be established because the relevant interest did not exist at the commencement bankruptcy, or indeed at any time prior to discharge from bankruptcy, but only thereafter upon the setting up of the GLO Scheme by the Government on an ex gratia basis.

59. As to the inability to establish this second gateway:

i) Mr Tilley suggests that there is no case where a future right that did not exist at the time of bankruptcy was held to be property simply because facts existed at the time of bankruptcy that entitled the bankrupt to claim the right when, in the future it came into existence.

ii) On this basis, Mr Tilley seeks to distinguish the present case from cases such as *Patel v Jones* [2001] BPIR 919:

a) *Patel v Jones* involved pension entitlements relating to work done prior to bankruptcy, but which were only triggered after discharge. The fact that they were only triggered after discharge did not prevent them from being "property" falling within the bankruptcy estate. The crucial point is said to be that the pension entitlement had been established prior to bankruptcy, unlike the GLO Scheme.

b) Likewise, so Mr Tilley submits, in *Ex p Huggins; In re Huggins* (1882) 21 ChD 85. In this case a retired judge had accepted his position as a judge on the basis he would be entitled to a pension. The benefit was held to have been conferred years before he became bankrupt, and hence was available to the trustees albeit that it would only be paid after discharge and could not have been sued for – see per Jessel MR at 89-90.

iii) Further, Mr Tilley relies on *Re Rae* (supra) on the basis that the entitlement to apply for the licence in that case arose from ownership of the vessels and the fact that the bankrupt had held licences associated therewith. Consequently, at the commencement of his bankruptcy, the bankrupt owned the vessels and the

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basis for the entitlement to apply for new licences in place of the licences that were invalidated on bankruptcy existed at that time. At p.113E, in the context of an undischarged bankruptcy, Warner J said: "I think that the recognised entitlement is a present interest incidental to the vessels". In the present case, there was no interest until the GLO Scheme was established some six years after Ms Palmer's discharge.

iv) Mr Tilley challenges Mr Grant KC's contention that his approach involves "reading down" the definition of "property" in s.436(1) in any way. Mr Tilley submits that s.283(1)(a) simply requires reading in such a way that the reference to "property" at the beginning thereof, before the words "belonging to or vested in the bankrupt", encompasses the full definition, i.e. each of the first and second limbs of the definition in s.436(1), and not just the first limb.

v) Mr Tilley submits that this approach is supported by the older, well-established authorities, a number of which were referred to without qualification in the recent decision of the Court of Appeal in *Gwinnutt George* [2019] Ch 471. In particular, Mr Tilley refers to *Johnson v Smiley* (1853) 17 Beav 223 at 230, and *In Re Inkson's Trusts* (1855) 21 Beav 310 at 311 as identifying the need for the relevant interest to exist at the time of bankruptcy and not simply to come into existence in consequence of subsequent events.

vi) Mr Tilley also relies upon *Re Campbell* [1997] Ch 14, a case concerned with the question as to whether an application for an award from the Criminal Injuries Compensation Board ("**CICB**") constituted "property" for the purposes of the definition thereof in s.436(1), it being argued by the trustee that it fell within the second limb of the s.436(1) definition. The argument that it did so was rejected on the basis that the latter was not susceptible of referring to something which had no present existence. At p.18B-D, Knox J said this:

> "Treating the matter purely as a matter of construction I am quite unable to accept that the word "property", when it is used in that definition of property, is intended to describe anything other than an existing item. In other words I do not accept that it is susceptible of referring to something which has no present existence but may possibly come into existence on some uncertain event in the future."

vii) In short, Mr Tilley submits that in order to satisfy the requirements of this second gateway, it would be necessary so show that the GLO Scheme existed at the commencement of bankruptcy, which it plainly did not. On this basis, it is submitted that, at that time, there cannot have been more than a mere hope or expectation that the Government might provide ex gratia compensation if a satisfactory and fair remedy against POL could not otherwise obtained.

60. For the above reasons, Mr Tilley submits that the entitlement to seek compensation under the GLO Scheme is not "property" that vested in the Respondents on the bankruptcy of Ms Palmer or the other relevant postmasters who became bankrupt.

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Effect of the Assignment

61. The issue is as to whether, as a matter of true construction thereof, the effect of the Assignment is that even if the entitlement to compensation under the GLO Scheme did not vest in the Respondents as trustees in bankruptcy, any compensation received pursuant thereto requires to be applied in accordance with the terms of recital 5 to, and clause 3 of the Assignment under which the Respondents are entitled to receive 49% of the amount received by Ms Palmer (and the other relevant postmasters), subject to the cap of the amount required to satisfy creditors in full, and pay the costs and expenses of bankruptcy.

62. I do not understand there to be any dispute between the parties as to the relevant principles to apply, including that:

    i) "Interpretation is the ascertainment of the objective meaning of the language in which the parties have chosen to express their agreement, in its documentary, factual and commercial context. That meaning is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. Both the text and context are tools in the process of interpretation."

    "The text must be assessed in the light of (i) the natural and ordinary meaning of the words, (ii) any other relevant provisions of the contract, and (iii) the overall purpose of the clause and the contract" …

    See - Lewison, The Interpretation of Contracts, 8th Edn, at p.1.

    ii) A contract must be interpreted according to its meaning at the date when it was made, and therefore having regard to "the relevant background … ascertained by reference to the date at which the contract became binding on the parties": Lewison, at 3.170.

    iii) Legal terms of art should be given their technical meaning in law unless there is something in the context to displace the presumption that it was intended to carry its technical meaning: Lewison, at 5.62. This involves a prior inquiry as to whether the term in question is a legal term of art: Lewison at 5.65.

63. Mr Tilley submits that there are four key reasons as to why the relevant provisions of the Assignment should not be construed as providing for any part of any compensation paid pursuant to the GLO Scheme to be applied in favour of the Respondents as trustees in bankruptcy:

    i) Firstly, reliance is placed upon the fact that the Schedule to the Assignment, in providing "Details of the Action" refers to proceedings, albeit in Ms Palmer's sole name or in conjunction with other parties, but importantly between "POST OFFICE LIMITED and SUZANNE LESLEY PALMER". It is submitted that, in no sense, can a claim upon a compensation scheme established on an ex gratia basis by, and funded by, the Government fall within a definition that identifies proceedings between POL and Ms Palmer. This is on the basis that the trigger for the obligation to account to the Respondents under recital 5/clause 3 is the receipt of sums from or in respect of "the Action".

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ii) Secondly, it is submitted that the GLO Scheme can, in no sense, be described as involving or concerning "proceedings", the expression used in the Schedule to the Assignment, which begins with the words "The proceedings in respect of …". It is submitted that the expression "proceedings" is a legal term of art, as illustrated by *Bristol Airport v Powdrill* [1990] Ch 744 at p.765F-G. In this passage, Sir Nicholas Browne-Wilkinson V-C referred to the natural meaning of the words "no other proceedings" as meaning legal proceedings or quasi-legal proceedings, at least unless there was something in the particular context to indicate otherwise. It is submitted that the Assignment was entered into in the context of ongoing legal proceedings, and that there is nothing in the context to indicate that the Schedule was referring to anything other than an adversarial legal process. So far as the earlier assignments are concerned, it is said that they were entered into in the context of the CRMS, an adversarial process involving the party against whom the relevant causes of action lay, rather than a claim made under of a government funded scheme such as the GLO Scheme.

iii) Thirdly, Mr Tilley highlights that one only gets to a consideration of this construction issue if the Respondents are unsuccessful with regard to the issue as to whether an entitlement to claim under the GLO Scheme constituted "property" falling within the bankruptcy. He submits that if it is the case that such entitlement did not fall within the relevant bankruptcy and therefore could not have been encompassed within the Assignment or other assignments of what had been vested in the Respondents, then it would be somewhat odd if the latter should give rise to an entitlement on the part of the Respondents, as trustees in bankruptcy, to the fruits of something that fell outside the terms of the Assignment or other assignments.

iv) Fourthly, Mr Tilley places reliance upon the fact that recital 5 to the Assignment, if not clause 3 thereof, referred to Ms Palmer accounting to the Respondents for £11,000 from her "Proportionate Share", and for an aggregate of 49% of "the Proportionate Share". Whilst the deeds of variation in respect of the earlier assignments could not be an admissible aid to construction in relation to the Assignment, not being shown to have been available to Ms Palmer at the time that she entered into the Assignment, Ms Palmer would have been aware that the Assignment was entered into in the context of the funding arrangements between Therium and the GLO Claimants, which provided for payment of a proportion of the recoveries to the respective GLO Claimants. It is submitted that, on the wording of recital 5, it is to the "Proportionate Share" to which Ms Palmer is entitled and to which the 49% is applied, i.e. the entitlement of Ms Palmer to share in the fruits of the GLO Litigation itself, and nothing else.

64. It is therefore submitted that, as a matter of true construction thereof, the relevant provisions of the Assignment, or indeed other assignments, cannot extend to compensation payable under the GLO Scheme.

The Respondents' case

Introduction

65. Over and above his remarks that I have referred to in paragraph 9 above, Mr Grant KC placed particular emphasis upon the circumstances behind the setting up of the GLO

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Scheme, which he contended was fundamental to a proper understanding of the issues that arise in respect of the present application.

66. Mr Grant KC referred, in particular, to the following, namely that:

i) The GLO Claimants had borne the risk of the GLO Litigation against POL, but their success had been marred by the fact that they had had to account for some 75% of the award achieved as against POL under clause 2 of the Settlement Deed to Therium as litigation funders. Thus, notwithstanding being the "trailblazers", they had been undercompensated. A further unfairness is said to be that whilst the GLO Claimants had, as part of the Settlement Deed, negotiated provision for compensation from POL for other postmasters not involved in the GLO Litigation through the HSS, these other postmasters would not be required to share the fruits thereof with a litigation funder as had the GLO Claimants. The GLO Scheme is therefore to be considered to be a way of putting the GLO Claimants in the same position as these other postmasters and making up for the deficiencies of the Settlement Deed.

ii) The Minister, Paul Scully MP, in making the statement announcing the GLO Scheme on 22 March 2022, had identified this unequal treatment and referred to the additional funding being made available "to give those in the GLO group compensation similar to that which is available to their non-GLO peers."

67. Mr Grant KC submitted that the root cause of the GLO Scheme was that the GLO Claimant "trailblazers" had suffered what he described as a "double whammy", and that the purpose of the GLO Scheme was to relieve them of the consequences thereof. It is not in dispute that, for the purposes of the HSS, the relevant causes of action of the postmasters in question will, in those cases where they had become bankrupt, have vested in their trustees in bankruptcy, such that any compensation payable pursuant to the HSS will be payable to their trustees in bankruptcy. Given that the purpose of the GLO Scheme, is to achieve equal treatment, it is submitted that there would be an oddity and an inconsistency if the entitlement to compensation thereunder did not vest in the trustees in bankruptcy of the GLO Claimants who had been made bankrupt in the same way as compensation payable to those claiming under the HSS is accepted to vest.

68. Mr Grant KC referred to various provisions of the GLO Scheme Guidance as demonstrating that the purpose of the GLO Scheme was to make good the deficiencies of the legal process concerning the GLO Litigation, and to do so by a carefully structured scheme that applied principles and an approach akin to that which would be taken by a court in assessing the proper amount of compensation. He placed particular emphasis on the fact that the GLO Scheme Guidance provided for the application not only of established legal principles, but findings from the Common Issues Judgment and the Horizon Issues Judgment and that the GLO Scheme aimed to restore postmasters back into the position they would have been in had it not been for the breach of POL's contractual obligations.

69. So far as paragraph 5.7 of the GLO Scheme Guidance is concerned, and the position in the case of bankruptcy/insolvency provided for thereby, Mr Grant KC made the point that whilst provision was made thereunder for those claiming under the GLO Scheme who had been made bankrupt to provide details such as of all creditors at the time of bankruptcy/insolvency, if compensation were to be paid to the individual GLO

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Claimants who had been made bankrupt, they could not be made to pay the same to their trustees in bankruptcy in order to obtain an annulment.

70. Thus, Mr Grant KC submitted that the above considerations informed the approach that the court should take to the issues as to whether entitlement to compensation under the GLO Scheme was vested in the Respondents, as trustees in bankruptcy, and as to the proper construction of the Assignment and other assignments, and pointed to a requirement to treat those claiming under the GLO Scheme and the HSS on the same basis so far as bankruptcy considerations were concerned.

Property vesting in the bankrupt estate?

71. As to whether obligations or interests "arising out of, or incidental to, property" were required to exist as at the commencement of bankruptcy, Mr Grant KC submits that the approach taken by the Applicant impermissibly reads down the wide wording of the definition in s.436 IA 1986.

72. Mr Grant KC submits that the authorities demonstrate that the definition is to be given the widest of meanings, and construed by reference to the statutory objective, and principles of public policy behind the relevant provisions of the IA 1986. As to these considerations, he refers, in particular, to the authorities identified by Newey LJ in *Gwinnutt v George* (supra) at [10](i) to (vii) (set out in paragraph 51 above), including *Bristol Airport v Powdrill* (supra) at 758-759, where, at 759, Sir Nicholas Browne-Wilkinson V-C had observed that: "It is hard to think of a wider definition of property".

73. Further, Mr Grant KC referred to *Re Rae* (supra) at p.110C-D, where Warner J had, as referred to in paragraph 55(i) above, spoken in terms of this second limb of the definition in s. 436(1) as going "wider" than the first limb, a matter that Warner J further developed at p.113. Mr Grant submits that this case shows that an entitlement to be considered for a benefit provided by a government department (even on a discretionary basis) does not have to be a legal right to qualify as such an "interest" as is contemplated by s.436(1).

74. So far as cases such as *In re Huggins* (supra) are concerned, Mr Grant KC submitted that these were concerned with the issue as to whether there was an entitlement sufficient to amount to "property" for the purposes of the then legislation given that the enjoyment of the entitlement did not arise until after discharge, and not with whether the relevant entitlement was required to exist at the time of bankruptcy if it arose out of or was consequential upon "property" that did. Consequently, it is submitted that this line of authorities is of no assistance to the Applicant on this point.

75. Mr Grant KC relied upon the cases that I have already referred to where compensation awards which were not based upon causes of action were held to fall within the bankruptcy estates. Specifically, Mr Grant KC relies upon:

    i) The PPI compensation case of *Ward v Official Receiver* (supra), where the award was held to vest in the trustee in circumstances in which the payment was made two years after the bankrupt's discharge from bankruptcy, after the bankrupt had brought the complaint himself during his bankruptcy. Mr Grant KC made the point that the property in respect of which the claim was said to have arisen out of, or to be incidental to, so as to satisfy the definition in the

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second limb of to s.436(1), namely the PPI policy, had long since ceased to exist prior to bankruptcy, yet the requirements of the second limb were held to have been satisfied.

ii) In respect of *Shop Direct v Official Receiver* (supra), Mr Grant KC took the point that notwithstanding the Court of Appeal's finding that, under the relevant rules of the Financial Ombudsman scheme, the "complainant" (whose knowledge was relevant the limitation purposes) was the individual bankrupt, the entitlement to complain, and thus to compensation, was held to vest in the trustee in bankruptcy – see per Singh LJ at [52]-[53], and [58].

iii) As to *Barclays Bank v Marsden* (supra) where the entitlement to complain under an FCA redress scheme was held to vest in the trustee in bankruptcy, Mr Grant KC referred to the fact that the bankrupt in question had been made bankrupt in 2012 and discharged in 2013, and that the offer of redress was only made in 2014 under a process that was gratuitous and non-actionable by the customer. Mr Grant KC referred to HHJ Kramer, sitting as a judge of the High Court, having said at [43]:

> "Mr Marsden, too, has more than a moral claim to the redress offer. Whilst he has no contractual entitlement to receive an offer, he can complain to the bank's regulator if the offer is not provided in accordance with the review. Following *Gwinnutt* and the very wide description of property in s.436 of the Act, it is irrelevant that under the redress scheme Mr Marsden had no contractual right to an offer. The availability of an offer under the scheme was property in his estate at the time of the bankruptcy provided that it existed as a contingent claim at the time."

76. As to the Applicant's reliance upon the older cases such *Johnson v Smiley* (supra) and *Re Inkson's Trusts* (supra) and the dicta of Romilly MR therein, Mr Grant KC submits that the court should exercise care in attaching undue weight thereto, in particular in the light of the observations of Morritt LJ in *Re Celtic Extraction Ltd* [2001] Ch 475 that in successive statutes dealing with bankruptcy and insolvency the definition of "property" has been progressively extended.

77. Mr Grant KC's key submission is that, on proper analysis, any entitlement to compensation under the GLO Scheme is, as he put it, "umbilically linked" to the GLO Litigation and the claims or cause of action behind it, and that, for the purposes of definition of "property" in s.436(1), and the application of s.283(1) IA 1986, there was no need for such entitlement to "exist" at the time of bankruptcy so long as it "flows out of" the GLO Litigation and the claim or cause of action behind it, which, so it is submitted, it does. On this basis, so it is submitted, the entitlement to compensation under the GLO Scheme is and was a future interest that falls within the second limb of s.436 IA 1986.

78. As to Mr Tilley's contention that there is no case where a future right that did not exist at the time of the bankruptcy was held to be "property" simply because facts existed at the time of the bankruptcy that subsequently entitled the bankrupt to claim the right when, in the future, it came into existence, Mr Grant KC submits that:

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i) As he put it in submissions, "the whole concept of a future right means that it does not exist"; and

ii) The fact that there may have been no such case is not to the point.

79. Mr Grant KC submits that the Respondents should succeed in respect of this issue for, essentially, the following reasons:

i) At the time that she was made bankrupt, Ms Palmer had vested in her a cause or causes of action against POL that allowed her to make a claim against the latter, subject to obtaining the Assignment.

ii) With the benefit of the Assignment, she participated in the GLO Litigation and was a party to the Settlement Deed. However, in consequence of the funding arrangements required in order to pursue the GLO Litigation she, along with the other GLO Claimants ended up with an inadequate settlement in contrast to the provision made by the Settlement Deed for postmasters who had not participated in the GLO Litigation, but who had causes of action against POL, through the HSS.

iii) The GLO Scheme was set up by the Government to alleviate the consequences of the inadequate settlement and in order, effectively, to make good the claims and causes of action that Ms Palmer and the other GLO Claimants had against POL given such deficiencies.

iv) It can therefore be seen that the future interest that has now come into existence through the entitlement to claim compensation through the GLO Scheme did arise out of, and is incidental to "property", i.e. the causes of action behind the GLO Litigation.

v) The fact that the GLO Scheme was the voluntary act of the Minister/Government is not, it is submitted, to the point.

vi) There is, it is said, nothing in the statutory definition of "property" that requires the future interest in question to have existed as at the commencement bankruptcy.

vii) There is, it is said, nothing within the GLO Scheme Guidance to suggest that a trustee in bankruptcy could not apply thereunder, with a view to obtaining compensation to pay off creditors and thereby enable annulment.

80. Mr Grant KC submits that it is necessary to step back and consider the reality of the position, and the fact that it would make no sense if whether the entitlement to compensation fell within the bankruptcy estate should depend upon the happenstance of whether or not the relevant postmaster who had been made bankrupt had participated in the GLO Litigation.

81. On this basis, it is submitted that any entitlement of Ms Palmer and other relevant bankrupt postmasters to compensation under the GLO Scheme vests in the Respondents as their trustees in bankruptcy.

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The effect of the Assignment

82. Mr Grant KC submits that even if the Respondents are unsuccessful in showing that the entitlement of GLO Claimants to seek compensation under the GLO Scheme falls within the bankruptcy estate, they are, as party to the Assignment and other assignments, entitled to participate in any award in respect thereof on the basis that any compensation payable would fall to be applied in accordance with the terms thereof thus entitling the relevant bankruptcy estates to 49% of any payments made under the GLO Scheme.

83. As I have said, there is no issue between the parties as to the appropriate principles to apply in construing the Assignment and other assignments. The essence of the Respondents' case thereon is as follows:

i) It is submitted that the concept of "Action" as referred to in the Assignment is anchored in original CRMS established by POL as described in paragraphs 17 and 18 of Mr Abdulali's witness statement. This, it is said, is made clear by the fact that recital 3 to the Assignment defers to the Schedule so far as the definition of "the Action" is concerned, and by the fact that even in the Assignment to Ms Palmer reference is made in the Schedule not solely to legal proceedings in the strict sense, but to the CRMS and "all or any connected proceedings going forward".

ii) On this basis, it is submitted that where "proceedings" are referred to in both the third and fourth lines of recital 3 to the Assignment, this is a reference to proceedings in a wider sense than simply legal proceedings in the strict sense, and thus that the reference to "connected proceedings" on the fourth line of recital 3 is capable of extending to, and does extend to something other than legal proceedings.

iii) Once this is understood, then the concept of "Action" as used in the Assignment is sufficiently wide to include the GLO Scheme. Thus, for the purposes of recital 5 to and clause 3 of the Assignment, the references to "any sums from the Action" and "for any sums received … In respect of the Action", extend to sums received by way of compensation under the GLO Scheme.

iv) It is submitted that no particular significance attaches to the fact that the Schedule refers to proceedings between POL and Ms Palmer, particularly bearing in mind that recital 3 does not identify POL as the required counterparty, and the Applicant is the sole shareholder in POL.

v) Further, it is submitted that no significance should be attached to the use of the expression "Proportionate Share" in recital 5 having regard to the fact that the parties had not confined the relevant obligation to account for sums received to the GLO Litigation as funded by Therium in respect of which a "Proportionate Share" could be relevant. Mr Grant KC submits that the point can be tested by considering what the position would have been if an individual offer had been made by POL to Ms Palmer. If monies been received pursuant thereto in the context of the GLO Litigation, it is said that it could not seriously be suggested that the monies received did not fall within the terms of recital 5 to, and clause 3 of the Assignment.

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84. On this basis, it is submitted that if the court is against the Respondents in respect of the issue as to whether the entitlement to compensation under the GLO Scheme vested in the Respondents, then the Respondents are entitled to rely upon the terms of the Assignment to require that 49% of any sums received by way of compensation to accounted for to them.

Determination

Discussion

85. There can be no doubt but that the intention behind the GLO Scheme is to make good the deficiencies of outcome consequential upon the Settlement Deed and, in particular, the requirement to pay Therium some 75% of the award thereunder pursuant to the relevant funding arrangements, and to provide compensation to the GLO Claimants that would, when taken together with what they had actually received pursuant to the Settlement Deed, mean that they received compensation similar to that available to those postmasters who were not involved in the GLO Litigation and are entitled to claim under the HSS.

86. However, there remain important differences between the GLO Scheme and the HSS, and there are features of the GLO Scheme that are, I consider, of particular significance. I consider the following to be of particular note:

i) The HSS, being available to those who are not involved in the GLO Litigation and party to the Settlement Deed, is available to those who continue to have undetermined causes of action against POL, which such causes of action, it is common ground, will have vested in the postmasters' trustees in bankruptcy in the case of those who were made bankrupt. It is a scheme established by POL to respond to these postmasters and, in the event that they became bankrupt, their trustees in bankruptcy. On the other hand, the GLO Scheme is an ex gratia scheme established by the Government as a matter of political will rather than any obligation to respond to the position of postmasters who have exhausted and compromised their claims against POL in circumstances that have produced an unfair result. Significantly, the GLO Scheme does not involve the making of further claims against POL.

ii) The ability to claim against the GLO Scheme is not inevitably linked to the cause of action that may have existed against POL, and those who directly had the benefit thereof as demonstrated by the ability of shareholders or directors of companies that have ceased to exist, and partners of partnerships that have ceased to exist, to claim against the GLO Scheme as a "linked individual".

iii) As I read them, the provisions of paragraph 5.7 of the GLO Scheme Guidance are specifically directed at providing compensation to postmasters who can show that they were made bankrupt in consequence of a Horizon Shortfall. While similar considerations might apply to a claim being pursued by a trustee in bankruptcy on behalf of the bankruptcy estate as against the HSS, paragraph 5.7 is, as I see it, very much more directed at providing compensation to the bankrupt Postmaster himself or herself as illustrated by paragraph 5.7.7 providing that if the postmaster wishes to obtain an annulment, then the GLO Scheme would cover the reasonable legal costs in doing so.

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87. Consequently, whilst the approach suggested by the Applicant does lead to an inconsistency of approach between the GLO Scheme and the HSS so far as the treatment of postmasters who had been made bankrupt is concerned, and this is, at least at first blush, incongruous, this may be a consequence of the different bases upon which the two schemes have been established, and the different circumstances behind the same.

88. The cases referred to by Newey LJ in *Gwinnutt v George* (supra) at [10(i)-(vii)] (as set out in paragraph 51 above) demonstrate that the definition of "property" in s.436(1) is very wide in its scope, and probably could not be any wider. Particular considerations relating thereto identified by Newey LJ were:

    i) The statutory objective behind the relevant provisions of IA 1986, reflecting principles of public policy, is to ensure that all of a debtor's property capable of realisation should be vested in the trustee for him to realise and distribute the proceeds amongst creditors, and the relevant provisions of the IA 1986 that fall to be considered in the present case require to be construed and applied in a manner consistent with this statutory objective, and the public policy considerations behind the same.

    ii) The word "property" in s.436(1) IA 1986 is not a term of art and takes its meaning from its context, and indeed is not, in truth, a definition at all given that it is expressed in non-exclusive terms, only setting out what is included.

89. However, as Newey LJ made clear at in *Gwinnutt v George* at [10(viii)], there are limits to the definition. One such limitation relates to a mere possibility of benefit, e.g. that of the beneficiary under a discretionary trust, or the possibility of receiving a legacy. Whilst these mere possibilities may be capable of realisation, the mere fact that they might be capable of realisation in some way will not, of itself, mean that the possibility is to be regarded as "property" for the purposes of s.436(1). At [10(viii)]. Newey LJ specifically referred to the case of *Ex p. Dever, In re Suse and Sibbeth* (1887) 18 QBD 660, and to Fry LJ at p.670 having queried how it could be said that any "property" was vested in the husband in that case when his "interest" could only accrue on the exercise of the wife's option on a double contingency. Until then, it was a mere hope that something might come to the husband by surviving for 10 years, and to his wife then exercising her option.

Does the entitlement to GLO Compensation vest in the Respondents?

90. The fundamental issue is as to whether the entitlement to compensation under the GLO Scheme is comprised within Ms Palmer's bankruptcy estate, and thus vested in the Respondents pursuant to s.306(1) IA 1986, because it was "property" that belonged to or was vested in her at the commencement of her bankruptcy so as to satisfy the requirements of s.283(1) IA 1986. If it was not "property" that belonged to or vested in Ms Palmer at the commencement of her bankruptcy, then the provisions of s.307(1) IA 1986 regarding after acquired property can be of no assistance to the Respondents because Ms Palmer was discharged from bankruptcy pursuant to s.279 IA 1986 as long ago as May 2016.

91. I agree with Mr Tilley that this key issue raises two questions, namely: (a) whether the entitlement to compensation under the GLO Scheme is "property", and (b) if it is,

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whether it belonged to, or was vested in Ms Palmer as at the commencement of her bankruptcy.

92. Dealing with the first question, I also agree with Mr Tilley that the definition of "property" in s.436(1) IA 1986, albeit a non-exclusive definition, does postulate two limbs, namely: (a) "money, goods, things in action, land and every description of property wherever situated"; and (b) "also obligations and every description of interest whether present or future or vested contingent, arising out of or incidental to, property". The existence of the two limbs of the definition is recognised by the authorities, including *Re Rae* (supra) at 110C-D, per Warner J.

93. As well as not being exhaustive, the definition in s.436(1) is, to an extent, circular as recognised by Morritt LJ in *Re Celtic Extraction* (supra) at [28]. Nevertheless, in a context such as the present where the case is put, as it is by the Respondents, in terms of the entitlement to compensation under the GLO Scheme being an interest that "arises out of" or that is "incidental" to "property", I do not understand there to be any issue that the reference to "property" in the second limb of the s.436(1) definition is a reference to "property" falling within the first limb of the definition which, in the present case, is said to be the claims and causes of action against POL that belonged to Ms Palmer as at the commencement of her bankruptcy, cf. the wording of s.167 of the Bankruptcy Act 1914.

94. I consider that the Respondents were plainly right not to seek to argue that the entitlement to compensation under the GLO Scheme itself falls within the first limb of the s.436(1) definition, essentially for the reasons advanced by Mr Tilley as set out in paragraph 55 above, and in particular because the same does not have the characteristics as to transferability and enforceability required, as explained by Warner J in *Re Rae* (supra) at p.110C-D, and by Mummery LJ in *Dear v Reeves* (supra) at [40].

95. The issue is therefore as to whether the entitlement to compensation under the GLO Scheme can properly be said to "arise out of", or to be "incidental" to "property", i.e., in the present case, the claims and causes of action against POL originally vested in Ms Palmer, that vested in the Respondents upon Ms Palmer's bankruptcy, and which were assigned back to her pursuant to the Assignment.

96. Notwithstanding the powerful arguments advanced by Mr Grant KC, I do not consider that, on proper analysis, the entitlement to compensation under the GLO Scheme can properly be said to "arise out of", or to be "incidental" to the claims and causes of action against POL notwithstanding that the GLO Scheme was established in order to alleviate the deficiencies in outcome occasioned by the circumstances in which the relevant claims and causes of action against POL had been pursued up to the Settlement Agreement.

97. Although the GLO Scheme might have been established in consequence of such deficiencies in outcome, I do not accept Mr Grant KC's characterisation of the GLO Scheme being, as he put it, "umbilically linked" to the relevant claims and causes of action, at least so that it can properly be said that the GLO Scheme and the entitlement to compensation thereunder, "arises out of", or is "incidental" thereto in that I consider that there is insufficient connection between the pursuit of the relevant claims and causes of action, and the entitlement to compensation under the GLO Scheme to conclude that this is the case.

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98. In this respect, I consider it to be of crucial significance that:

    i) The GLO Scheme is an ex gratia scheme established as a matter of government decision and discretion;

    ii) The claims and causes of action against POL were extinguished by the Settlement Deed so as to leave the GLO Claimants without any further remedy against POL, and that was the position that pertained at the time that the GLO Scheme was announced and set up; and

    iii) As demonstrated by paragraph 2.1.5 of the GLO Scheme Guidance, the ability to make a claim under the GLO Scheme is not inexorably linked to the person or entity that might have been entitled to the benefit of the relevant claim or cause against POL.

99. I consider that there is a clear distinction between the facts of the present case, and cases such as *Re Rae* (supra), *Ward v Official Receiver* (supra) and *Shop Direct v Official Receiver* (supra), where interests incidental to, or arising out of "property" were held to exist, vested in the trustee in bankruptcy.

100. As to *Re Rae*, in that case it can be seen that incidental to the ownership of the fishing vessels, which did vest in the trustee in bankruptcy, were the fishing licences, and the entitlement of the bankrupt to apply for new licences once the existing licences had become ineffective. The fishing licences, and the entitlement of the bankrupt to apply for new licences, could clearly be seen to go with the ownership of the vessels as vested in the trustee in bankruptcy. If the entitlement of the bankrupt to apply for new licences had simply been a question of ministerial discretion, then Warner J would have found the argument "compelling" that the ability to apply for the licences was not "property" that vested in the trustee in bankruptcy – see p.114B-C. Similarly, in the present case, the entitlement to apply for compensation under the GLO Scheme arises on an ex gratia basis solely as a matter of governmental decision and discretion, rather than as being something "arising from", or "incidental" to ownership of "property", namely claims and causes of action against POL which were exhausted prior to the GLO Scheme being established. In this respect, I consider it important to distinguish between something simply being consequential upon the past ownership of "property", and something arising from, or being incidental to it.

101. In *Ward v Official Receiver* (supra) and *Shop Direct v Official Receiver*, the entitlement to complain and seek compensation in respect of mis-sold PPI policies could properly be said to have arisen from the policies, which were "property", albeit that they may have terminated by the time of bankruptcy, and to be "incidental" thereto, not only because the entitlement to complain/seek compensation was against the original counterparty, but because it involved an existing complaints procedure and mechanism already in place at the time of the commencement of the bankruptcy in contrast to an ex gratia scheme funded by the Government set up following discharge from bankruptcy.

102. As I have indicated, I regard it as being a significant factor that the ex gratia GLO Scheme was announced and set up after the GLO Claimants had exhausted their remedies and causes of action as against POL by their participation in the GLO Litigation and the Settlement Deed. This consideration is, in my judgment, sufficient in

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itself to so distance the entitlement to compensation under the GLO Scheme from the causes of action in question to make it unrealistic to suggest that such entitlement arose from, or is incidental to those causes of action, i.e. the relevant "property" referred to in the second limb of the definition in s.436(1) IA 1996.

103. I am satisfied that, on this point, *Barclays Bank v Marsden* (supra), referred to in paragraphs 57(iv) and 75(ii) above, is to be distinguished from the facts of the present case. In that case, although there had been a previous compromise between the parties, the compromise was to all intents and purposes reopened by the FCA review, thus enabling a claim for compensation to be pursued against the original obligor, Barclays Bank. This is very different from the present case where, after all claims against POL had been exhausted and extinguished, the Government has stepped in with an ex gratia scheme.

104. Mr Grant KC has made the point that the Applicant wholly owns POL. That may be correct, but it does not seem to me that it can realistically be suggested that the Applicant established the GLO Scheme in her capacity as sole shareholder as such in POL, but, rather, pursuant to her wider governmental role and function.

105. However, even if I am wrong as to the above, and ought to find that the entitlement to compensation under the GLO Scheme was properly to be regarded as having "arisen from", or to be "incidental" to "property" in the form of the underlying causes of action in the GLO Litigation, I would have found that the relevant interest falling within the second limb of the definition of "property" in s.436(1) IA 1986 would have required to, but did not, exist at the date on which Ms Palmer became bankrupt.

106. I agree with Mr Tilley that it is necessary to go back to the wording of s.283(1) IA 1986, and to the fact that it provides that the bankrupt's estate comprises not simply "all property", but "all property belonging to or vested in the bankrupt at the commencement of the bankruptcy." Consequently, it will only be "property" that so belonged or vested in the bankrupt at the commencement of bankruptcy that will have vested in the trustee in bankruptcy pursuant to s.306(1). On the basis that the definition of "property" comprises two limbs, then I consider that whichever limb the "property" or "interest" is said to fall into, the "property" or "interest" must exist at the commencement of bankruptcy as only then can it be said to have belonged to or been vested in the bankrupt at that time. I agree with Mr Tilley that one must construe the word "property" at the beginning of s.283(1) as encompassing the whole of the wording of the definition in s.436(1), i.e. as including the two limbs thereof.

107. Mr Grant KC submits that there is no need for the entitlement to compensation under the GLO Scheme to have existed at the commencement of bankruptcy so long as it can be said that it flowed out of the GLO Litigation and the causes of action behind it. However, I consider there to be a number of difficulties with this analysis.

108. The argument is based upon the premise that, as Mr Grant KC put it, "the whole concept of a future right means that it does not exist". However, I am concerned that the position is not as simple as this. The second limb of the definition in s.436(1) talks in terms of interests and obligations rather than rights, and future interests can presently "exist", e.g. contingent interests or defeasible vested interests – see e.g. Lewin on Trusts, 20th Edn, at 21-008. I note that the language of the second limb of the definition in s.436(1) talks in terms of obligations or interests "present or future or vested or contingent",

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suggesting, as I read it, an interest that does exist, either because it is vested or because it exists subject to a contingency.

109. On this basis, and apart from authority, I am satisfied that, on a proper reading of s.283(1) taken together with the definition of "property" in s.436(1), even "property" otherwise falling within the second limb of this definition has to exist, in the sense of being capable of belonging to, or being vested in the bankrupt, at the time of the commencement of his or her bankruptcy, before it can properly be regarded as forming part of the bankruptcy estate vesting in the trustee in bankruptcy.

110. I consider that such conclusion is amply supported by the authorities.

111. I agree with Mr Grant KC that cases such as *Patel v Jones* (supra) *and In re Huggins* (supra) do not really assist on this point because the court was, in those cases, concerned with the different issue as to whether a non-enforceable entitlement to a pension was sufficient to amount to "property" rather than whether the interest existed as such. However, I consider that other authorities do support the proposition that the relevant interest should exist at the date of bankruptcy, including the following:

i) Fry LJ's analysis in *Ex p. Dever* at p.670 referred to in paragraph 89 above;

ii) The approach taken in *Johnson v Smiley* (supra), (also referred to by Newey LJ in *Gwinnutt v George* (supra), at [10(viii)]), where, in the context a consideration as to whether the possibility of being able to sell the chance of receiving a legacy pointed to it being property that would vest in a trustee because it was capable of being transferred, Romilly MR, at p.130, observed that, if not sold, the legacy would not pass to the bankrupt's assignees, i.e. his trustees in bankruptcy. He then commented:

> "When I speak of an interest which the bankrupt could dispose of, I mean an existing interest, whether vested or contingent, and which if conveyed or released and assigned by him requires no further act on the part of the bankrupt, to vest it in the purchaser."

iii) In similar vein, in *Re Inkson's Trusts* (supra), at p.311, Romilly MR observed:

> "All that passes to the assignees is an existing interest; but where it is only mere possibility or expectancy to which the bankrupt will be entitled under the contract, and it continued such until he obtains his certificate, the assignees have no right."

iv) In a more recent context, it is clear from the passage of the judgment of Knox J in *Re Campbell* (supra) at p.18B-D cited in paragraph 59(vi) above, that he considered that only an existing interest would suffice in the context of a case that relied upon the second limb of the definition of "property" in s.436(1) IA 2016.

v) In *Re Rae* (supra) at 113E, Warner J described the entitlement of the bankrupt to apply for a fishing licence as: "a present interest incidental to the vessels" [my emphasis]. In commenting on this case in *Re Celtic Extraction Ltd* (supra),

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Morritt LJ, at [29], referred to Warner J as having: "… decided that the "entitlement" was within the definition of "property" as a present interest in property, namely the vessels" [my emphasis].

vi) In *Barclays Bank v Marsden* (supra) at [43], HHJ Kramer, in the passage referred to in paragraph 73(iii) above referred to the availability of an offer under the FCA scheme as being property in the bankrupts estate at the time of the bankruptcy provided that it existed as a contingent claim at the time. [My emphasis].

112. I am mindful of the need for caution with regard to relying upon older authorities decided in respect of earlier legislation, and in particular those that pre-date the radical overhaul of personal insolvency law effected by the IA 1986. However, I am satisfied that the reasoning of the earlier cases that I have referred to follows through to the more recent authorities decided under the IA 1986, including *Gwinnutt v George*.

113. In the circumstances, notwithstanding the wide and non-exhaustive definition of "property" in s.436(1) IA 1986, and the policy considerations behind the need for such a wide definition of "property", I am satisfied as a matter of principle and authority that any entitlement to compensation under the GLO Scheme, even if otherwise falling within the definition of "property", cannot have vested in the Respondents as Ms Palmer's trustees in bankruptcy, because such entitlement did not exist at the time that Ms Palmer was made bankrupt, and only came into existence when the GLO Scheme was established from and after March 2022. Prior thereto, and at the time of the commencement of her bankruptcy, Ms Palmer had, at the very most, as I see it, a hope or expectation that if, for whatever reason, mediation or litigation involving POL then under contemplation did not provide a fair and just solution for postmasters, then the government might step in and offer ex gratia compensation along the lines of that provided for by the GLO Scheme. This is, as I see it, very different from a contingent interest that exists on bankruptcy.

114. In the circumstances, I am satisfied and find that the entitlement of Ms Palmer to compensation under the GLO Scheme, and any compensation payable pursuant thereto, does not vest in the Respondents as her trustees in bankruptcy.

Effect of the Assignment

115. The key question that arises for determination in respect of the Assignment is as to the scope and meaning of the expression "the Action", as described in the Schedule thereto, given that Ms Palmer is liable to account to the Respondents pursuant to the terms of the Assignment for £11,000 and a further 49% of sums received by her "from the Action" as specified in recital 5 to and clause 3 of the Assignment.

116. In respect of this key question, two important considerations do, I consider, arise:

i) The Assignment provided a mechanism for the Respondents to transfer or assign to Ms Palmer sufficient by way of rights and entitlement to pursue causes of action against POL with a view to recovering damages to compensate her in respect of the claims that she had against POL;

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ii) The quid pro quo of this was that Ms Palmer would be required to account to the Respondents for a proportion (£11,000 plus 49%) of any sums received by Ms Palmer in pursuing the claims.

117. On this basis, if the entitlement to claim compensation under the GLO did not, as I have found, vest in the Respondents so as to have been capable of being included in the claims and causes of action assigned to Ms Palmer pursuant to the Assignment, it would, as I see it, have taken very clear language for the Assignment to have provided for Ms Palmer to have to account for something that did not represent the fruits of that which has been assigned.

118. I take Mr Grant KC's point that the fact that the Schedule to the Assignment (providing "Details of the Action") refers to "proceedings", but does so by reference not to formal legal proceedings as such, but to the CRMS and "connected proceedings going forward", and that this can be said to support a construction of "Action" and "proceedings" in the Assignment that extends beyond strict legal proceedings to other proceeding or procedures, and thus, potentially, to the making of a claim under the GLO Scheme.

119. As against this, it is to be borne in mind that, despite the language used in the Schedule, by the time that the Assignment came to be entered into, and indeed by the time that the deeds of variation were entered into varying the assignments entered into between the Respondents and other bankrupt postmasters, the CRMS had been unilaterally terminated by POL, and the "Action" or "proceedings" being contemplated or underway in order to pursue the relevant claims and causes of action against POL was or were the GLO Litigation for which funding from Therium had been obtained.

120. Further, the Schedule to the Assignment does refer to proceedings "between" POL and Ms Palmer (either in her sole name or in conjunction with other parties). To my mind, this points to an adversarial process, or at least some process involving POL as one party, and Ms Palmer as another party, and not some other form of process or procedure involving ex gratia payments, or compensation being paid by a party other than POL. I take into account that recital 3 does not specifically identify POL as the opposing party to "the Action", but the Schedule clearly does.

121. Further, there is the reference in recital 5 to the Assignment to Ms Palmer accounting to the Respondents from her "Proportionate Share". I accept that the deeds of variation entered into between the Respondents and other bankrupt postmasters cannot be admissible as an aid to construction of the Assignment, not having been available to Ms Palmer. However, one can ascertain therefrom that part of the admissible background against which the Assignment is to be construed is the fact that litigation funding had been obtained from Therium on terms that provided for Therium to share in any recovery, before a balance could be made available to the individual GLO Claimants. The funding in question was for the GLO Litigation, and therefore one would, I consider, expect the reference to "Proportionate Share" to relate to the fruits thereof and the pursuit of the relevant claims or causes of action against POL, rather than ex gratia payments on the part of the Government made ex post facto to make up for deficiencies in the result of the GLO Litigation.

122. On this latter point, I take Mr Grant KC's point with regard to what might have been expected to happen if there had been an individual settlement between Ms Palmer and

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POL. However, in this situation, one would have expected a proportion of any award agreed by the relevant settlement to be caught by an obligation to Therium to account under the relevant funding arrangements, in which case it would not be inapt to describe what remained actually payable to Ms Palmer as her proportionate share, in which case, the Applicant's argument as to "Proportionate Share" seems to me to remain good.

123. In all the circumstances, and having due regard to the admissible background circumstances, I consider that it unduly strains the language of the Assignment to construe it in the way contended for by the Respondents. I consider that the reasonable objective observer having all the background knowledge which would have been available to the parties at the time that the Assignment was entered into would have understood the language of the Assignment, and in particular the use of the expressions "Action" and "proceedings" in the relevant provisions thereof, as being limited to the pursuit of claims and causes of action against POL, whether by the GLO Litigation or otherwise, and not a claim for compensation made against an ex gratia compensation scheme such as the GLO Scheme set up by the Government to compensate postmasters in the event that the pursuit of the claims against POL failed to produce a fair result. I consider that very much clearer wording would have been required for the Assignment to be construed as contended for by the Respondents.

Conclusion in summary

124. For the reasons set out above, I have come to the firm view that:

i) The entitlement to claim and receive compensation under the GLO Scheme, and any compensation received under the GLO, does not constitute "property" vested in the Respondents as trustees in bankruptcy of Ms Palmer on a proper application of s.283(1), s.306(1) and s. 436(1) IA 1986;

ii) Ms Palmer is under no liability pursuant to recital 5 to, or clause 3 of the Assignment, or otherwise, to account to the Respondents for any part of any compensation that she might receive pursuant to the GLO Scheme.

125. No attendance will be required on the hand down of this judgment. I understand that it is agreed between the parties that the Court should make no order as to costs in relation to the Application. I would invite the parties to seek to agree a minute of order reflecting this judgment, and the declarations that the parties consider that it is appropriate for the Court to make. In the event that there is any dispute in relation thereto, I will determine the same on paper, together with any application that might be made for permission to appeal.