

IN THE MATTER OF THE POST OFFICE HORIZON IT INQUIRY

FURTHER SUBMISSIONS ON COMPENSATION

1. These submissions are made on behalf of the Core Participants represented by Hudgell Solicitors. They are limited only to the invitation for further submissions by the Chair in his announcement of 10 May 2022. They should be read together with our submissions dated 4 April 2022 (attached as Annex 1). They address only the matters identified by the Chair, using his headings, below:
 - a. Historic Shortfall Scheme
 - b. Final Compensation for SPMs with Quashed Convictions
 - c. Fair Compensation for the Group Litigation Claimants
 - d. Conclusion/Summary

A) Historic Shortfall Scheme

2. Hudgell Solicitors wrote to the Inquiry to raise substantial concerns about the progress of the Historic Shortfall Scheme (“HSS”) on 11 April 2022 (attached as Annex 2). This was shortly followed by correspondence raising very similar concerns on behalf of the CPs represented by Howe & Co. The issues raised on behalf of our clients were:
 - a. The overwhelming majority of HSS offers were being accepted without the benefit of legal advice;
 - b. In our experience, heads of loss have been routinely missed; often involving significant amounts;
 - c. Post Office routinely refuses to consider additional heads of claim when challenged and/or delays in considering the request;
 - d. Post Office refuses to make interim payments for agreed shortfall losses whilst other issues are explored;
 - e. Delay remains a significant concern in a number of respects; and,
 - f. The inadequacy of legal fees. A fixed contribution is made to review offers (£400 or £1200 depending on value).

3. We do not intend to repeat that correspondence here in full, but we provide some additional and updating information below.
4. To provide some context, our submissions on the HSS are based on an analysis of a cohort of approximately 70 cases. We also draw on the impact evidence heard by the Inquiry.
5. The position on many of our clients' claims remains fluid, with ongoing correspondence on a number of matters. Where possible, we will expand on these submissions at the hearing in July.

(i) Recoverable heads of loss/exclusions

6. Having regard to *Historical Shortfall Scheme Consequential Loss Principles and Guidance* ("the Guidance"), it appears that all heads of loss are recoverable, provided they are incurred as a direct consequence of the Horizon shortfall loss claimed.
7. The Guidance provides:

"2. Definitions

2.1 - Consequential Loss means financial or non-financial loss that is not a Shortfall loss.

[...]

3. Key Principles

3.1 - Burden of proof in relation to proof of Consequential loss.

3.1.1 – The burden of proof is on the postmaster to provide sufficient evidence in support of their claim to demonstrate that on the balance of probabilities (i.e. a greater than 50% likelihood) (a) such losses have been suffered and (b) as a consequence of a Horizon Shortfall (as such are found in the Common Issues Judgment or the Horizon Issues Judgment). This means evidencing the fact that a loss was incurred, the amount of that loss and that the cause of the loss was due to a Horizon Shortfall.

3.1.2 – Where the Postmaster is unable to satisfy the burden of proof in relation to their claim, their claim may nonetheless be accepted in whole or in part if the Scheme consider it to be fair in all the circumstances.

[...]

3.3 - Established legal principles

3.3.1 In considering a claim for Consequential Loss the Scheme will apply the findings in the Common Issues Judgment and the Horizon Issues Judgment relevant to the claim and any relevant legal and accounting principles applicable to the assessment of damages for breach of a legal duty when determining whether on the balance of probabilities, the loss claimed is attributable to a Horizon Shortfall. In making that assessment the Scheme will consider:

- a) causation [...]*
- b) remoteness [...]*
- c) mitigation [...]*
- d) quantum. [...]*

[...]

5-Types of Loss

5.1 – There is no exhaustive list of the types of loss that can be claimed as a Consequential Loss (assuming they make the applicable legal tests and noting that the additional losses claimed must be linked back to a Horizon Shortfall): however, certain examples are detailed below along with examples of the types of evidence that postmasters should provide to support claim for Consequential loss

[...]

5.2 – Loss of earnings [...]

5.3 – Loss of profits [...]

5.3.3 The postmaster needs to provide a calculation showing how the amount being claimed has been quantified (this wording is repeated in each of the following sub paragraphs) [...]

5.4 - Loss of property [...]

5.5 - Loss of opportunity/loss of chance [...]

5.6 - Penalties/general or increased cost of financing [...]

5.7 - Bankruptcy/insolvency [...]

5.8- Legal and professional fees [...]

5.9 - Stigma/damage to reputation [...]

5.10 - Personal Injury/harassment [...]”

8. As stated at paragraph 6 above, the combined effect of these provisions is that no relevant heads of loss are excluded from recovery. As in ordinary civil litigation, the scheme requires any claimant to prove their losses to the civil standard. However, unlike a civil claim, the scheme recognises that where for any reason a claimant cannot discharge that burden of proof, fairness may require their claim to be accepted in whole or in part (see Guidance, 3.1.2). This is significant as, through the passage of time, records may be lost or otherwise become unavailable. As Wendy Burke told the Inquiry in Focus Group Session 3, limited documentation may lead to a significant reduction in the compensation offered to SPMs. She said “*I got a small pay out. I think a difficulty with the scheme is that most of us really have destroyed any documentation.*” (see also the evidence of Paul Brannlund to similar effect) (see Transcript, 11 March 2022, p82/18– 19 (Wendy Burke); p70/10-18 (Paul Brannlund)). We return to this issue below, but the Inquiry may wish to consider the fairness of SPMs’ restitution being reduced directly as a result of the delay in the Post Office accepting the flaws in Horizon.
9. Importantly, in our experience, some consequential heads of loss are frequently not claimed in the original application made by many SPMs. This is not surprising when most SPMs are not legally trained and most applications are completed without legal support or advice. In some cases, applicants claim consequential loss but do not include the evidence sufficient to discharge the burden of proof.
10. The original application form did not assist and was potentially misleading. One catch-all question at Box 24 read:

“Have you experienced any losses that are directly related to the alleged shortfall(s) in respect of which you would like to claim? If yes, please provide the following details for each loss:

- *The dates of the alleged loss;*
- *How the loss arose as a result of the alleged shortfall; and*

- *The value/size of the loss.”*
11. There was no signposting to any of the examples set out in the Guidance (and highlighted above).
 12. In practice, this lack of clarity has had significant consequences for applicants. Features of the HSS operation include:
 - a. Shortfall losses are routinely claimed, but not consequential losses.
 - b. An absence of paperwork is routinely leading to the disallowance of consequential losses in their entirety (despite the provisions on fairness in the Guidance, at 3.1.2 highlighted, above).
 - c. Post Office has consistently been slow to disclose the records it holds [our experience is that in many cases disclosure only follows after an offer is made and a Good Faith Meeting (“GFM”) held].
 - d. There is an inconsistency in the level of reduction applied for shortfall losses where there is an absence of paperwork (between 10 and 30 per cent reduction). It is unclear how the level of reduction is calculated and we have been unable to identify a clear and consistent pattern. We are aware, for example, of at least one application related to shortfalls at three branches where it appears each branch was awarded shortfalls according to a different calculation.
 - e. There has been no, or limited proactive interrogation of possible consequential losses even though they are apparent on the face of papers, including in follow up telephone calls from the scheme to applicants.
 - f. In some cases the scheme has allowed unexplained credit for heads of loss which have not been claimed (for example, we have seen proposals to allow recovery for “*time taken to deal with Horizon shortfalls*”).

- g. On some occasions, awards have been made for “*distress and inconvenience*” (whether claimed or not), but without any consistent explanation as to how this loss has been quantified. Again, we have been unable to easily identify a clear and consistent pattern in the quantification of these awards. By way of contrast, we are to date unaware of any successful claim for consequential personal injury under the HSS.
- 13. In the absence of clarity on the methodology adopted by the scheme in the calculation of losses and in the application of reductions, it is very difficult to advise applicants on whether the offer made in their case is fair or it ought to be challenged. The need for clarity is illustrated in the evidence heard by the Inquiry. Fiona Elliot, for example, told the Inquiry that she submitted her application with support from her accountant. She rushed to meet the deadline for submissions of claims. Her losses were calculated by her accountant at over £1million. HSS offered her £24,000 in compensation (Transcript, 19 May, pp24/23-25 – 15/7). It is not unusual in our experience for there to be a considerable difference in the calculation of loss by an applicant (or their advisors) and the offer made by the Post Office. This disparity in calculations is but one example of why the offers made require close scrutiny; scrutiny which is impaired in the absence of clear and consistent method.
- 14. In a recent response to the House of Commons Select Committee on Business Energy and Industrial Strategy, the Government claimed that the principles in the Guidance were sufficient to afford clarity and consistency, but indicated that these principles would be “*updated as necessary in the light of Panel decisions on individual cases and wider consideration on the handling of appropriate losses*” (see Tenth Special Report of Session 2021-22, House of Commons Business, Energy and Industrial Strategy Select Committee, “*Post Office and Horizon – Compensation: Interim Report. Government Response*”, HC1267, p3 (Hereinafter the “BEIS Response”, p15). The decisions on individual cases we have seen suggest that the Guidance must be supplemented without delay to ensure greater clarity and consistency in decision making.
- 15. Finally, we note that the Government’s intention is for HSS decisions to be fair and appropriately independent of the Post Office:

“The Government believes that the Post Office cannot fully move on until it has righted the wrongs of the past and that it is therefore appropriate that the Post Office itself takes responsibility for making amends to the postmasters affected by the Horizon IT issues and that the Government holds it to account for doing so in a fair and consistent manner. The Government agrees that it is also right, for the reasons outlined by the Committee, that the Post Office itself is not the judge and jury in assessment of individual claims.”

16. However, all offers are made on the basis of legal advice and analysis prepared by HSF, the Post Office’s legal representatives:

“The first stage of assessing a claim involves an independent Legal Case Assessment by Herbert Smith Freehills. This takes into account the information provided in the application and the shortfall analysis information provided by the Post Office from its branch and historical record sources. Herbert Smith Freehills’ initial assessment is passed to the Independent Advisory Panel which includes experts from the retail, forensic accountancy and legal sectors, who review the initial assessment and the facts of the application. The Independent Advisory Panel can request further information or recommend an offer be sent to the postmaster based on its assessment of the evidence.

As noted previously, Herbert Smith Freehills’ role is to assess claims purely against legal principles and present options for the Panel to consider quantum of compensation. The Panel can then also exercise its discretion to recommend what it believes to be a ‘fair offer’ when considering the facts of the case in the round. Government supports the Panel in this approach. As of 5 April 2022, there have been no cases where the Post Office has offered an applicant less than the Panel has recommended” (BEIS Response, p16).

17. The Inquiry may wish to consider how this relationship works in practice and whether (or not) it would be more appropriate for the Independent Panel to have its own independent legal advice.

(ii) Whether there has been delay, and if so, the cause(s) of any delay

18. The HSS Scheme opened on 1st May 2020. It closed on 14th August 2020 with a further 15 week grace period for cases with “*exceptional circumstances*” to be submitted. We understand that a total of 2,365 eligible applications were processed:
- a. As of 5th April 2022, a total of 1,210 offers had been made of which 892 had been accepted, resulting in total payments of £7.1million. This represents an average of £7,959 per case.
 - b. By 4th May 2022, a total of 1303 offers had been made, and 101 further offers were accepted, resulting in total payments of £9.4million. Average payments thus rose to £9,466 per case.
 - c. Of the 101 payments accepted in the most recent month for which statistics were available, the average payment was £22,772.¹
 - d. In April 2022, Paul Scully MP, the Minister for Small Business, Consumers and Labour Markets, repeated that the Government has “*set the Post Office an ambitious aim of making 100% of HSS offers this year*” (BEIS Response, p3).
19. Using last month’s available figures as a barometer, it is likely that the remaining scheme claims will be processed over a period of 10/11 months, taking the scheme to February/March 2023. This is obviously beyond the Minister’s ambitions of making all offers in the course of this calendar year. This analysis also assumes that claims are processed at the same rate, but it appears to us that more complex, greater value claims are now being processed, which may slow down matters. This appears to have been confirmed by Ministers. Applications have been grouped in cohorts of similar complexity (as confirmed in the BEIS Response at p 16): “*to enable early progress, the first cohorts included the least complex cases and were generally lower value claims*”.

¹ The number of offers made and accepted and the sum of total payments are published on a regular basis on the HSS website. These calculations of simple averages are based on the figures published in [May 2022](#) and [April 2022](#).

20. Analysis of applicants' claims advised on by Hudgell Solicitors suggests that the time from application to offer can be substantial. Response times already vary from 13 to 23 months. On the information available to Hudgell Solicitors, there appears to be a pattern which confirms that processing time is increasing. On average, offers made in December 2021 had been outstanding for 16.5 months; in April 2022, the average had risen to 21.6 months. With some applications, further information is sought by the Post Office before an offer is made. Sometimes this happens more than once. On average, where further information is sought these cases take 2 months longer to reach an offer.
21. Delay in the application process can occur for a number of reasons but there are significant reasons why only the time taken to offer is not a good marker for the assessment of the efficiency of the HSS:
 - a. The more complex cases could well lead to an increase in the proportion of claims being taken to dispute resolution.
 - b. There are in-built delays in elevating claims through the first stages of the post-offer Dispute Resolution Procedure.
 - c. The Dispute Resolution Procedure where a Postmaster is not happy with the outcome of their application, involves a GFM, an Escalation Meeting and, finally, Mediation to try and resolve the case.
 - d. The first stage in this process – the GFM - does not involve Post Office tabling any improved proposals, but exists as an opportunity to explain the basis of the offer put forward.²
 - e. From rejection of an offer by the SPM, it is taking an average of two months to arrange a GFM. We have examples of multiple GFMs in the same case.

² The BEIS Response explains that both the GFM and the Escalation Meeting "*provide an opportunity for the Post Office and its legal representatives to engage with a claimant who has rejected the Post Office's offer to explain the rationale behind the offer and to consider any additional evidence provided by the claimant. If the claimant does not wish to accept the offer following the GFM, he or she has the option to request an Escalation Meeting with a senior manager from the Post Office who will further consider the claim, any new evidence and seek to negotiate a mutually acceptable outcome*" (See p13).

- f. Some 21 months after the scheme has closed, no claims have yet reached Mediation.
 - g. If Mediation is not successful, disputes for sums totalling not more than £10,000 are to be resolved through the civil procedures of the County Court, pursuant to the Small Claims track. Disputes for sums totalling more than £10,000 are to be determined by Arbitration rather than through the Courts.
 - h. If an applicant is required to pursue a small claim in the County Court, current research demonstrates that the average time from issue to final hearing is 51 weeks, and increasing (see MOJ, [Civil Justice Statistics Quarterly Jan – March 2022](#), 1 June 2022).
22. In some cases specific complications will delay final agreement even further. For example, bankruptcy cases are extremely complicated (we do not propose to address the detail of these claims in these submissions). It is unknown how many cases are affected by insolvency within the scheme. While the heads of loss identified in the Guidance (above) include consequential losses connected with bankruptcy, little further guidance is available on how the complexity of claims by bankrupt SPMs will be managed within the HSS. In none of the cases of which we are aware have any settlement proposals yet been advanced. Applicants are invited by the scheme to contact their Trustee-in-Bankruptcy. That is not adequate for these cases. In these complex circumstances, an applicant needs independent advice on which aspects of any claim may or may not vest in the Trustee. They may also need to be advised as to whether to seek to annul the bankruptcy or apply for formal discharge.
23. Other than making provision for deduction of income tax on interest for shortfall losses, no or limited consideration appears to be given to potential tax consequences for certain heads of claim. Again, these are complex issues we are working through with SPMs whose convictions have been quashed in the context of their ongoing civil claims (see below). Post Office is invited to confirm what provisions they have made for dealing with the tax implications on certain pecuniary heads of loss recovered within HSS, such as indemnifying claimants against any later HMRC demand for payment. A continuing

lack of clarity on the tax position of awards only serves to further compound the difficulties inherent in the scheme.

24. In summary, there are both continuing and anticipated delays with the Scheme and, regrettably, in our experience, there are applicants considering they must settle their claims under their true value just to bring closure because of those continuing and anticipated delays.

(iii) The provision for legal advice in respect of HSS claims

25. The scheme appears designed to restrict applicants' legal costs to an absolute minimum whilst at the same time allocating £69 million in legal fees and administration costs for the set up and running of the scheme.³ We return to these figures below; but for clarity, Hudgell Solicitors and counsel have been working, so far, without payment. Figures recently published suggest that applicants' claims for legal expenses incurred in connection with HSS, as at March 2022, amounted to £6,500 (in total, across 9 claims).
26. The scheme makes very limited provision for applicants to obtain independent legal advice. In our experience, applicants may have been actively discouraged from seeking legal representation. The HSS website contains the following in its Question and Answer section:

Q – Will Post Office provide financial assistance to help me claim on the Scheme?

A – No, as the Scheme is being provided at no cost and is designed to be straightforward and user friendly. It includes a Dispute Resolution process if you are not content with the assessment of your claim.

Q – Can I represent myself or do I need a solicitor?

A – The Scheme has been designed to be simple and user friendly to avoid the need to incur costs of legal representation. Applicants are welcome to engage a lawyer or other professional to provide independent representation at their own expense.

³ [Figures for legal and administrative costs provided in correspondence from Paul Scully MP](#), Parliamentary Under Secretary for State to Chair, BEIS Select Committee, 2 February 2022.

27. For the reasons identified above, these are not simple claims, and properly resourced legal advice is imperative to ensure settlements are fair and appropriate. The appointment of an independent panel with oversight and administration of the scheme is not, in our experience, operating as a sufficient safeguard to ensure the fair resolution of all claims.
28. We suggest that, in reality, the provision for legal advice within the scheme is woefully inadequate for the following reasons:
 - a. Where there is provision for legal advice it is limited only to advising on the adequacy of scheme offers.
 - b. Costs for this purpose are randomly assessed at a fixed contribution of £400 or £1200 (inclusive of VAT).
 - c. There is no provision for underwriting the costs of legal advice in completing the application (albeit that, as highlighted above, historic legal expenses are a recoverable head of loss, where consequential to a shortfall claim. The provisions in the Guidance expressly treat fees incurred in bringing an application as “*separate*” from this recoverable loss.).
 - d. There is limited provision for payment of disbursements including, in particular, accountancy fees and the cost of medical reports. The Guidance provides that in the assessment of a consequential loss claim and only where “*new documentation relevant to a claim cannot be obtained without a fee*”; and in those circumstances an SPM may request that the Post Office reimburse such costs. There is no right to reimbursement and all payments are at the discretion of the Post Office. No costs will be reimbursed without prior approval (see Guidance, [4.2.4]). Such expenditure is essential in complex cases given the need to satisfy the requirements of the Guidance. In all but one sub-category of loss identified in paragraph 7 above, the postmaster needs to provide a calculation showing how the amount being claimed has been quantified. In the absence of this information, our experience is that it is likely a claim will fail.

This information may be essential where a legal advisor is instructed to advise on an offer made by the Post Office.

- e. Even where an offer is acceptable, the fixed contribution towards legal fees is rarely sufficient to cover the legal advisor's time. The amount of time required will obviously depend to a large extent on the amount of paperwork that the legal advisor must consider in order to advise to a proper standard. Only in cases where a small shortfall loss is claimed in isolation, with no supporting documentation, does the fixed fee provide adequate remuneration for the work required.
 - f. If an offer is unacceptable there is no provision for payment of legal costs through the Dispute Resolution Process. The scheme makes this clear. To illustrate, in its letters confirming a GFM, Post Office invites an applicant to bring a legal advisor "*at their own expense*". Such meetings routinely are attended by a representative of the Post Office's lawyers, HSF, presumably paid for by the Post Office. An applicant has either to fund these costs privately (which most are unable to afford) or enter into a damages based conditional fee agreement ("CFA") (if available) and forfeit a percentage of any award in legal fees. The other alternative is to rely on the goodwill of the legal advisor to continue to work *pro bono*. Hudgell Solicitors and counsel estimate hundreds of hours of *pro bono* scheme work has been carried out to date.
29. Very few claims have been concluded with the benefit of legal advice and the take-up of the limited legal advice available has so far been low. In the BEIS Response, the following figures were identified:

"The following figures are accurate as of 18th March 2022....

[...]

ii. Post-Offer legal support - a small number of claimants have submitted invoices for reimbursement of these legal fees: 9 claims totalling £6.5k. The take up of legal support so far has been low because very few claims have been escalated to a Dispute Resolution Procedure. As the more complex cases

proceed, it is expected the take up will increase. Details on the available legal support are included in the offer letter to claimants ” (See BEIS Response, p22)

30. A further and potentially very significant post-settlement concern is the treatment of advice on tax liabilities (as outlined, above). Applicants need to understand their liabilities (if any). Basic rate tax is deducted by Post Office on interest on shortfall losses, and applicants are recommended to seek independent tax advice, at their own cost. They may be due a rebate, or may be liable to further tax as a higher rate tax payer, on payment of the interest on shortfall losses alone. In respect of other heads of pecuniary loss, HMRC may at a time in the future deem these subject to deduction of income tax and raise a demand of the applicant. In the absence of provision for advice, there is a real risk applicants will face renewed hardship and unanticipated legal consequences.

(iv) Provision made for interim payments pending dispute resolution

31. As of 5 April 2022, a total of 24 interim payments had been made, in unspecified amounts (BEIS Response, p12). In our experience, Post Office is only issuing interim payments in cases evidencing exceptional hardship.
32. Routinely, in our experience, Post Office is refusing to issue interim payments where applicants accept a shortfall offer but invoke Dispute Resolution Procedure for other consequential heads of claim. The Inquiry may wish to explore the reason for this approach. Where the claimant has accepted the Post Office assessment of shortfall losses, there seems little rationale not to afford an interim payment in respect of that element of compensation. Instead, for many of our clients, the refusal to make an interim payment is viewed - whether rightly or wrongly - as a litigation tactic or a lever to secure early settlement on their other claims at a reduced value. Regardless of the justification for this approach; we invite the Inquiry to consider the detrimental effects upon applicants of the delay in payment of these agreed sums.

(v) Other matters

33. The application period for the HSS was unduly short. The scheme opened during the height of the pandemic. Applications needed to be completed quickly and there is

evidence that not all potential applicants were made aware of the scheme by the Post Office.

34. We have encountered numerous examples of inflexibility over the closing date of the scheme when applications are made out of time. The Inquiry has heard, in the impact evidence, of some of these examples. We have seen cases refused where the reasons for delay arise from dementia or bereavement or where the SPM has since died.
35. The exclusion of applicants with otherwise good claims, and the lack of clarity on claims out of time, leaves SPMs again feeling they are beholden to the Post Office. The Inquiry has heard numerous examples of those excluded from the scheme being told that something may be done to help them. For example, Mary Philip told the Inquiry about recent correspondence where she was informed that, although 122 people were excluded from the scheme; a mechanism was being explored to correct this (Transcript, 11 May, p175/21-25). John Gormley gave similar evidence. He was told the scheme was closed. He told the Chair that with Hudgell Solicitors he was further exploring ways in which he might pursue compensation but this was a “*long drawn-out situation*” (Transcript, 19 May, pp10-12).
36. Finally, the Inquiry may wish to subject the terms of settlement on any offer to scrutiny. As the Inquiry has heard, the terms on which offers are made have caused considerable distress to some applicants. They have been left with the understanding that if an offer is accepted, they will then be prevented from speaking out about their experiences with Horizon (see Julie Beisner, Transcript, 16 March, pp22/1-11: “*I decided that I’m going to decline because I’m not going to be gagged.*” See also Chirag Sidphura, Transcript, 17 March, p38/10-16).

B) Final Compensation for SPMs with Quashed Convictions

37. As addressed in earlier submissions, this category of SPMs remains eligible to pursue civil claims for malicious prosecution. The CPs we represent (except one) fall within this category. The Government has publicly committed to compensation for SPMs who were tried and whose convictions have been quashed on appeal. In general, interim payments have been made swiftly. Behind these payments lie the strong prospects for

any of these individual claimants to pursue a civil claim for malicious prosecution against the Post Office; regardless of whether they were a member of the 555 Group Litigants or not. Correspondence with Post Office continues on a without prejudice basis on behalf of many of the CPs represented by Hudgell Solicitors in their civil claims. However, as far as we are aware, liability has not been admitted in any civil claim involving Horizon. This position necessarily limits what can be said in the public domain about the detail of negotiation with the Post Office and about individual claims without breaching privilege or confidentiality and/or undermining any individual client's position.

38. We briefly address the questions posed by the Chair in general terms. In so far as we are able, we will seek to assist the Inquiry further in oral submissions in July 2022. The dialogue between our clients and the Post Office is fast-moving and the forthcoming hearing may provide a meaningful opportunity for an update to be provided to the Inquiry.
 - (i) **The principles which are being applied to the calculation of final compensation payments.**
39. The Post Office and BEIS may be better able to explain the approach to individual civil claims arising from Horizon and their approach to calculation of compensation more generally. As explained above, we are limited in the level of detail we can share about the claims of individual clients while pre-litigation negotiation remains live.
40. We note that the Post Office submissions dated 8 April 2022 refer to the pursuit of "*ordinary civil claims, made in the ordinary way*" (at [5]). The Post Office goes on to indicate that interim payments have been made to this class of CP on request as "*prospective claimants who will likely to be offered at least that much, while they and their solicitors formulate their full compensation claims and those claims are worked through.*"⁴ Any possible implication herein that any resulting delay arises from the Claimants or their legal team's lack of expedition is resisted.

⁴ A similar formulation is reflected in the BEIS Response, at p7: "*Final compensation settlements are determined through individual negotiations between the claimants' legal representatives and the Post Office. The length of time this will take depends upon how long it takes claimants' advisers to submit their claims and to reach a settlement agreement with the Post Office's legal representatives. BEIS, with support from UKGI, has full visibility*

41. Even in cases where an interim payment has been made, many of our clients experience ongoing uncertainty as to their future while these claims are ongoing. A number are fearful (despite reassurance) that the interim payment will be “clawed back” and are reluctant to rely on those funds being secure. For many, this means continuing financial hardship in the absence of any reassurance from the Post Office on their claims (whether by means of assurance in respect of the interim payment or in the form of an admission of liability). It would, of course, be open to the Post Office to make any such concession or give such reassurance to these claimants. However, beyond the public statement of Ministers that these individuals will be properly compensated; no such formal concession has so far been made. In circumstances where some SPMs have been living with the financial and emotional consequences of their convictions for almost two decades, further delay and insecurity at this stage is considerably distressing both for them and their families.
42. The value of any individual claim must be calculated applying the ordinary principles applicable to the recovery of civil damages for malicious prosecution. This includes consideration of all pecuniary and non-pecuniary losses (and any supporting evidence), together with appropriate aggravated and exemplary damages. The heads of claim/damage will vary across individual claims but inevitably will include pecuniary losses incurred by SPMs including money paid to cover shortfalls; business losses and loss of earnings; and, non-pecuniary damage including personal injuries caused or exacerbated by the malicious prosecution. Any non-pecuniary compensation must truly reflect the life changing circumstances these wrongful prosecutions created for the claimant SPMs. We do not repeat the Phase 1 impact evidence here, but underline that the impact on these men and women of good character of convictions which stood in some cases for over a decade must sound in compensation which reflects the true harm caused by the Post Office’s actions.
43. The Chair and CTI will be very familiar with the ordinary legal principles applicable to the calculation of civil damages and, in particular, the recovery of damages in the context

of this process. The Post Office is committed to moving these negotiations forward as quickly as practicable and is working with the first two postmasters whose legal representatives have submitted a fully quantified claim. The Government is working to support this process in whatever way it can. (Emphasis added)”

of malicious prosecution. For the avoidance of doubt, the following principles must inform the calculation of any final payment of compensation to any individual SPM pursuing a civil claim:

- a. The purpose of any award of damages is to put a successful claimant in as close to the position they would have been had the “wrong” (in this case, the malicious prosecution) not occurred. The statement of the general rule as to the measure of compensatory damages has its origin in the speech of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25 at 39:

“... that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

(See also *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 A.C. 309 at [129], per Lord Scott; in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C 353 at [80], per Lord Brown).

- b. Aggravated damages may be awarded where there is evidence of “any conduct of those responsible for the arrest or the prosecution which shows they had behaved in a high handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution” (see *Thomson v Commissioner of Police for the Metropolis* [1998] QB 498 at 516C (Emphasis added)). Aggravating features can also include the way the litigation and trial have been conducted. However, aggravated damages are compensatory and not punitive in nature. Leggatt J defined aggravated damages in the following terms in *Alseran and others v. Ministry of Defence* [2019] QB 1251 at [874]:

“In this context the term “aggravated damages” refers to damages awarded as compensation for mental distress caused by the manner in which a tort has been committed, or the motive with which it was committed, or subsequent conduct of the defendant.”

- c. Exemplary damages may be awarded where a compensatory award, taking into account aggravated damages, would be inadequate. An award is available where it is necessary in order to mark disapproval of oppressive or arbitrary behaviour (see *Thomson*, above, at [516H-517]). There can be no double recovery and it should not be viewed as a windfall for the Claimant. Such conduct must be “outrageous” before exemplary damages will be paid (see *Kuddus v Chief Constable* [2001] UKHL 29, e.g. at [68]). Categories of case where exemplary damages are awarded have included circumstances of oppressive, arbitrary or unconstitutional conduct by Government servants and, in other cases, in respect of conduct calculated to result in profit for the individual or organisation concerned.
- 44. While argument may be required on loss in the circumstances of each individual case; the Post Office can be invited to clarify its approach to the general principles in play in assessing liability and quantum in these cases; but they will benefit from legal privilege as to their own legal advice. In the BEIS Response (above), it was said (at p7):

“Final compensation payments will be determined on a case-by-case basis. When responding to claims, the Post Office is using a set of legal principles prepared following legal advice and with input from BEIS and UKGI based on current case law; they will be updated as necessary. These principles will inform the offers made in response to claims and the approach adopted when compensating specific heads of loss and assessing the available evidence. The principles will support a consistent approach to determining postmasters’ settlements while still allowing the flexibility needed to take into account each individual postmaster’s particular circumstances. This will help ensure that fair compensation is paid (while appropriately stewarding public funding) and claims are settled as quickly as possible.

All compensation will be assessed on a case-by-case basis, and payments made in response to claims for pecuniary losses, both direct and consequential, which may include loss of past and future earnings, alleged shortfalls and other costs

incurred; as well as claims for non-pecuniary losses such as mental distress, personal injury, injury to reputation and loss of liberty. It is anticipated that payments will also be made in respect of interest and to address tax liabilities.”

45. There is no question that for each of the Hudgell Solicitor CPs, and others, actionable damage has occurred as a result of their prosecution. The Inquiry has heard about the devastating impact of prosecution on the reputation of numerous SPMs, previously of good character and considered leading citizens in their communities. Publicity and the effects of publicity have been explored in the inquiry. Similarly, other heads of damage are likely to be satisfied. The Inquiry has heard that numerous CPs faced the threat of custody and a number spent time in prison. Loss of earnings and profits, including consequential losses including through bankruptcy have been covered at length in the impact hearings concluded in Phase 1 of this inquiry. The heads of loss outlined for consideration in connection with HSS claims above are illustrative.
46. There is ample foundation on the information already in the public domain to indicate that aggravated and exemplary damages would be appropriate in claims by SPMs. While without prejudice negotiations continue; we do not propose to address this in further detail in these submissions. However, this must be reflected in the approach to compensation adopted both by the Post Office and by Ministers. We note again that it is the Government which has responsibility for providing the funding for settlement payments and that BEIS supported by UKGI will have sign off on processes, principles and oversight of the initial cases (see BEIS Response, pp6-7). The scale of the scandal of the mistreatment of SPMs by the Post Office gives no reason to discount the application of the ordinary principles of the law on quantification of compensation. The basic principle remains that these Claimants compensation must in so far as possible put them in a position they would have been in had these wrongful prosecutions not been pursued by the Post Office. The quantification of damages must include aggravated and exemplary damages. Any other approach would create a perverse precedent, benefitting more widespread oppressive or unconstitutional conduct by a private prosecutor acting on behalf of a public service owned by the Government.

(ii) The mechanism(s) by which final compensation payments are being calculated.

47. At present, we repeat, claims which are progressing are in pre-action correspondence with a view to settlement without need for trial, if possible (i.e. in without prejudice correspondence identifying the scope of each claim and the sums claimed by each SPM, together with arguments on the law). The quantification of the pecuniary losses incurred by each individual SPM and the valuation of their non-pecuniary losses is a complex exercise.
48. The existing claims have encountered some practical difficulties associated with the historic nature of the index events. Some of these difficulties echo the experience of the difficulties in quantifying HSS claims, as outlined above. These difficulties have a substantial impact, not least because they lead to delay, incur the need for further legal work and run the increasing risk that at least some of the aging cohort of SPM claimants will never benefit from the compensation sought.
49. For example, there are difficulties arising in disclosure of relevant records. In any civil claim, while the claimant bears the burden of proof, the Defendant has well-rehearsed responsibilities in respect of disclosure. The exercise of disclosure from the Post Office is ongoing for many Hudgell Solicitor clients. These events cover a period of almost 20 years. As the Inquiry has heard, for many SPMs their records were seized by the Post Office during the audit process. In any event, it was a feature of the operation of Horizon that records were held centrally and the form in which SPMs could download data was limited. As has been indicated by a number of witnesses during the impact hearings, the Post Office has previously informed many SPMs that their records have been lost or damaged over the years and that they were not available for disclosure. Other forms of evidence significant to the calculation and proof of loss may be lost to other public systems and rules on archiving and the destruction of records. These are third party records which, in an ordinary civil claim, conducted two or three years after the Index events, a Claimant might easily be able access in order to support their claim. For example, difficulties may arise where full historic HMRC, banking or benefits records are not retained in respect of individual claimants. Records are unlikely to be complete, especially in relation to documents over 6 years old (which are not routinely retained

whether by public or private institutions). The consequent difficulties are compounded where SPMs have not themselves kept copies of their own records reaching back decades; including records of their own traumatic experiences with the Post Office. As the Inquiry has heard, for example, many of these Claimants lost their homes and had to downsize as a result of their prosecution.

50. When the burden of proof is being applied, the Post Office must not now benefit from their own wrongdoing at the expense of the SPMs. The burden of proof must be applied on the basis of the evidence available. Claims for pecuniary loss should not be arbitrarily reduced on the basis there is now a lack of documentation to support an SPM's own evidence as to the harm they experienced.
51. Further complexity arises in connection with Claimants who are bankrupt (an issue touched on above, in connection with HSS applications). For example, where records were available, those would have been surrendered to the Official Receiver. We do not propose to address this issue in any further detail here (this being a difficult issue to explain in the abstract without including information relating to particular claims). However, where a bankruptcy was consequent to the conviction of a Claimant compensation must cover any costs associated with the bankruptcy, including the cost of now annulling or setting aside any bankruptcy order.
52. Additional issues arise for Claimants who operated their businesses in partnership with others. The Inquiry has heard from some SPMs how their businesses were owned and run jointly, including, in some cases with spouses and other family members. Any claim in malicious prosecution which is limited only to the personal losses of the convicted SPM may be difficult to calculate separately; and, if divisible, may not reflect the true consequential losses incurred as a result.
53. The consequential losses for many SPMs were wide-ranging, including losses to pre-existing businesses adversely affected by their conviction by the Post-Office; losses to pension savings (and expectations) and losses to property (with business and personal property sold by many SPMs at a loss); and, increased costs incurred in insurance, mortgage rates and other financial products post-conviction.

54. Similar issues arise in respect of tax liabilities outlined in connection with the quantification of loss in the HSS scheme in connection with civil claims. Clarity in respect of tax issues is essential; in the absence of agreement on approach (and access to advice for SPMs) there will be additional and continuing uncertainty for Claimants and delay in reaching settlement.
55. These practical difficulties are principally caused by the recognised delay by Post Office in addressing the wrongs consequent to the introduction of Horizon; and they arise in seeking to reflect the true losses consequent upon the Post Office's prosecution of our clients. Many of these difficulties arise from gaps in record keeping and archiving outside the control of the Claimants. They cannot act as a barrier to otherwise effective claims; or to the detriment of the SPMs concerned. Not least, many of these Claimants have met repeated resistance from the Post Office despite earlier efforts to secure full and fair redress following their convictions. The intransigent defence of Horizon as robust and the repeated insistence by Post Office that the convictions that ensued were safe cannot now benefit the Post Office in the conduct of claims delayed for reasons beyond the control of the Claimants. The Post Office chose to resist earlier attempts to overturn the convictions and aggressively contested the original civil proceedings over many years. This cannot now prejudice individual SPMs' prospects for full and fair compensation.

(iii) The provision (if any) which is being made for applicants to obtain independent legal advice in relation to their claims.

56. There is no specific provision for independent legal advice to be provided (or funded) in respect of these claims beyond the ordinary arrangements for litigation funding in civil litigation.
57. These claims do not attract legal aid. Clients can choose to pay privately (a prospect in practice unavailable to any SPM affected by Horizon losses and subsequently convicted); or can seek to find a legal team willing to act on a CFA. CFAs require legal professionals to be satisfied as to the prospects of any claim before proceeding and require those professionals to share the risk in pursuing a claim. Even where solicitors agree to act on

a CFA; a considerable liability for disbursements may be incurred, including in respect of other professional fees. Such liability will be incurred, for example, where expert input is required in order to properly investigate, quantify and advise on an individual claim and its value (e.g. medical experts, forensic accountants and actuaries). Hudgell Solicitors (and counsel in the civil claims) act for 62 claimants on this basis and the work involved – at risk – in preparing these claims has so far been enormous. Further work is expected to be required to secure a satisfactory settlement or to take these cases to trial. Each case must be considered on its own facts and each of the cases will require the input of specialist counsel and experts (including forensic accountants).⁵ The necessary work on these claims has been done without any payment to date. The Post Office continue to resist making any, or any realistic, interim payment proposal in respect of Claimants' costs. This sits in contrast to the substantial legal support available to the Post Office in considering, scrutinising and resisting the recovery of damages sought by individual SPMs. We anticipate that these further legal costs will present a significant expense for the Post Office (and ultimately, the public purse). As with the historic experience of the SPMs, there is no semblance of equality of arms in the process as it stands.

(iv) The procedures which are being adopted to resolve disputes about the value of final compensation payments.

58. Our clients are currently engaged in pre-action correspondence with the Post Office to identify areas of dispute and to resolve the question of compensation swiftly without trial.
59. We stress that each of our clients retains the ability to pursue their claims for malicious prosecution and any dispute, whether as to liability or quantum of damages, may ultimately require resolution by the High Court. The burden of continued litigation on our clients is substantial. The complexity of the litigation, as outlined above, illustrates that these matters are not simple or undemanding for any individual litigant. The Inquiry has already heard from many SPMs about the impact of the Horizon scandal on their health and wellbeing. The Inquiry has also heard about the continuing traumatic impact engaging with the Post Office and with this Inquiry has had for many SPMs. The Chair

⁵ We outline above the inadequacy of the provision for legal support within the HSS (see also Annex 2). Frankly, the availability of CFA depends on the prospects in any individual client's claim. They are not without considerable risk to any firm and not all legal professionals will accept the risk involved in CFA.)

is aware that there appears to be a number of convicted SPMs who have not yet come forward; including, at least in part, because they may not wish to revisit past trauma.

60. While an option of last resort, a further trial to determine compensation remains in prospect. In the light of Ministers' repeated commitment to ensure that compensation for this group is provided swiftly; this outcome would be equally undesirable for our clients, for Post Office and for the Government. It would result in considerable delay and substantial costs on both sides. Any echoes of the aggressive litigation conduct by Post Office as criticised in the GLO judgements would be regrettable.
61. In addition to the questions posed by the Chair, and beyond the principles being used to calculate sums of compensation owing, there are fundamental differences between Hudgell Solicitors and Post Office in respect of three of the SPMs represented by Hudgells.⁶ The position of Oyeteju Adedayo, Parmod Kalia and Vipinchandra Patel are addressed at length in our earlier submissions (see Annex 1).
62. We reiterate that it was open to the Post Office to pursue an argument that these convictions should not be quashed, or to pursue a further prosecution, and they have not done so. Instead, they choose now to argue that the decision to proceed with prosecution was not malicious for the purposes of their civil claim and this Inquiry. The convictions of these individuals are quashed. They are not guilty of the offences alleged by the Post Office. Yet the prosecuting authority continues to, by implication, assert that their convictions were sound such that any claim for damages may now be resisted (PO Submissions, [39.7]). In Ms. Adedayo's case, at the time of writing, the Post Office is even refusing to return the money she was required to pay in respect of a confiscation order flowing from conviction. The fairness of the Post Office's approach to these cases remains a live issue which we do not propose to further address here.

⁶ See PO Submissions, 8 April, 2022, [38] on.

C) Fair Compensation for the Group Litigation Claimants

63. All but one of the CPs represented by Hudgell Solicitors fall within the group of convicted persons (i.e. Category B above). In the circumstances, it would not be appropriate for us to make detailed submissions on the fairness of wider compensation payments, as outlined by the Chair.
64. We underline that there are a number of GLO Claimants who were convicted persons and are now within Category B. As new arrangements are settled to provide for compensation for persons in other categories; those who were convicted and have had those convictions quashed should not be treated any less fairly as their valid civil claims for compensation proceed.

D) CONCLUSION/SUMMARY

65. We reiterate that our clients consider that justice will not be done until all those SPMs who formed part of the 555 are properly compensated for their pecuniary and non-pecuniary losses in full.
66. Our clients (and the wider cohort of SPMs and others affected by the Horizon scandal) are an aging group. Many have lived with the fallout of the public failures at the heart of this Inquiry for almost two decades.
67. As heard in the impact evidence, many have continuing and significant mental and physical health problems which can be linked to their prosecutions and to Horizon. The continuing fight for compensation is extremely difficult for many of them; and while the process continues, it prolongs their trauma.
68. While public bodies engaged in this Inquiry have clear duties to the public purse; Ministers have recognised an obvious obligation to provide full and fair compensation to SPMs. This obligation must be met swiftly. We continue to engage with the Post Office on the first cases being considered. We understand that the decisions involved are multi-layered involving Post Office, BEIS and the Treasury. However, we are concerned that even in those cases which plainly fall within the Minister's commitment to compensate

(i.e. the convicted SPMs), legal difficulty, delay and distress remain the experience of those we represent.

TIM MOLONEY QC
ANGELA PATRICK

HUDGELL SOLICITORS

10 JUNE 2022