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**MATTERS RELATING TO THE INTERIM COMPENSATION SCHEME  
AND MALICIOUS PROSECUTION**

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Introduction

1. On 17 February 2022, during the evidence of Ms Susan Hazzleton, the Chair requested submissions in the following way:

*“...I want to use something you told me to make some enquiries publicly of both the inquiry lawyer and your own legal team ...you have told me that you were prosecuted and in the end acquitted... in the end you were acquitted...My understanding of the Bates’ litigation is that those who might have a claim for malicious prosecution, those rights were preserved...notwithstanding the full and final nature of settlement in other aspects. .. First question; can a person who has been acquitted sue for malicious prosecution? I am not going to make any definitive legal rulings but the answer I think is yes. And if that is correct, it appears to me that there may be a loop hole a lacuna in the sense that those who have been convicted and had their convictions quashed are entitled to an interim payment but those who may have been acquitted may fall into a hole, so to speak. I must say I’m reasonably unhappy about that state of affairs given that their rights to sue for malicious prosecution have been preserved apparently.*

*Accordingly, I would like at some point in the not too far distant future for your legal team [Howe & Co] to write me a short note explaining the position that I’ve set out with some answers to it and my own legal team [Inquiry legal team] will do its research as well because I want to understand whether the interim scheme, which is apparently being applied as we are going along, so to speak, is being fair to everyone who might take advantage of it...*

### **Ability of acquitted SPMs to sue for malicious prosecution**

2. We can confirm, as the Chair understood, that a person who has been acquitted could indeed sue for malicious prosecution. There is a line of authorities in relation to civil actions being brought on this point.
3. In Rees v Commissioner of Police for the Metropolis [2017] EWHC 273 (QB) Mitting J summarised the test for succeeding in such an action:

*136. The claimant must prove the five elements essential to a successful action for malicious prosecution:*

- *i) He was prosecuted by the defendant.*
- *ii) The prosecution was determined in his favour.*
- *iii) The prosecution was without reasonable and probable cause.*
- *iv) It was malicious.*
- *v) The claimant suffered actionable damage.*

4. We accept that there is indeed a loop hole or a lacuna, in the sense that those who have been convicted and had their convictions quashed are entitled to an interim payment, but those who may have been acquitted without first being convicted fall into a hole.
5. It should also be noted that an action for malicious prosecution is available outside the sphere of criminal prosecutions and can be applied within the context of civil litigation; *Willers v Joyce* [2016] UKSC 43<sup>1</sup>.

### **Exclusion of SPMs from Historic Shortfall Scheme**

6. As matters stand, the only route whereby a subpostmaster such as our client and core participant, Suzanne Palmer, who was prosecuted, stood trial for 3-days and was acquitted by a jury, would be able to receive compensation now is through a claim for

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<sup>1</sup> <https://www.supremecourt.uk/cases/docs/uksc-2015-0154-judgment.pdf>

malicious prosecution. She is excluded from the Historical Shortfall Scheme because she was one of the 555 SPMs who participated in the group litigation and is excluded from the Interim Compensation Scheme for the same reasons.

### Flawed rationale for such exclusion

7. The rationale for excluding Ms Palmer from the scheme is flawed.
8. The eligibility criteria for the Post Office Historic Shortfall Scheme expressly excludes the 555 who were concerned in the group litigation because they reached a 'full and final settlement'. The Scheme states : (emphasis added)

*6. You must not have been part of the group litigation against Post Office that settled in December 2019. **The settlement reached by the parties was full and final.** You must also not have entered into a settlement agreement with Post Office after the High Court's judgment on Horizon Issues dated 16 December 2019.*

9. However, the Settlement Agreement was not 'full and final' insofar as it did not prevent the group litigants from bringing claims arising from their contracts with Post Office Limited.
10. In particular, the Deed of Agreement specifically reserved their rights to bring claims for malicious prosecution.
11. The publicly available version of the Settlement Deed dated 10 December 2019 on the Post Office website states at Clause 4:

#### *4 Releases and Covenants not to sue*

*4.1 Save as expressly set out in clause 4.2 below, this Agreement is in full and final settlement of the Action, the Claimants' claims, the Defendant's Counterclaims and any further claims which arise out of or are in any way connected to, whether directly or indirectly, the claims or counterclaims made or the facts and matters alleged by any party in the Action (the "Settled Claims").*

4.2 *The Settled Claims shall not include:*

4.2.1 *claims in contract between the Defendant and those Claimants who remain in post as postmasters as set out in Schedule 3 which (a) arise wholly out of facts and matters which took place after the Effective Date of this Deed; and (b) which could not have been brought in the Action; and*

**4.2.2 claims against the Defendant for Malicious Prosecution.** [Our emphasis]

12. The link to the published copy of the Settlement Deed is here:

[https://www.onepostoffice.co.uk/media/47518/20191210-glo-confidential-settlement-deed-executed-version-redacted\\_-003.pdf](https://www.onepostoffice.co.uk/media/47518/20191210-glo-confidential-settlement-deed-executed-version-redacted_-003.pdf)

### **Scope and inherent unfairness of Interim Compensation Scheme**

12. In July 2021 the Government announced that it would pay interim compensation of up to £100,000 for each of the subpostmasters who have had their convictions quashed.<sup>2</sup>

13. This interim compensation is available to members of the group litigation, who were convicted and subsequently acquitted when their convictions were overturned.

14. However, the interim compensation scheme is inherently unfair as it excludes former subpostmasters like Suzanne Palmer, who were acquitted at first instance and for example Susan Hazzleton and Thomas Brown who have given evidence that their charges were dropped at the last minute before the start of trials for theft and false accounting.

15. It may be relevant to note that Herbert Smith Freehills, the solicitors who represented the Post Office, when the Deed of Settlement was drafted on terms that were not in

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<sup>2</sup> [Government to fund interim compensation of up to £100,000 for each wrongly convicted subpostmaster \(computerweekly.com\)](#)

full and final settlement (insofar as they left the door open for further claims by the group claimants) also advise and act for Post Office Limited in the HSS, which excludes the group litigants on the basis that their settlement agreement was full and final. Herbert Smith Freehills also act for Post Office Limited/BEIS in relation to the Interim Compensation Scheme. The continued involvement of this firm in drafting and setting up Post Office compensation schemes has been the subject of criticism by victims and Parliamentarians.

16. The current position is inherently inconsistent.

17. There is a clear unfairness within the interim compensation scheme in that those who were prosecuted and acquitted (who achieved the same favourable outcome as those who were convicted and whose convictions have been overturned) are excluded from that scheme.

### **Impact of unfairness**

18. We refer the Chair to the second witness statement of Suzanne Palmer dated 9 February 2022. She sets out the impact of this unfairness on her as follows:

*In July 2021, the Department for Business announced an 'interim' compensation scheme for those subpostmasters, to help with their immediate financial pressures, recognising the harm and stress which the criminal prosecutions had on those individuals. The scheme provides for interim payments of up to £100,000 for those subpostmasters, payable within 28 days of an application being made.*

*I believe that those subpostmasters wholeheartedly deserve that compensation and more. However, eligibility for the scheme is narrow, as the interim compensation is available only to those who: (a) were criminally prosecuted; (b) found guilty; and (c) have since had those convictions overturned by the Court of Appeal. As a result, a huge majority of subpostmasters affected by this scandal*

*are excluded from receiving compensation which they need and, I believe, they are entitled.*

*I am excluded from this scheme because I stuck to my principles, as I knew I had done nothing wrong, and therefore pleaded not guilty and fought the wrongful prosecution. I am now being penalised for successfully defending myself against allegations which I knew to be untrue, and for exercising my right to a trial.*

*Again and again I have thought that it was a mistake that I pleaded not guilty, and also that it was unfortunate that I was acquitted. This is because if I had pleaded guilty, been convicted and then had my conviction quashed, I would have been entitled to some compensation. As I said in my first witness statement: it seems that I have lost everything for defending my innocence.*

*I feel that my exclusion from compensation, and the exclusion of others like me, is little more than a continuation of the victimisation and harms which occurred at the time. It has brought the suffering into the present day, and I feel as though preventing me and people in my situation from receiving compensation is a continuing injustice.*

### **Those who received cautions and other categories**

19. There is another aspect of the compensation schemes which is unfair. Those who received cautions are also unable to bring a claim within the scheme. They, as a matter of law, are unable to bring proceedings in the Court of Appeal to have their cautions overturned.

20. A caution is not a conviction. There is no right of appeal against the imposition of a caution once it is accepted. Neither is there any mechanism to set aside a caution other than by way of judicial review or by way of an administrative removal (normally by way of a complaint to the police/post office).

21. Those who accept cautions must admit the offence, and they do so at such an early stage of proceedings at the police station that there is no possible consideration of disclosed material, adequacy of disclosure or questioning of disclosure. There is also a concern that Post Office Limited, when administering cautions as a prosecuting authority, failed to explain to SPMs that a caution forms part of a criminal record and can have impacts on future employment. In cases where future employers wish to check whether a prospective employee has a record, a caution can restrict foreign travel and can cause difficulties when seeking finance. A caution carries stigma and has all of the hallmarks of a conviction.
22. It is also unclear whether a SPM who successfully sought judicial review of his or her caution and succeeded or had their caution removed administratively would be entitled to interim compensation, in the same way as those whose convictions have been overturned. This situation represents a further example of the disparity of treatment between SPMs in the compensation schemes.
23. There is also a concern, arising from the evidence of subpostmasters, that undue and improper pressure was brought to bear on subpostmasters by the prosecuting authority (Post Office Ltd) to accept cautions.
24. There also appear to be other categories of person/action that require consideration. These include subpostmasters who were told by Post Office Ltd, or led to believe by Post Office Ltd that they would be subject to criminal or civil action and who, as a result spent many months in anticipation of, and in fear from, the threat of such action, which never materialised and/or Post Office Ltd did not confirm would be discontinued/not pursued. For example, this scenario arose in the cases of Mr Kevin Palmer.
25. There are also cases, such as that of Rita Threlfall, Susan Hazzleton and Thomas Brown, where prosecutions were pursued vigorously, but discontinued at a late stage. In the case of Thomas Brown, after a delay of almost 5 years between the audit leading to charges in November 2008 and getting to the Crown Court for charges to be dropped

in June 2013, or where threatened action was discontinued, but no notice of discontinuance given, after a subpostmaster became a party to the Group Litigation (e.g. Kevin Palmer).

26. There are also cases where (on the evidence of subpostmasters) the threat of prosecution of greater charges was used as a means to compel subpostmasters to accept lesser charges. Such scenarios may prove even more difficult to unravel.
27. There are also cases, such as Mr Mujahid Aziz Faisal, where the threat of prosecution was used to compel a frightened and unrepresented subpostmaster to make immediate payments of significant sums of money in respect of alleged shortfalls.
28. Indeed, it is the evidence of many witnesses that the threat of civil action or prosecution was either raised, or hung in the air, routinely during Post Office audits and investigations.
29. Other categories of person/circumstance may become clearer during the course of this Inquiry, which give rise to concern as to the action of the Post Office when exercising or threatening to exercise its prosecutorial powers or threatening civil legal action that may engage the question raised by the Chair.
30. A further important issue has arisen, which is evidence of a very low level of take-up by subpostmasters seeking to make applications to challenge their unsafe and wrong convictions; including those who have been identified as potentially benefiting directly from the Court of Appeal judgment in April 2021. The Business Select Committee recently heard evidence on this issue and raised concerns regarding it with the Post Office CEO and relevant Minister (Mr Scully MP).
31. It is not difficult to conjecture as to the reasons why subpostmaster victims, who are certain or likely to have their convictions quashed on application, have not come forward when invited to do so by their former prosecutor. Even in the simplest and most obvious case, the process of applying to the Criminal Cases Review Board and Criminal Court of Appeal is a daunting and lengthy process. However, these individuals remain victims of a serious and demonstrated miscarriage of justice, and it is for the



former prosecuting authority (Post Office) and its owner and supervisor (BEIS) to find the means to quash these convictions and speedily compensate those victims.

32. We would suggest that the Chair invites submissions from all core participants on this pressing issue, as it clearly engages the question the Chair has posed.

### **Legal representation – Equality of arms**

33. The issue of access to representation and the cost to SPMs of legal representation in order to represent themselves, vindicate themselves and seek fair compensation, is live in this Inquiry and more generally.

34. The Chair is aware of the concerns of SPMs as to the fact that over 80% of the settlement monies in the Group Litigation was taken up by legal and legal funding costs. That litigation revealed the flaws in the Horizon System, opened the way for the quashing of criminal convictions, initiated police perjury investigations and led to the establishment of this Inquiry. The group civil action could not have been brought without the funding arrangements entered into. However, Post Office Ltd, who contested the claim vigorously, had no limitations on its ability to fund legal representation.

35. This inequality of arms in access to legal representation between Post Office Ltd/Department of Business and SPMs persists. For example, neither the Historic Shortfall Scheme nor the Interim Compensation Scheme make any provision for legal or accounting advice for SPMs applying to those complex schemes; whereas Post Office Ltd continues to enjoy the legal advice and representation of Herbert Smith Freehills, and no doubt counsel, as well as the assistance of in-house experts, accountants and civil servants (BEIS).

36. Indeed, restrictions on legal funding persist even within this Inquiry, despite the efforts of the Chair to secure the agreement of the Minister on the issue of Section 40 funding. The Chair will have gleaned from the evidence of victims and submissions

that those representing victim core participants have engaged in considerable work, including substantial engagements with BEIS and Post Office Ltd, which is not funded. Indeed, these submissions could not have been made (funded under Section 40) save for the fact that they were invited by the Chair. The Post Office, BEIS, UKGI and Fujitsu experience no such restrictions.

37. The Chair has already heard live evidence from many affected subpostmasters. The Chair will have noted that despite the witnesses being obviously hardworking and diligent persons, they gave consistent evidence as to their inability to contend with the Post Office unassisted. They have spoken of their fear in having to face the Post Office on their own. Their experiences of being investigated, interviewed, threatened, cautioned and prosecuted by the Post Office have scarred many of them in ways that have become apparent in the human impact evidence that has been heard, and no doubt will continue to be heard.

38. It remains the case that all of the tools, means and control of the compensation schemes remain with the Post Office and Department of Business, whilst funding has not been made available to SPMs for independent legal and financial advice when making their claims in the schemes. Subpostmaster victims continue to be placed in the invidious position of an Oliver Twist, bowl in hand, asking for crumbs from the all-powerful top table.

## Conclusions

39. Consequently, we share the concern expressed by Sir Wyn Williams that *the interim scheme is not being applied in a manner that is fair to everyone who might take advantage of it.*

40. We take the view that the inherent unfairness in the interim compensation scheme amounts to a continuation of victimisation of Subpostmasters and that this is a matter which the Inquiry should address.

41. We have repeatedly asked Post Office Limited, BEIS and Minister Paul Scully MP for the return of the High Court litigants' legal and legal funding costs, the fair consideration of compensation for the 555 who exposed the scandalous conduct of the Post Office and for a fair, and for rapid compensation payment to all SPMs who have suffered at the hands of the Post Office. The human impact hearings are demonstrating that the personal devastation to so many subpostmasters is continuing.

42. The victims of the worst miscarriage of justice in British history are still being victimised and the Chair is requested to do whatever can be done to stop their suffering, including making interim recommendations concerning the compensation schemes where obvious continuing injustice is causing real hardship to the blighted lives of subpostmasters.

Sam Stein QC

Nexus Chambers

Christopher Jacobs

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Howe & Co Solicitors

25<sup>th</sup> February 2022