For Hearing 8th December 2022

IN THE MATTER OF A PUBLIC INQUIRY

THE POST OFFICE HORIZON IT INQUIRY

(1) TRACY FELSTEAD
(2) SEEMA MISRA
(3) JANET SKINNER
(4) LEE CASTLETON
(5) NICHOLA ARCH
(6) VIJAY PAREKH
(7) SATHYAN SHIJU

SUMBMISSIONS ON COMPENSATION

Thursday 1st December 2022

It is difficult to conceive of a more egregious abuse of prosecutorial power than, in pursuit of a commercial objective, wrongfully to prosecute an innocent person and cause them, on incomplete and misleading evidence, to be convicted and imprisoned for a criminal offence that they did not commit. That thereafter they be intentionally disabled from appealing their conviction by the further withholding by their prosecutor of disclosable material, in pursuit of commercial advantage, is to strain credulity.

1. These submissions are made on behalf of Tracy Felstead, Janet Skinner, Seema Misra, Lee Castleton and Nichola Arch, Core Participants in this Inquiry, and on behalf of Vijay Parekh and Sathyan Shiju, both of whom have applied to the Inquiry to be permitted to become Core Participants.

Delay

2. It has recently been explained that the BEIS compensation scheme, for those who were claimants in the GLO litigation, is not likely to be fully established and operating to accept claims before spring of 2023. It is understood that BEIS has limited capacity to establish and operate the scheme, albeit it is not envisaged as being likely to be an overly formal process.

3. The delay in establishing and operating the BEIS scheme stands in marked contrast with the scheme for preserved claims for malicious prosecution, that is being operated by Herbert Smith Freehills LLP on behalf of the Post Office (though as noted below, that scheme is not without some difficulties). The Post Office/HSF scheme, that of course is in the nature of a negotiation of the settlement of a legal claim, is actively receiving claims and paying-out compensation, notably in connection with claims for general damages.

4. It is unsatisfactory that the BEIS scheme is taking so long to establish. The Post Office's conduct is the subject of claims for "further compensation" from the government (BEIS) that are as long-standing as other claims (e.g. those in the Post Office scheme for preserved malicious prosecution claims). Mrs Nichola Arch, for example, was prosecuted, but fortuitously acquitted of the charges against her, in 2002. The years leading up to her prosecution, carrying with them the loss of her

business, her good name (despite her acquittal) and her aspirations, and the trauma of her prosecution, have devastated her life and destroyed her livelihood. She suffers from long-term chronic depressive illness as a result of her experience. Under the original 2019 settlement of the GLO litigation, she received £8,500 compensation. She recently received somewhat less than £19,000 from BEIS by way of an interim payment on account. That is wholly inadequate to her circumstances and experience, distressing evidence of the extraordinary strain and stress of which she has given in this Inquiry. That evidence included that she and he partner were driven to actively contemplating jointly committing suicide, confronted as they were by Mrs Arch's ruin at the Post Office's hands and her being ostracised, and vilified, like so many others, in her community. She has now been waiting for 20 years to be properly compensated. That in itself is the very antithesis of justice and is its denial, for which the (government-owned) Post Office is responsible.

5. It is anomalous that the Post Office is processing claims through HSF, amply-resourced (as in the GLO litigation) and without, as would appear, substantial constraints, but BEIS, whose remit is similarly to distribute and pay over tax-payer funds to claimants, is under-resourced for the task to which it is appointed, after all, by government. When the question was raised recently as to why this should be so, no answer was available. It is fair to observe that it is becoming increasingly clear in this Inquiry that the government itself is also responsible, if indirectly, for the calamity that from 1999 was visited upon postmasters and its employees by the Post Office - an institution that the government is less now enthusiastic to describe as its "partner" in delivering services (through UKGI) than formerly it was.

Unsatisfactory features of the existing compensation scheme that is being administered by Herbert Smith Freehills LLP for the Post Office.

6. Progress has undoubtedly been made in connection with preserved claims for malicious prosecution under the Post Office scheme administered by Herbert Smith Freehills. There has recently been an encouraging flurry of activity and communication.

7. It is important for it to be borne in mind, given what follows, that the HSF compensation scheme for preserved malicious prosecution claims, is adversarial in character, regardless of how constructive, and by intention cooperative, the scheme is presented (by the Post Office/government) as being. HSF acts for the Post Office as its solicitors and necessarily in the Post Office's interests. It is bound to do so by reason of its retainer.

Asymmetry in available information in preparing claims for general damages – preserved claims for malicious prosecution

8. Progress has been undoubtedly been made. A particularly important development has been an ENE undertaken by Lord Dyson, the former judge, who has provided (subject to provisos below) a useful written evaluation expressing his opinion on heads of loss for general damages. There are two problems that arise.

9. First, the ENE undertaken by Dyson was upon joint instructions from Hudgells Solicitors and the Post Office, and is the evaluation of sample representative claims provided by Hudgells. While no doubt expedient, it has had an unfortunate consequence. Dyson's report has been made available to claimants for compensation outside Hudgells only on a heavily (substantially) redacted basis.

10. This has important consequences, self-evidently, in creating an asymmetry/disparity in available information between classes of claimants. That is ex facie unfair and there is no answer to it.

11. Restricted This (unsatisfactory) position requires to be addressed and either justified or resolved.

12. The writer observed in an email to HSF, dated 30 September 2022:

Restricted

13. HSF have explained that, while the Post Office is willing to disclose more of Dyson's analysis, Hudgells Solicitors is not.

14. The consequence is asymmetry/disparity in information available between classes of claimants, viz those represented by Hudgells, who have received the (valuable) benefit of an ENE from a former judge, and those who have not. That is unfair. It is not known how this can be justified and it adds friction in advancing claims that already have had almost every conceivable obstacle placed in their path. (It is presumed that the Post Office, rather than Hudgells' clients, paid for the ENE.)

15. There was even an oral hearing on the ENE between Hudgells Solicitors' clients and the Post Office, that took place on 18 July 2022. Only Hudgells' clients and the Post Office were represented on that hearing. That might be thought unsatisfactory, where the overriding requirement is that compensation paid be administered indifferently. There appears to be a preferential class. That is both unfair and objectionable.

The intentional denial of information/material to which convicted defendants were entitled in law

16.

Restricted Because of the novelty of the point, it is not developed, but it is nonetheless of possible importance. What follows is an outline/is schematic.

17. It is trite that the gist of the tort in malicious prosecution is the impropriety of the motive. The injury compensated by recognition given in law to the tort, when established, is that caused by the proceedings – hence, for example, the head of loss for deprivation of liberty – though this is not a necessary ingredient of the tort. The gist of the tort is malice, not damage (and it is not necessary, for example, for the 'prosecution' (civil (Willers v Joyce [2016] UKSC 43) or criminal,) to be successful).

18. But there is another important right to which the tort of malicious prosecution gives no effect in damages, and that is a right guaranteed by the state, the violation of which is a salient, it might be said the defining feature of the Post Office scandal. Shortly stated, it is this – a convicted defendant has a right, recognised and guaranteed by statute, to the hearing of an appeal within a reasonable time. That is part of the Article 6(1) right under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Importantly, violation of the right to a hearing within a reasonable time is "irretrievable": per Lord Rodger AG Reference No 2 of 2001 [2003] UKHL 68 at [151].

19. The reason why the guarantee of a hearing within a reasonable time appears in Article 6(1) is because prejudice is presumed to arise if the guarantee is violated. In Stögmüller v Austria 1 EHRR 155, 191, para 5 the court said that the aim of article 6(1) is to protect

all parties to proceedings against excessive procedural delays, and that in criminal proceedings especially it is designed "to avoid that a person charged should remain too long in a state of uncertainty about his fate": Dyer [78] Lord Hope. Underlining supplied. The Inquiry is invited to accept that continuing uncertainty causes stress and anxiety.

20. The relevant period of time period begins when the person is charged and ends at acquittal or conviction, even if this decision is reached on appeal: Wemhoff v Germany (A/7) [1976] 6 WLUK 71 and Eckle v Federal Republic of Germany [1982] 5 EHRR 1, applied Dyer v Watson [2004] 1 AC 379 [76], [90].

21. It almost does not require stating that the 19 years for Tracy Felstead's appeal against her conviction to be heard and the 14 years for Janet Skinner's appeal against conviction to be heard was an inordinate and unreasonable time. Their Article 6 rights were incontestably violated by the delay. No one can suggest otherwise.

22. Where the delay to the hearing of an appeal is unreasonable, it is for the state to come forward with explanations: Dyer [52] per Lord Bingham, [76] per Lord Hope. The Court of Appeal was singularly uninterested in this important circumstance - and requirement - in its judgment in Hamilton v Post Office Ltd [2021] EWHC 577. No formal explanation has ever been provided. That might be thought unsatisfactory given the effluxion of time, in many instances, between a person having been charged and the April 2021 appeals. (In Tracy Felstead's case, 20 years.)

23. Throughout the period of the subsistence of their convictions, Tracy Felstead's and Janet Skinner's lives (and, of course, the lives of others with similar experience) were blighted by their convictions, that affected every aspect of their lives in ways that plainly went beyond pecuniary loss (though inevitably including this). The burden for Tracy Felstead of waking up every day for almost 20 years as a convicted thief, having been wrongfully convicted on incomplete and misleading evidence from the Post Office and imprisoned for an offence she did not commit, is plainly almost unimaginable and is unbearable to contemplate. It might be salutary for the many lawyers in these proceedings perhaps to reflect on that. That it was the result of the

intentional concealment by the Post Office and those who advised it of known flaws in the Horizon system, is grotesque.

24. The Post Office acted intentionally in a way calculated to deprive defendants of their right to appeal. More particularly, it did so with the same improper motive that lay behind the original prosecution, namely the commercial imperative to protect Horizon.

25. It is of course right that the UK has not provided a remedy in damages for breach of the Article 6 right simpliciter, unlike, say, the Federal Republic of Germany. But that is not a reason why the law should not recognise and provide relief for the deliberate violation and denial by a prosecuting authority of the substantive right to an appeal within a reasonable time, where the violation is for an improper purpose. It would be wholly consistent with principle and authority for the law to do so.

26. For present purposes, it may be taken as a working hypothesis that the shame and trauma of remaining a person convicted of a criminal offence, of which one is innocent, is distinct and separate from the injury caused by the prosecution itself, where the means and material for appealing that conviction were at all material times in the possession of the prosecuting authority but intentionally withheld/suppressed by it.

27. It is perhaps unsurprising that this combination of features and circumstances is not considered in the books or in the authorities. So far as is known, the Post Office's conduct was unprecedented, qua its status as a prosecuting authority. It may well be that it will not arise again and may thus remain sui generis. Rarely will a prosecuting authority have a direct commercial interest in inhibiting and frustrating the prospect of a successful appeal by a convicted defendant. The Post Office had such an interest and actively pursued it. That interest was its commercial interest and purpose of protecting Horizon against effective challenge and its known unreliability from being exposed.

28. The commercial risk to the Post Office, both in its prosecutions and in any successful appeal, was that, if Horizon itself and bugs in it was identified as the cause of

unexplained "shortfalls", its entire business model was at risk, for it would be/become apparent that the Post Office was unable to distinguish between system error/bugs and fraud. That in fact was the reality and the truth of the position as the Post Office knew it to be, or should be taken to have known it to be, from 2013 at the latest and almost certainly long before that. It was an issue of existential importance – impliedly recognised by leading counsel for the Post Office at the outset of the Common Issues trial before Fraser J in 2019.

The seriously skewed Cartwright King LLP "sift review" of 2013-2014 – preventing appeals

29. Part of the Post Office's scheme to protect against successful appeals against criminal convictions, secured by the Post Office on its 'Horizon' prosecutions, was the flawed and seriously skewed Cartwright King LLP "sift review" of 2013-2014.

30. The Inquiry will in due course require to consider the circumstances of the extraordinary "review" by the solicitors firm Cartwright King LLP of hundreds of Post Office prosecutions that took as its start date 1 January 2010. The review was first revealed by the Post Office on 30 November 2020, shortly after the first Court of Appeal directions hearing on the first tranche of 42 appeals referred by the CCRC. That review, it was then explained, was prompted by the July 2013 (first) "Clarke Advice".

31. The CCRC appear to have been unaware of the Cartwright King sift review. There appears to be no reference to the firm or the review by the CCRC in its 2020 "Statement of Reasons" (s. 9 reference). The fact of the review might be thought to have been a relevant consideration for the CCRC – though its fact would have revealed its occasion, viz the July 2013 "Clarke Advice" (and the cat, as it were, would have been out of the bag).

32. Though stated to have been an independent review, Cartwright King had frequently acted as prosecuting agents for the Post Office in its prosecutions. The review it conducted was, accordingly, not independent. (It is understood that Second Sight had been insisting, from about 2013, upon a properly independent review of Post Office prosecutions. That did not, obviously, happen.)

33. It is now known (revealed in 2022 by the Post Office in response to a FOI request) that the terms of the Cartwright King review from 2013 were provided to Cartwright King by Mr Brian Altman Q.C., the Post Office's lead counsel on the appeals referred by the CCRC in 2021. Mr Altman had considered the July 2013 Clarke Advice, and advised the Post Office both as to its reasoning and conclusions. Further, he had provided advice, under a "General Review" of October 2013, in connection with the Post Office's disclosure obligations owed to convicted defendants. Convicted defendants did not receive disclosure of material to which by law they were entitled.

34. Mr Simon Clarke of Cartwright King reviewed Mrs Misra's prosecution, as part of the Cartwright King sift review in January 2014. His review was both remarkable and unsatisfactory:

a. In his written opinion he noted that the review was unusual in that, in undertaking it, he was not provided with the prosecution file, only the transcripts of the trial. Mr Clarke observed this to be an unusual circumstance. Accordingly, he did not have sight of, for example, Mr Jenkins's witness statements in which Mr Jenkins, among other things, stated that remote access was not possible without Horizon branch operator knowledge. Shortly beforehand, Second Sight in 2013 had provided its Interim Report stating that there was a clear conflict of evidence on the issue of 'remote access' – a facility that the Post Office went to strenuous lengths and great expense (per Fraser J), until just before the Horizon Issues trial in 2019, to falsely deny.

b. Mr Clarke would have read that Mrs Misra's trial was the first trial in which Mr Jenkins had given live oral evidence. That is because Mr Jenkins said so. Mrs Misra's trial was accordingly of particular importance – especially set against Mr Clarke's July 2013 Advice and his evaluation of Mr Jenkins as a prosecution witness. It appears that, in all other cases in which Mr Jenkins gave evidence, his evidence was unchallenged, presumably on the basis that there was no basis for doing so.

c. Although Mr Clarke had concluded, in July 2013, that Mr Jenkins was a wholly unreliable witness who had put the Post Office in breach of its duty to the court as prosecutor, in every one of the 5 cases that he had then reviewed, and, further, he had advised that Mr Jenkins was a witness the Post Office should not use again, Mr Clarke, for reasons that remain opaque, did not consider that those circumstances might have any bearing on the reliability/truthfulness of evidence given by Mr Jenkins at Mrs Misra's trial or otherwise engage with the possible safety of her conviction. Mr Clarke did not address the question (or seemingly turn his mind to) why Mr Jenkins gave serially incomplete evidence of his knowledge of Horizon bugs, in particular, given Mr Jenkins was an "architect" of Horizon and employed by Fujitsu, and thus was not (was anything but) an independent expert witness. He concentrated heavily on the limited questions that he had been instructed to consider: disclosure of the Second Sight Interim report and the Helen Rose report.

d. The principal questions that Mr Clarke was required to consider under the review he was required to undertake of Mrs Misra's prosecution was whether (1) the Second Sight Interim Report of 2013 and (2) the 'Helen Rose report' of 2013 should be disclosed to Mrs Misra. (Those issues are peculiar – and arguably simply wrong for their purpose, given the Post Office's and Mr Jenkins's knowledge of Horizon bugs and his known unreliability as a witness.) Mr Clarke concluded and advised the Post Office that those reports should not be disclosed to Mrs Misra. The Second Sight Interim Report raised, inter alia, the issue of the fundamentally important Receipts and Payments mismatch bug, the most important of the bugs considered by Mr Justice Fraser in 2019. (The known effects of the Receipts and Payments mismatch bug as recorded in the September memorandum undermined and contradicted the way the prosecution case was put at Mrs Misra's trial. The memorandum was not disclosed either in 2010 nor in the Cartwright King 2014 review.)

e. In advising on the non-disclosure of the Second Sight Report and the Helen Rose report, Mr Clarke in 2014 expressly relied upon the advice as to the Post Office's disclosure obligations that had been given by Mr Brian Altman Q.C. in his October 2013 "General Review".

35. As noted, the supervisory role of Mr Altman Q.C. in connection with the Cartwright King sift review was very recently revealed by disclosure of the advice given by Mr Jonathan Swift Q.C. (as he then was) to Tim Parker, chair of the Post Office in 2016. That advice was not shared by Mr Parker with the Post Office board, on advice, it seems, from the Post Office's General Counsel as a result of a failure to understand the law of legal privilege.

36. It is unexceptionable that failing to ask the right questions will typically not elicit purposeful answers of utility.

37. The Cartwright King review, by failing to address the correct questions, unsurprisingly seems not to have given rise to a single appeal, successful or otherwise. That will not have been a disappointing outcome of the review for the Post Office.

38. It is submitted that the outcome was intentional and engineered by the framework for review provided to Cartwright King. Otherwise, it is almost impossible to understand how Mr Clarke can have arrived at the conclusion that his and the Post Office's knowledge of Mr Jenkins as a witness, and his knowledge of bugs in Horizon and their effects, had no possible bearing on the safety of Mrs Misra's conviction – that being, it is submitted, the dominant purpose of any review of a prosecution by a prosecuting authority. It is almost bizarre, when the occasion for the Cartwright King review was the July 2013 Clarke Advice.

39. The contrast between the complete failure of the Cartwright King 2013-2014 review, of hundreds of Post Office criminal prosecutions, to generate a single appeal (regardless of success) with the extraordinary outcome of the Court of Appeal hearing in March 2021 (93% of the appeals were successful) is so striking that it is difficult to avoid the inference that the Cartwright King review of prosecutions was intended to

fail to throw up - i.e. to preclude - an appeal. The wrong issues were self-evidently considered under the review.

40. In 2020 the Post Office by its counsel accepted that the Clarke Advice of July 2013 was disclosed (November 2020) pursuant to the duty of disclosure at common law identified by the Supreme Court as explained by Lord Hughes in R (on the application of Nunn) v Chief Constable of Suffolk [205] AC 225, [2014] UKSC 37. It follows that material in the advice was material disclosable to convicted defendants as of right, not subject to conditions that the Post Office qua prosecutor might choose to impose in giving its disclosure.

41. Though perhaps for argument, it is submitted that the injury and harm caused by a prosecutor for an improper purpose intentionally denying to a convicted defendant disclosable material reasonably necessary to challenge the safety of a conviction, that results in the violation of the guaranteed Article 6 right to hearing of an appeal within a reasonable time, is a separate wrong from the wrong done by malicious prosecution. That much may perhaps be obvious.

42. It may be said that the damage, occasioned by a conviction subsisting when properly it could have been appealed, but for the wrong, overlaps with damage caused by wrongful prosecution. That may indeed be the case. But both conceptually and causatively the damage is different. After 2013 Mrs Misra's life and that of her family was blighted by the Post Office withholding inter alia information in the 2013 Clarke Advice. Any reasonable lawyer properly directing themselves as to the law would have recognised the possible implications for the safety of Mrs Misra's conviction of material in the Clarke Advice. Mr Altman Q.C. rightly conceded in March 2021 that her prosecution represented the high point of Post Office prosecutions. Subsequent to its receipt of the October 2013 "General Review", the Post Office largely ceased prosecuting for Horizon shortfalls from 2014, as explained by Mrs Paul Vennells in June 2020 to Mr Darren Jones M.P. as Chair of the BEIS Select Committee.

43. It is submitted that damages for the malicious violation of the Article 6 right to an appeal within a reasonable time is an intentional tort for which damages should be recoverable.

44. Further, it is a head of claim that properly should support aggravated (subject to the requirement that other damages are insufficient to compensate) and, in particular, exemplary damages, independent of those heads being available in respect of malicious prosecution. As noted, it is a singular circumstance because prosecuting authorities rarely have direct commercial interests in the outcome of an appeal. Similarly there is an obvious interest in the court marking the abuse of state power inherent in the denial by a prosecuting authority of a convicted person's right to appeal. Doing so exhibits a mendacity and abuse of power of a high order.

45. The Post Office's wilful obstruction of scrutiny, and its campaign to prevent its abuse of power being revealed, is a profoundly aggravating circumstance, because of the extraordinary and inordinate delay thereby caused - such that the Post Office almost 'got away with it'.

46. Those who were acquitted, but destroyed, financially, reputationally, mentally and physically in the process, could not begin to see any prospect of redress until former postmasters such as Seema Misra and Janet Skinner were brought together by the industry and effort of Alan Bates to launch the GLO litigation. It must have seemed a remote and unwelcome contingency for the Post Office and those advising it, given the procedural hurdles that the civil law places in the path of those wishing to bring group claims. The Post Office, it will be recalled, opposed the bringing of a group claim. Chief Master Fontaine permitted a GLO in the face of the Post Office's objections.

The Historical Shortfall scheme. The circumstances of Mr Sathyan Shiju

47. The circumstances of Mr Sathyan Shiju are troubling, both in absolute terms and also because of what they reveal about problems with the HSS scheme established by the Post Office pursuant to the terms of the 2019 settlement of the GLO litigation. The HSS scheme is for those Post Office victims: (1) not convicted of offences and (2) not having been party to the GLO litigation.

48. For the wider implication, it is necessary to outline Mr Shiju's circumstances. Mr Shiju, from 2001, was postmaster of a branch post office at 54 The Broadway, Tolworth, Surbiton, Surrey KT6 7HR. He had another business, a grocery store, very close by. He was in his own view successful, comfortably-off, and owned two cars. He was entrepreneurial and owned two properties in Croydon.

49. Following a branch audit in 2006, Mr Shiju was told that there was a Horizon shortfall of £20,287.66. Mr Shiju says that he was told that he had to repay the money immediately. He was interviewed under caution at length by post office investigators in Croydon. He says that he was told that, in the absence of immediate repayment by him of the alleged shortfall, he would be prosecuted and would be imprisoned. In a state of panic and distress he wrote a cheque the same day for £15,000. He had no funds to pay but raised funds from his family and friends. He has explained that he wrote a further cheque for the balance of £5,287.66 on 23 June 2006.

50. Mr Shiju says he was immediately suspended by the Post Office from his branch and was subsequently dismissed as postmaster. His contract with the Post Office was summarily terminated in early September 2006.

51. Not long after payment to the Post Office was made by him, Mr Shiju says that he was repaid by the Post Office the sum of £13,910.40. It was explained that the Post Office had found some of the money that was said to be missing in the alleged shortfall. Mr Shiju says that he had a meeting with his area manager, Ms Elaine Ridge, and another lady whom he only remembers as 'Angela'. They told him that, despite what had happened, he would not be reinstated at his branch.

52. The loss of his Post Office business and the allegations made against Mr Shiju have had a devastating and long-term impact upon Mr Shiju and his family. He says that in his locality and community his reputation was utterly destroyed. His retail business collapsed as did his grocery store. He lost the whole of investment (some £60,000) in his Post Office business. Unable to maintain mortgage payments, Mr Shiju's properties were re-possessed. He says that he became acutely depressed and suicidal. He attempted to kill himself. His wife and daughter removed him for his safety to his family in India, where he was cared for.

53. Mr Shiju says that his wife's extended family believed that he must have been taking money – because it was the Post Office that suspended him, a reputable national institution. Mr Shiju has had no contact with his wife's side of the family since returning to the UK from India in 2015. The family relationship has been wholly sundered by his experience. When his daughter was married, his wife's family did not attend the wedding. The impact of this upon him and upon his family is profound and distressing.

54. Mr Shiju's daughter was an exemplary student at her school. She was in the lower sixth having achieved a large number of A* GCSEs. She was expecting to go to university. She withdrew from education in the UK to support and care for her father in India. She never returned to full-time education with the consequent curtailment of her educational aspirations and professional ambitions.

55. In July 2020, upon his application, Mr Shiju was accepted into the HSS compensation scheme.

56. In October 2020 Mr Shiju received £10,000 from the Post Office by way of interim payment.

57. The HSS scheme on several occasions wrote to Mr Shiju assuring him that, <u>if further information about his claim for compensation was necessary/required for his claim to be processed, he would be asked for it</u>.

Derisory sum offered under the HSS scheme

58. In February 2022 Mr Shiju was offered a sum slightly in excess of £2,000 in full and final settlement of all his claims under the HSS compensation scheme. He rejected the offer.

59. The offer was been explained to have been made on the basis that Mr Shiju had provided insufficient evidence of his losses. That explanation is at odds, if not a statement of the obvious, with the statement from the scheme that if more evidence was necessary in processing his claim he would be asked for it.

60. Mr Shiju was fortunate in having engaged the interest and support of his constituency Member of Parliament, Wes Streeting M.P..

61. Towards the end of May 2022, Mr Shiju attended a "Good Faith Meeting" with the Post Office and its solicitors, Herbert Smith Freehills. Mr Streeting's office manager attended in his place. The meeting was chaired by a barrister employed by HSF.

62. In September 2022 Mr Shiju came to see the writer in conference, accompanied by his daughter. It is the first time that he had consulted a lawyer about his circumstances.

63. On the information and instructions provided by Mr Shiju, his claims are extensive, substantial and complex. (They are likely to be incapable of being evaluated without expert accounting, valuation and medical assistance.) The same is apparent from even the most cursory acquaintance with Mr Shiju and his circumstances, as he recounts these. The disparity between what is apparent from his outline of his circumstances, and the derisory offer made a year and-a-half after his acceptance into the HSS scheme, should be a matter of concern.

Post Office repayment of 68% of the alleged "shortfall" for which Mr Shiju lost his Post Office branch, his business and his reputation

64. Of likely interest to this Inquiry is the fact that, of the original alleged £20,287.66 shortfall - that triggered Mr Shiju's suspension from his Post Office branch, and caused the collapse of his business, the loss of his reputation in his community, the destruction of his family relationships, his consequent attempted suicide and his subsequent mental illness - £13,910.40 was said to have been "found" by the Post Office quite soon after his suspension. Short of being a quantity of cash (not suggested) the inescapable inference is that the original alleged shortfall was found to have been wrong. <u>It was wrong by 68.6%</u>.

65. There are plainly important questions raised as to what the Post Office did with that information and what it suggested about apparent Horizon "shortfalls" and the degree of confidence/assurance that the Post Office could place upon "shortfalls" identified

on branch "audits"- that typically provided the platform for long hostile interrogation and threats by the Post Office and its investigators against postmasters.

66. In that regard, Detica Net Reveal, a consulting division of BAE Systems, was later in October 2013, after a lengthy and exhaustive review of Post Office systems (that it is unclear was disclosed in the GLO litigation – though there is passing reference to the expense of Detica in the Horizon Issues judgment) concluded that the Post Office had the greatest difficulty in reconciling data from disparate sources. Detica expressed its view that Post Office systems (note – not Horizon) were in its estimation "not fit for purpose" in modern retail environment. Had that report been disclosed in the GLO litigation it is extraordinary that the claimants' diligent and able lawyers overlooked the contents of what was a substantial (and expensive) report - that must have been considered at board level within the Post Office. It will be seen that the Detica report was more or less contemporaneous with the Post Office's change in its prosecution strategy from 2014.

Required independence of the HSS scheme – Appearance of Bias?

67. Perhaps more importantly, the exiguous nature of the offer made to Mr Shiju in the HSS scheme raises a serious question over the independence, and the perceived independence, of Herbert Smith Freehills in its role in overseeing the HSS scheme.

68. It is submitted that, subject only to the issue as to whether it has any evaluative role in the assessment of compensation in which it exercises a discretion, HSF is unable to escape the appearance of bias. (If there is no discretion capable of being exercised by HSF, it is unlikely the issue can arise.)

69. The foregoing circumstance engages with an issue of legal principle. In the HSS compensation scheme, the manifest fundamental requirement is that the scheme be administered, where there is any discretion to be exercised in making a decision, in a way that is demonstrably independent and even-handed. The reason for this is that independence and even-handedness are necessary to command the confidence of participants in/applicants to the HSS scheme, and therefore public confidence.

70. The test for apparent bias is that set out in Porter v. Magill [2002] 2 AC 357 at 494, [102]-[103], which incorporates the approved modification to the R v. Gough [1993] AC 646 test adumbrated by Lord Phillips in In re Medicaments and Related Classes of Goods (No. 2) [2001] 1 WLR 700. The question is whether a fair-minded and informed observer, having considered the facts, would conclude that there was real possibility that the decision-making body was biased.

71. The question whether a fair-minded and informed observer would conclude that there was a real possibility that the decision-making body was biased cannot be answered without looking at the facts. The question whether a decision-making body was biased, because it had pre-determined the issue (i.e. fettered its discretion), is essentially a question of law to which there can only be one correct answer. To answer the question incorrectly is an error of law, open to correction by an appellate court: Gillies v. Secretary of State for Work & Pensions (Scotland) [2006] UKHL 2 at [6]-[7].

72. The fair-minded and informed observer is to be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters: Gillies v. Secretary of State for Work & Pensions (Scotland) [2006] UKHL 2 at [17].

73. The fair-minded and informed observer would of course know that Herbert Smith Freehills:

a. Acted for the Post Office in its unsuccessful attempt to appeal the Common Issues judgment of Mr Justice Fraser Bates and ors v Post Office Ltd No. 3 (Common Issues) [2019] EWHC 606 QB (refused by Coulson LJ).

b. Acted for the Post Office in the settlement of the GLO litigation in December 2019.

c. Acted for the Post Office in successfully resisting an application for judicial review of the HSS scheme: Sidhpura, R on the Application of v Post Office Ltd (2021) EWHC 8665 Admin.

d. Now acts for the Post Office in (adversarial) settlement of the preserved malicious prosecution claims.

e. Acts in this Inquiry for Post Office witnesses.

74. It is submitted that relevant facts, in the present circumstances, are the history and nature of the legal proceedings in which the Post Office has engaged in defending claims against it over time and the role of Herbert Smith Freehills in representing the Post Office in defending those claims, seeking to appeal judgments against the Post Office, and its vigour in settling the GLO claims, and thereafter in representing employees and officers and former employees and officers of the Post Office who may be vulnerable to criticism.

75. It is still not entirely clear when HSF was first instructed on behalf of the Post Office in connection with the Bates GLO litigation. It is not known whether HSF performed a 'shadowing' role prior to their formal engagement. This merits clarification. It is not known, for example, whether HSF had any role in the recusal application made to Fraser J: Bates and ors. v Post Office Ltd [2019] EWHC 871 QB. (It is not thereby suggested that it had – but HSF's role for the Post Office increased over 2019.)

76. The requirement for observable independence, and the way independence may be affected, is thus informed by and/or takes its measure from the foregoing circumstances and, in particular, the vigour and robustness with which HSF represented and now represents its client's continuing interests and those of its officers, former officers and employees and former employees.

77. It might be thought a curiosity, if not more than that, that HSF purports to exercise and independent oversight role in connection with the HSS scheme while simultaneously performing a partisan and adversarial role in connection with the Post Office preserved malicious prosecution claims and their settlement.

78. Mr Kevin Hollinrake M.P., formerly Chair of the APPG on Fair Business Banking, now Minister Hollinrake M.P. of BEIS, On 22 June 2020 wrote to Mr Paul Scully

M.P., then Minister for Small Business, Consumer and Labour Markets and Minister for London. Mr Hollinrake wrote:

> "The solicitors that the PO has brought in to deal with historic cases are Herbert Smith Freehills, the same firm who were involved in the cover up of the fraud at Lloyds HBOS and who also went on to advise on the establishment and operation of the subsequent Lloyds Bank Customer Review, the damning FCA commissioned review of which described it as "discriminatory", "flawed" and "an unacceptable denial of responsibility". The Post Office must review this decision and replace them with a firm not connected to the previous legal action."

79. On 13 July 2020 Paul Scully M.P., replied:

> "Finally, with regards to Herbert Smith Freehills being brought in to work on the Historical Shortfalls Scheme, it is for the Post Office to decide on its legal advisors. POL decided to change its advisors to Herbert Smith Freehills in the latter stages of the litigation and this has resulted in the settlement, good progress on resolving outstanding claimant issues and the successful launch of the Historical Shortfalls Scheme." (Underlining mine.)

80. Mr Scully's response does not address the issue of (a) whether HSF is able to exercise any discretion in connection with the administration of the HSS scheme and (b) if so the requirement for observable independence. The points were squarely raised by Mr Hollinrake M.P..

81. On 7 July 2020 Mr Hollinrake M.P. further expressed his profound misgivings about the independence of HSS scheme in an email to Mr Darren Jones M.P., then as now, Chair of the BEIS Select Committee:

> "… The Historic Shortfall compensation scheme, both in inception and intended operation, shows all the signs of being a seriously flawed scheme, if anything, even more unsatisfactory than the Lloyds Bank Customer Review (Griggs Review) scheme set up to compensate the victims of the Lloyds Bank/HBOS Reading fraud. Following three years of objection and outcry from the APPG, SME Alliance and victims, this

scheme is now having to be completely rebuilt and restarted by Sir David Foskett following the Cranston Review. As I said in my previous email, Herbert Smith Freehills acted on behalf of Lloyds during their years of denials of fraud and the discrediting of whistleblower, Sally Masterton, and were involved in elements of the establishment and operations of the Griggs Review.

The "Historic Shortfall" compensation scheme was established and will be operated by the Post Office with the assistance of Herbert Smith Freehills LLP in the wake of the settlement of the Bates litigation in which the trial judge, Sir Peter Fraser, concluded that the Post Office's Horizon system had been unreliable since its introduction twenty years ago. It was liable to cause the kind of shortfalls at branch terminals experienced by some 550 claimant sub-postmasters and sub-postmistresses and former sub-postmasters and sub-postmistresses - as alleged by them in that group litigation. Further, the judge concluded that witnesses for the Post Office set out to mislead him in their evidence. In other cases (i.e. not the case he was immediately called upon to decide), he concluded that important evidence given by witnesses from Fujitsu in support of the Post Office's claim/prosecution was so misleading as to merit his referring them to the Director of Public Prosecutions for possible criminal investigation.

… [omitted text]

There are a number of aspects of the Historic Shortfall Scheme that appear to make it unsatisfactory and give every indication of the scheme failing in its purpose:

1. It lacks independence and doesn't pretend to independence. An elementary aspect of natural justice is that claims be determined in a way that is disinterested – otherwise the complaint is that, if not independent, the person acts 'as a judge in their own cause'. This usually requires that the person making the determination be not only independent in fact but, importantly, that they be seen to be independent. These requirements do not begin to be satisfied under the Historic Shortfall scheme. I can see no sensible basis for it being

> suggested otherwise. Without more, this makes the scheme being flawed and in hindsight will also be judged to be flawed. I welcome Nick Read, Group Chief Executive Officer, statement that "We are resolving past events fairly where we got things wrong", but this has all the hallmarks of the promises made at the start of the Griggs Review. Even if awards are fair, allowing any entity to preside as 'judge, jury and executioner' over its own crimes will never be ultimately considered to be such by many of those whose cases are considered by the process. The fact that Herbert Smith Freehills LLP defended the Post Office in the legal action and will now assist and advise on the compensation scheme will only add to the inevitable future 'cries of foul'. …".

82. Under the terms of the 2019 settlement deed, claimants in the GLO litigation were precluded from continuing to use Freeths LLP as their solicitors.

A leopard does not change its spots – Mr Vijay Parekh and the Post Office's failure to give restitution

83. Mr Parekh was the postmaster of a branch post office at 78 High Road, Willesden, London, NW10 2PX. At the time of his prosecution by the Post Office, Mr Parekh had been a postmaster for four years, since 2006.

84. Mr Parekh had his conviction quashed by the Court of Appeal in 2021 but, unusually for that tranche of appellants, he had not been a claimant in the GLO litigation. His then trustee in bankruptcy would not permit him to join – albeit he was originally named in the claim form. (Mr Parekh's claims are not, accordingly, a preserved malicious prosecution claim (i.e. 'final compensation') but are at large.)

85. Mr Parekh was in his own view successful and comfortably-off. His post office was a substantial post office, to his recollection it had 7 Horizon terminals. He employed a number of staff.

86. Following a Post Office 'branch audit' on 30 April 2009, he was interviewed in connection with an alleged Horizon shortfall of £74,880. On that day he was suspended from his post office business and excluded from his post office branch. He was never to return.

87. In 2010, the Post Office prosecuted Mr Parekh for the alleged theft of £74,880. That was shortly after the Post Office/Fujitsu meeting and memorandum concerning the

Receipts and Payments mismatch bug,[1] the most important of the bugs considered by Fraser J. in his Horizon Issues judgment: Bates and ors. v Post Office Ltd (Horizon Issues) No 6. [2019] EWHC 3408 QB paragraph [427] ff and especially [428]. The Receipts and Payments mismatch bug was the bug that was discussed at length between the Post Office and Fujitsu, together with its known consequences, in September 2010. That was immediately before the successful but wrongful Post Office prosecution of Seema Misra for theft, to which she had pleaded not guilty, but of which she was convicted in October 2010.

88. There was no evidence to support the Horizon data relied upon by the Post Office at Mr Parekh's prosecution and there was no investigation by the Post Office into the explanations given by Mr Parekh at his interview. "[T]here was no investigation [by the Post Office] .... into the root cause of the shortfalls", per the Court of Appeal, Hamilton and Ors. v Post Office Ltd [2021] EWCA Crim 577, paragraph [264].

89. On 8 November 2010, at Harrow Crown Court, upon advice, Mr Parekh pleaded guilty to theft. The legal advice to plead guilty to a serious offence of dishonesty, an offence Mr Parekh knew he had not committed, and his subsequent imprisonment, effectively broke Mr Parekh, who was President of a Gujurati community. He considered himself to be, and was regarded by others, as a pillar of his local community. On 10 January 2011 Mr Parekh was sentenced to 18 months' imprisonment. Mr Parekh appealed his sentence. The appeal was (inevitably) dismissed (201100665 A6).

90. It will have been well known by all concerned at the time of Mr Parekh's prosecution that the reliability of Horizon had been put in issue in Mrs Misra's case, but, to use Mr Jarnail Singh's (the Post Office's senior supervising lawyer's) expression, the prosecution "destroyed" her defence.

91. Mr Parekh's conviction was quashed by the Court of Appeal on 23 April 2021, the court holding that he had not received a fair trial, for non-disclosure by the Post Office (first category abuse of process), and that the Post Office had engaged in conduct likely to undermine the criminal justice system and/or public confidence in it, such that Mr Parekh's prosecution was an affront to the conscience of the court (second category abuse of process). The court said that at the time of his prosecution "... Any reasonable prosecutor, concerned with the interests of justice, would have had questions about Horizon at the front of its consideration" and commented that

[1] Receipts and payments mismatching was a known problem with "Legacy Horizon" long before 2010 – see the 'Callendar Square' Bug etc..

the "[Post Office] appears to have learned nothing from any aspect of Mrs Misra's case": Hamilton v Post Office Ltd [2021] EWCA Crim 577, paragraph [265]. (The Post Office and its advisers had, on the contrary, learned that it could "destroy" (Jarnail Singh) challenges to the integrity and asserted reliability of Horizon by withholding disclosure.)

Failure to repay money paid over to the Post Office – failure to give restitution

92. Between his conviction and sentence in January 2011, Mr Parekh with his family raised the money that he was falsely alleged to have stolen, and repaid it to the Post Office in the hope (vain as it turned out) that doing so might avert a custodial sentence. The Court of Appeal refer to this at Hamilton and Ors. v Post Office Ltd paragraph [262].

93. The Inquiry is likely to be concerned that since the date of Mr Parekh's conviction being quashed on 23 April 2021 and the end of September 2022, the Post Office made no attempt of any kind either to investigate sums paid over by Mr Parekh at the time of his conviction, still less has it taken any steps, that properly it ought to have taken, to repay those monies.

94. On 5 October 2022 the Post Office's solicitors were asked to confirm (1) whether or not the Post Office had any intention of repaying the £74,880.75 paid over by Mr Parekh in 2010 and (2) why no attempt had been made in the 17 months since Mr Parekh's conviction had been quashed to repay the money.

95. At the time of writing, the Post Office is yet to make any substantive proposal for the repayment of the £74,880 paid over by Mr Parekh in 2010.[2]

96. That is profoundly unsatisfactory. It is unlikely that Mr Parekh is alone in his experience.

97. The Post Office was first asked about sums paid over to it, in respect of which there existed a duty to repay, entirely outside the settlement of the GLO litigation and its settlement, by Ms Flora Page of Counsel in February 2022. That was during the course of this Inquiry and the question was raised in connection with sums paid over by/property taken from Ms Page's clients in this Inquiry pursuant to confiscation orders wrongly obtained by the Post Office. It appears that no thought or

[2] Today (1st December 2022) after these submissions were finalised and were about to be filed, the Post Office has offered to repay the entire sum with interest.

consideration of any kind had been given by the Post Office before then to such sums and the duty to repay these, once convictions had been quashed. The Court of Appeal, for reasons that are unclear, made no consequential directions or orders in connection with confiscation orders that had been made by the courts where convictions had been secured the Post Office. (In fairness to the Court of Appeal it is not clear that any such consequential orders or directions were sought on behalf of the appellants.) Giving the lie to the Post Office being a reformed institution

98. The importance of Mr Parekh's experience and the Post Office's unwillingness to repay (give restitution of) sums it has unlawfully received, is that it gives the lie to the proposition that the Post Office is now a different institution, determined to turn its back on its past conduct and to behave differently. It appears that it will hang on to (keep) money that it has unlawfully obtained, unless actively pursued for its repayment.

99. It is accepted that for the Post Office £74,880.75 would not represent even a rounding error in its accounts, but for most ordinary people it is a substantial sum of money. Further, it was an amount for the alleged loss of which the Post Office was willing to see innocent people imprisoned for substantial periods and to lose their livelihoods, their health and homes.

Mr Castleton's experience – Interim payment by BEIS

100. Mr Castleton remains an undischarged bankrupt. His bankruptcy was precipitated by the costs order of £321,000 made against him in the High Court by Judge Richard Havery Q.C. in January 2007 on the Post Office succeeding in its civil claim for £26,000. In 2021, Mr Castleton was about to obtain the annulment of his bankruptcy. His trustee (of Moore) had paid over to him the modest balance standing to his account in the estate, him having no creditors. Steps towards annulment were suspended and a joint trustee (of Grant Thornton) was appointed.

101. Following announcement that the government would compensate claimants in the GLO litigation, Mr Castleton became eligible for payment of an interim award.

102. From August 2022 there were discussions about how an interim payment would be dealt with by the joint trustee.

103. Both Freeths LLP – who were appointed to administer payment of interim payments to those eligible, and who were retained by Mr Castleton for this purpose (there being no other way of obtaining an interim payment from BEIS), and, separately, BEIS sought confirmation that an interim payment would be paid over to Mr Castleton. The joint trustee (of Moore and Grant Thornton) was unwilling to provide that confirmation.

104. There followed extensive discussions, in which Freeths expressed the view that, despite being appointed on Mr Castleton's behalf as his solicitors for the purpose of administering the interim compensation amounts payable, they could not actively engage with the trustee because they had not been put in funds (by BEIS) to do so.

105. BEIS was unable to make headway with the trustee. BEIS were not willing to make any payment over to Mr Castleton and were similarly unwilling to pay the sum over to the trustee, in the absence of clarification as to how the sum would be dealt with on behalf of the estate.

106. It was common ground:

a. That Mr Castleton's estate had no outstanding creditors; and

b. That he was entitled as of right, his debts having been discharged, to seek annulment of his bankruptcy.

Despite the sum being in law an ex gratia payment (and therefore not recoverable at the suit of the estate) it was not accepted that the sum be paid either directly to Mr Castleton or, without deduction, to him if first paid over to the trustee. A form of disclaimer on behalf of Mr Castleton was proposed and submitted to the trustee (and to Freeths and to BEIS for their comment). The trustee demurred and responded by proposing Mr Castleton should seek annulment of his bankruptcy - a process that will likely take months to finalise.

107. Mr Castleton was left without payment of the interim sum to which BEIS agreed he was in principle entitled.

108. In the face of the apparent log-jam, the trustee was advised in a letter, dated 15 November 2022, that the issue would be raised on Mr Castleton's behalf in this Inquiry at the compensation hearing fixed for 8 December 2022.

109. On 23 November 2022 the trustee confirmed the sum in interim compensation from BEIS could be paid over to Mr Castleton by BEIS directly and without any deduction. On 30 November 2022 interim compensation was received by Mr Castleton. It is the first significant amount he has received from the Post Office in connection with the wrongful (malicious) civil claim brought against him in 2006.

110. Mr Castleton has been waiting for more than 16 years to receive compensation for the grievous harm inflicted by the Post Office upon him and his family by the Post Office and Fujitsu.

111. What emerges from this short, and necessarily simplified, summary, is that the Inquiry's close interest in the payment of compensation is having a salutary effect.

112. The Chair is very respectfully invited to maintain interest in the issue of compensation, that is of overwhelming importance to those afflicted by the Post Office's actions. That interest to date has had an animating and energising effect.

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