

THE POST OFFICE HORIZON IT INQUIRY

On behalf of Core Participants

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Further Submissions on Compensation following the Chair's Statement of Issues
Relating to Compensation, dated 9 January 2023, and

- 1) Paul Marshall's submissions on the tort of abuse of process &
 - 2) Further information regarding the role of Herbert Smith Freehills (HSF)
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ABUSE OF PROCESS & COMPENSATION

1. We acknowledge receipt of and thank the Chair for the *Chair's Statement on Issues relating to Compensation*, and for deciding to keep a close watch on developments, including scheduling a further compensation issues hearing in April 2023 (paragraphs 6, 11, and 44.) We further acknowledge the Chair's observations at paragraph 31, which refer to Mr Henry KC's oral submissions and Mr Marshall's written submissions on compensation for the intentional denial of information that would allow judgments and convictions to be challenged. Ahead of Phases 4 and 5, when the facts behind that argument will be investigated, these submissions are to endorse Mr Marshall's refinement of his argument, as set out in his Supplemental Submissions dated 6 January 2023, and to give advance notice of what must be addressed at the next hearing.

2. This is a matter that will be returned to in April, but we set down a marker: claimants who were pursued through the courts by the Post Office should not only be able to claim compensation for malicious prosecution, but also – in principle – for the tort of abuse of process, to reflect an apparent malicious obstruction of their right of appeal. We also alert the Inquiry to the relatively recent case of *Total Extraction Ltd V Aircentric Ltd*.¹ It is a decision of the first instance but does not appear to have been appealed. Commentary on this case further supports the contention that the tort of abuse of process is recognised as being discrete from malicious prosecution.²
3. We agree that the various compensation processes underway are suffering from a failure to articulate transparent principles explaining what the claimants are being compensated for, and that this will become an important issue in Phase 5. We share the Chair’s concern as to the continuing lack of transparency attending the OHCS (paragraph 27) which affects four of the core participants we represent.

THE ROLE OF HSF

4. On 8th December 2022, a worrying development emerged when it was revealed that derisory sums had been agreed with unrepresented victims by HSF, sums that were plainly inadequate, and subject to errors and omissions. That this had been sanctioned on the Post Office’s behalf gives rise to legitimate concerns that very little has been learnt from this tragedy: the dynamics of power and inequality persist, whether consciously exploited or not by the Post Office and its advisers.
5. This is in addition to the fact that the Post Office, assisted by HSF, is seeking to agree binding settlements before the true and fullest extent of its wrongdoing

¹ [2021] EW Misc 21 (CC) (30 September 2021) <https://www.bailii.org/ew/cases/Misc/2021/21.html>

² <https://www.civillitigationbrief.com/2021/12/06/wrongfullyentering-judgment-gives-rise-to-a-cause-of-action-for-a-defendant-the-tort-of-abuse-of-process/>

has been arrived at through the process of this Inquiry. It is also set against the context which we raised in paragraphs 15 to 17 of our first Submissions on compensation, dated 22 June 2022: *“We note that HSF negotiated the Settlement Deed, and acted with uncompromising determination on their client’s instructions, such that the Deed they fashioned on behalf of their client has left the group litigants inadequately compensated... Were it not for the delay that would inevitably ensue, we would be advocating in the strongest terms for the removal of HSF and the appointment of a suitable independent third party who would be responsible for the vital task of awarding and administering claims. However, such a course (desirable as it is) would bring with it further delay, disrupting a process already dogged by the Post Office’s inordinate obstruction over a number of years. We submit, therefore, that the appropriate course is to allow HSF to continue acting for the Post Office in this matter, but to stipulate that such acquiescence is dependent upon the publication of clear principles, or criteria that shall govern the process of compensation, and the redress of these grave wrongs.”*

6. There has been no such publication of clear principles or criteria, and we now learn of the derisory awards described by Tim Moloney KC on behalf of those represented by Hudgells. These have not, so far as we can discern, been referred to within the Chair’s statement. We submit, despite that, that it appears increasingly likely that settled compensation awards will become another instance of abusive inequality of arms, like the Settlement Deed itself, which required the intervention of BEIS to prevent further abuses being inflicted on the vulnerable.
7. Yet more troubling, disclosure of the unredacted minutes of the Postmaster Litigation Subcommittee has revealed HSF’s role in advising the Post Office on the conduct of the GLO *before* advising on settlement. It transpires that Alan Watts of HSF advised POL on the highly controversial decision to seek Mr Justice

Fraser's recusal.³ Section D of the List of Issues, headed Conduct of the Group Litigation, makes it clear that decisions around the recusal application will be a very important issue in Phase 4 of the Inquiry.

8. We do not see how HSF can be seen to be impartial in acting for POL in the Inquiry while the conduct of its own lawyers will be under examination by the Inquiry, in relation to an issue of arguable bad faith, or catastrophic misjudgement. Meanwhile, HSF (Cerberus like) will continue to wear a third hat investigating and settling compensation claims from those brave litigants who brought the action, which led to the recusal application which the Inquiry will be investigating, which HSF advised upon.
9. We fully endorse Paul Marshall's submissions regarding the appearance of bias: a reasonable observer could not but be concerned at this situation. All the more so in the absence of any published, coherent principles for the payment of compensation. If HSF is to remain onboard these principles must be stated and published, and privilege should be waived in respect of its instructions. It remains unclear how a Global Law Firm of such reputation settled cases (to which Mr Moloney KC averted) that omitted to consider obvious heads of damages. These are matters which we flag for April.
10. Given the professed desire of the Post Office to provide full and proper compensation, and the towering reputation of its advisers, the errors and oversights which led to these meagre (arguably voidable) settlements are difficult to understand.

CONCLUSION

11. We remain concerned (as orally submitted on 8th December 2022) that by the time Phase 4 of the Inquiry has exposed the Post Office's conduct over the years 2013 to 2019, and the earlier unprincipled approach to compensation has been

³ POL00006755 p1

examined in Phase 5, further, perhaps irrevocable, damage will have been inflicted. We therefore ask that the April compensation hearing addresses two important and related issues: apparent bias in HSF's role as administrators of compensation, and the lack of published compensation principles.

12. It remains our view that HSF should never have been instructed to administer any compensation scheme, but out of necessity, with great misgiving, HSF having been foisted upon the aggrieved SPMs their position was tolerated for pragmatic reasons. This is, we submit, another matter for the Inquiry to review, because there is sufficient evidence to suggest that the errors of the past have not been taken on board and may even have been compounded by them remaining in place.
13. The structural flaw presented by HSF's involvement, and the Post Office's past of exercising oppressive sway over the vulnerable requires the closest scrutiny, and so the Chair's intention to monitor the process is both welcome, and a necessity.

Edward Henry KC, Mountford Chambers
Flora Page, 23ES Chambers
Hodge Jones & Allen

9 January 2023