IN THE MATTER OF A PUBLIC INQUIRY

THE POST OFFICE HORIZON IT INQUIRY

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(2) SEEMA MISRA
(3) JANET SKINNER
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SUPPLEMENTAL SUMBMISSIONS ON COMPENSATION CLARIFICATION AND PERSONAL INSOLVENCY

Friday 6th January 2023

1. These (supplemental) submissions are made on behalf of Tracy Felstead, Janet Skinner, Seema Misra, Lee Castleton and Nichola Arch, Vijay Parekh and Sathyan Shiju, Core Participants in this Inquiry. They are provided, in part, in response to the invitation by the Chair for further submissions in connection with the bankruptcy of claimants for compensation.

Introduction

2. There is no existing consensus as to what it is that the Post Office's victims are being compensated for – still less the legal basis for the payment of compensation. The result is uncertainty and scope for subsequent disagreement.

3. This is perhaps inevitable, for being the consequence of:

a. the fact that, although Mr Justice Fraser made a large number of findings of fact and law in his two principal ("Common Issues" and "Horizon Issues") judgments, those findings were generic to the group litigation on preliminary issues, and not specific to any particular claims (despite evidence being given by lead claimants on particular issues – the main challenge to whose evidence was that they were being untruthful, a contention by the Post Office that Fraser J rejected). The present compensation arrangements are in this respect fundamentally different from the claims, for example, under the HBOS/Lloyds compensation scheme overseen by Sir David Foskett.

b. The asymmetry between the timings of the establishment of (1) the HSS compensation scheme pursuant to the terms of the 2019 settlement deed (regardless of the curious and legally questionable arrangements for this), and (2) the Post Office scheme for payment of claims for malicious prosecution (preserved under the settlement terms for convicted GLO claimants), and (3) the eventual acceptance by the government that it could not, in fairness and justice, in the face of (1) continue to maintain its original stated position that the December 2019 settlement was (finally) binding on the GLO claimants.

The result is that there are three schemes for compensation, two of them overseen in different capacities by Herbert Smith Freehills LLP, and two of them ((2) and (3)) dealing with claims for compensation on bases that, at least in principle, provide compensation on legally differing grounds – with scope for injustice in different compensation being recoverable (subject to the actual legal effect, if any, of the 2019 settlement terms. (Further, below)).

4. What is not in doubt, for example, is that, in the case of GLO former claimants who were convicted of offences and whose claims for the tort of malicious prosecution were expressly preserved under the December 2019 settlement of the civil litigation, subject to the quashing of their convictions, claims for compensation are being considered as claims for malicious prosecution. It is submitted that that is insufficient and fails to

adequately reflect the wrong done and injury inflicted by the Post Office upon those it prosecuted.

5. There is a fundamental question, that appears to remain unresolved, as to the continuing effect, if any, of the 2019 settlement deed that brought to a conclusion the GLO litigation. This is important. Both BEIS and the Post Office should make it clear that the 2019 settlement deed is treated for all purposes in the compensation schemes as not binding upon the parties for the purposes of claims to, and payment of, compensation. Unless this is made clear, and is a consensual basis for the payment of compensation, there are likely to be asymmetries in the way that the claims for compensation by formerly convicted defendants are treated as compared with claimants under the BEIS scheme (below).

6. Malicious prosecution is an intentional tort that carries with it, in appropriate circumstances, heads of claim that may extend both to aggravated damages and also exemplary damages, the former being intended to augment ordinary damages in circumstances where these would not otherwise provide adequate compensation for the injury suffered, the latter as reflecting an intentionally penal aspect – that is to say, the intention of an award of exemplary damages is to punish the wrongdoer.

7. Malicious prosecution is an unusual tort so far as the subjective intention of the wrongdoer is relevant – and an essential element of the cause of action. It is not an element of the separate tort of abuse of process as a cause of action.

Clarification

8. In previous submissions it was suggested that the violation of a defendant's Article 6 right of a hearing of an appeal hearing within a reasonable time is an intentional tort. This note supplements and is intended to refine that submission, to the effect that the intentional tort may better be characterised as abuse of process – a well-established tort. It is a cause of action to which little, if any, consideration has thus far been given in connection with claims against the Post Office for compensation.

Interference with rights of appeal

9. It is not thought to be contentious that the Post Office in its prosecutions gave misleading evidence to the court that was false and known to have been false - or should be taken to have been known to be false. At risk of repetition, for example, at Mrs Misra's prosecution there was misleading evidence on the following issues (more may be revealed during the course of this Inquiry):

   a. **Receipts and Payments Mismatch bug**. The case for the Crown was that any problem with Horizon would have been apparent to an Horizon terminal operator. (Transcript, Day 1 Monday 11 October 2010, 21A-C, 23H-24A. Transcript, Day 7 19 October 2010 p 24H, Day 7, pp 25H, 26A.) That was false. It was known by both the Post Office and Fujitsu to be have been false, because the known effects of the Receipts and Payments Mismatch bug (see Horizon Issues para [428] ff.) had been discussed at a meeting between senior management of the Post Office and Fujitsu in about September 2010, only a few weeks before Mrs Misra's criminal trial in October 2010. That the Receipts and Payments Mismatch bug might impact upon Post Office prosecutions was expressly recognised and recorded in the briefing memorandum circulated by Mr Jenkins (*q.v.* Horizon Issues para [457]). Mr Jenkins gave evidence at Mrs Misra's trial. Neither the Receipts and Payments Mismatch bug, nor the memorandum recording the bug and its known effects, were revealed/disclosed. Mr Rob Wilson, head of criminal legal for the Post Office, and Mr Jarnail Singh, the senior solicitor with conduct of Mrs Misra's prosecution, had been sent the memorandum. The known effects of the bug undermined the prosecution case, (a case that wholly improperly included transferring the evidential burden to Mrs Misra of showing what particular problems she had experienced with Horizon – a burden impossible for her to discharge (a difficulty that appears to have eluded Judge Stewart)). Of this bug, Fraser J commented in his letter of January 2020 to the Director Public Prosecutions, and said of the report prepared by Mr Jenkins for the Fujitsu/Post Office meeting in September 2010: *"This records the risk that if this was "widely known [it] could cause a loss of confidence in the Horizon System by branches" and that there was a "potential impact upon ongoing legal*

cases where branches are disputing the integrity of Horizon Data"". Fraser J commented that *"despite this knowledge that the existence and effect of this bug was directly relevant, the existence of the bug was kept secret from the court."*

b. **The Callendar Square bug.** The Post Office's evidence was that the "Callendar Square" bug was of no relevance to Mrs Misra's circumstances. This was because Mr Jenkins's evidence to the court was that the bug had been resolved by the time of the events/factual circumstances relevant to Mrs Misra's prosecution. That was untrue. (It was also an issue on which the Post Office set out to mislead Mrs Justice Fraser in the Horizon Issues trial (Horizon Issues paras [414], [424].)) The discovery of the Callendar Square bug was an issue that Mr Justice Fraser considered to be a "milestone" in the history of the Horizon system: Technical Appendix to the Horizon Issues judgment, para [115](2). The judge found as facts (1) that the Callendar Square bug was not resolved or fixed in March 2006, as the Post Office had asserted that it had been at Mrs Misra's trial – a contention that it continued to maintain at the Horizon Issues trial in 2019 (Technical Appendix [149]), and (2) that the Callendar Square bug in fact persisted until 2010 (it was probably in the system from 2000 and after its discovery in 2005 it lay in the system for "for 5 years" (Technical Appendix paras [50], [150])). Those facts undermined, were inconsistent with and contradicted the prosecution case at Mrs Misra's trial. The Crown's case and Mr Jenkins's evidence was that was that the Callendar Square bug had been resolved in March 2006 and, accordingly, it therefore *could not* have caused the shortfalls that she experienced after December 2006, for which Mrs Misra was charged for theft. That was untrue. In correspondence from the Post Office's (then) solicitors, Womble Bond Dickinson LLP, in the GLO litigation, on 28 July 2016 and 11 January 2019, the Post Office untruthfully maintained that the Callendar Square bug was discovered only in 2005 and that it only affected one branch: Horizon Issues paras [422], [423]. Mr Justice Fraser found those contentions to be "completely wrong" [423]. Disclosure of Callendar Square documents had been sought by Mrs Misra of the Post Office before her trial. At her trial it

was contended that Mrs Misra could not have a fair trial without that disclosure. Those requests were dismissed: Transcript, Day 1 11 October 2010 p 7F. Mr Jenkins falsely contended to Professor McLachlan that the Callendar Square bug was "not relevant to this case".

The Callendar Square bug was a bug that caused receipts and payments mismatching (Horizon Issues paras [418], [427]) – i.e. precisely the problem experienced by Mrs Misra, amongst many others.

c. **Remote access.** At Mrs Misra's trial Mr Jenkins provided a written response to Professor MacLauchlan's evidence in which he stated:

> *"..."Finally, in Section 1.2.3 there is the Hypothesis that "External systems across the wider Post Office Limited Operating Environment provide incorrect externally entered information to the Horizon accounts through system or operator error outside Horizon", I was not quite clear what Professor McLachlan was referring to here, in the updated version of the report, Professor McLachlan (sic) has clarified this by adding "For example, incorrect transaction corrections are submitted from the central systems for acceptance by the sub post, master"" However in my view this is not really relevant since any transaction that is recorded on Horizon must be authorised by a User of the Horizon system who is taking responsibility for the impact that such a transaction has on the Branch's accounts. There are no cases where external systems can manipulate the Branch's accounts without the Users in the Branch being aware of what is happening and authorising transactions."* (Underlining supplied.)

Conscious of repetition, the importance of this selective, incomplete and consequently misleading, evidence requires to be viewed against/in conjunction with the Post Office's reluctance to provide a full picture/to present anything like a comprehensive account of the circumstances and relevant disclosure to any of those entitled to it (below). These included, most importantly, the convicted defendants and the CCRC, but also Second Sight (promised, but denied, cooperation from the Post Office – most notably at the 2015 Select Committee hearing), and Jonathan Swift Q.C., engaged in 2016 to advise

the Post Office's chair, Tim Parker. In short, the Post Office's abusive conduct is evident in its earliest prosecutions, throughout the period of active prosecution until 2014, and thereafter. That conduct was directed at the same object and purpose, namely, the protection and promotion of its commercial interests.

10. As a prosecuting authority, the Post Office was institutionally corrupt. There is no precedent for such extensive abusive prosecutorial conduct – in either duration or scale.

11. It is remarkable that when Mr Clarke was instructed to review and advise upon Mrs Seema Misra's prosecution (a "Full Review"), his instructions were "*to determine whether or not the Helen Rose report or the Second Sight Interim Report ought to be served (sic) on Mrs Misra's lawyers so as to correct what would have been a failing had POL been possessed of those documents in October 2010.*"

12. At paragraph 68 of his July 2013 advice Mr Clarke wrote that "[h]aving considered both Mrs Misra's case and the details of the Second Sight Interim Report I can divine no instance where there is any convergence of similarity of complaint on the issue of fallibility." But he had not been provided with the Post Office prosecution file with the consequence that, in his words, *"[n]ecessarily therefore, this Full Review takes a different form from the general"*.

13. In his July 2013 advice Mr Clarke had confirmed that the general effect of Mr Jenkins's evidence was that "failures [in Horizon] will only occur "... as a result of a bug in the code or by somebody tampering with the data in BRDB and this check is included specifically to check for any such bugs/tampering" or that a problem can ".... Only happen as a result of a bug in the code and this check is included specifically to check for any such bugs" [and that] "... [t]he inevitable conclusion to which the reader is driven is that ... <u>if that is right, there must be no bugs</u>" (July 2013 Clarke Advice para 13), in short, his evidence was that "... there is nothing wrong with the system" (para 14). As Mr Clarke put it: "<u>Unfortunately that was not the case</u>". (Underlining supplied.)

14. To any reasonably competent and conscientious lawyer undertaking a review of Mrs Misra's prosecution, the obvious question, so far as Mr Jenkins was known to be a wholly unreliable expert witness who had repeatedly given incomplete and misleading evidence of his knowledge of failures/bugs in Horizon to the court, was whether *those*

facts might bear upon the safety of Mrs Misra's conviction and whether the communication of them to her by the Post Office might provide her with material to appeal her conviction? There is, and was, only one possible answer to those questions.

15. Mr Clarke said of the Helen Rose report: *".... That matter goes solely to Gareth Jenkins' knowledge of Horizon concerns arising some 5 years after the events considered in Mrs Misra's trial and his credibility as an expert witness in 2013. An analysis of the events dealt with in that report, and the potential that Gareth Jenkins' credibility as a witness might be undermined in 2013, does not in my view lead to the conclusion that material which might undermine his credibility now ought to be made available so as to do so in relation to a trial which occurred in October of 2010."*

16. Mr Clarke's reasoning and conclusion here is bizarre and fantastically implausible and offends even common sense. (The (double) conditional in connection with "undermined" was an inappropriately moderated version of his actual conclusion – he had concluded Mr Jenkins's credibility *had been* wholly undermined.)

17. That Mr Clarke's review of Mrs Misra's case proceeded on a skewed basis, by its terms, and that he felt constrained to advise in the terms that he did, suggests that the Cartwright King review was intended to avoid appeals, successful or otherwise.

18. In response to an FOI request in 2022, a report of a review was disclosed that had been undertaken by Mr Jonathan Swift Q.C. (as he then was) for Tim Parker, the chair of the Post Office, in 2016. The review revealed that the "scope and scale of the review [by Cartwright King] was the subject of oversight and advice from Brian Altman QC, who delivered interim advice on 2 August 2013 and a general review on 15 October 2013." Mr Swift commented "We have read those opinions and it is clear that Mr Altman QC considered both the process adopted by Cartwright King, and their actual decisions in a sample of cases, to be reasonable and appropriate".

19. In the Court of Appeal, on Day 2 of the appeal, 23 March 2021, Mr Altman Q.C. referred to the Cartwright King "post conviction disclosure exercise" in which disclosure of the Second Sight Interim Report and the Helen Rose report were to be disclosed "in cases which Cartwright King deemed to be appropriate". Mr Altman made no mention of his own role in determining the scope and scale of the Cartwright King review, or that

he himself had considered and approved actual decisions by Cartwright King in a sample of cases: Transcript Day 2/66/16. The Cartwright King review itself, as Peters & Peters on 30 November 2020 explained[1] was triggered by the July 2013 Clarke Advice. That connection was not made in, or by, the Court of Appeal. The Clarke Advice, as Mr Altman Q.C. explained to the Court of Appeal (Transcript Day 1/156/6), came into existence because of the fact that Second Sight, *inter alia*, had been alerted by Mr Jenkins to, and reported in their Interim Report on, the existence of the fundamentally important Receipts and Payments mismatch bug. Thus:

a. the Receipts and Payments mismatch bug; and

b. the Second Sight July 2013 Interim Report; and

c. the Clarke Advice of 15 July 2013; and

d. the Cartwright King review of 2013-2014

were all thematically inextricably connected together. But that connection was kept by the Post Office to itself, was not disclosed to the CCRC and was not even revealed in the Court of Appeal. That is profoundly unsatisfactory. The significance of the Receipts and Payments mismatch bug, and *its recognised effects – and implications,* and the importance of the incompleteness and unreliability of evidence given by Mr Jenkins, were lost from sight in the Cartwright King review.

20. Although Swift in his review gives some consideration to the Callendar Square bug, that he notes was the subject of cross examination of Mr Jenkins at Mrs Misra's trial in 2010 and which he states (accepting the Post Office's false contention) was "fixed in 2006", nowhere in the "Swift Review" is there reference either:

a. to Mr Jenkins's known unreliability as an expert witness; or

b. to the July 2013 Clarke Advice.

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[1] "... in mid-2013, following receipt of the Clarke Advice, Cartwright King Solicitors (a leading criminal law firm who had acted as prosecution agents for POL in a significant number of cases) were instructed to conduct an independent review to ensure that proper post-conviction disclosure was made in appropriate cases".

This is surprising, not least because at paragraph 10 of his Review, Mr Swift refers to meetings that he with his junior had with Mr Jenkins. At paragraph 22, Mr Swift refers to his having considered "witness statements provided by Gareth Jenkins of Fujitsu in POL legal proceedings against SPMRs".

21. It is inconceivable that Mr Swift Q.C. would have met with and received, and (seemingly) uncritically relied upon, Mr Jenkins's witness statements and other evidence given by him in cross-examination, without caveat, comment or qualification had he been alive to either the severe criticisms made by Mr Clarke in 2013, or to the fact that it had been determined that Mr Jenkins should not be used as an expert witness by the Post Office in the future for having placed the Post Office in breach of its obligations to the court *qua* prosecutor.

22. The omission is made all the more remarkable by the fact that Mr Swift said that he and his junior had read Mr Altman's general review of 15 October 2013. On 30 November 2020, Peters & Peters wrote that that 'General Review' "... amongst other matters, extensively referred to the [July 2013] Clarke Advice and its contents and conclusions". (If it did in fact refer to Mr Clarke's conclusions about Mr Jenkins, it seems that these were overlooked by Mr Swift Q.C..)

23. Accordingly, neither the CCRC in its investigation, nor Mr Swift Q.C. in the review undertaken in 2016 for the chair of the Post Office, appear to have been alive either to Mr Clarke's advice of July 2013 or to the extensive and serious issues raised as to the reliability of Mr Jenkins's evidence about the integrity of the Horizon system.

24. Mr Swift Q.C. *did* observe that Deloitte documents disclosed by the Post Office in connection with the remote access issue, including the ability of Fujitsu to "'fake' digital signatures", "pose real issues for [the Post Office]" but inexplicably considered these "most likely to be wild goose chases" (paragraph 145, 146). Nonetheless, Swift advised the position should be confirmed and he recommended that the advice of external counsel should be sought by Mr Parker.

25. Strikingly, at paragraph 147 of Mr Swift's report, it is noted that:

> *"... the Deloitte reports, or at least the information contained within them, may be disclosable under POL's on-going duties as a criminal prosecutor. We suspect that it is likely that such functionality would have been something an SPMR' s defence team would have considered relevant to their case, even if the likelihood of remote Fujitsu interference is very limited. We do not know whether this information has been provided to the CCRC. But given that POL used a Balancing Transaction in 2010, it cannot say that the functionality was not known to it, and we have seen no reference to such capabilities in the witness evidence given by Gareth Jenkins of Fujitsu...".* (Underlining supplied.).

It follows that Mr Swift cannot have been provided with Mr Jenkins's evidence in reply to Professor MacLaughlan on the issue of remote access (paragraph 9(c) above). Given the reference to the fact of the balancing transaction in 2010, that evidence would have been highly relevant to Mr Swift's review – and would no doubt have had other implications and effects.

26. Mr Swift, despite specific reference at paragraph 118(2) to the Receipts and Payments Mismatch bug identified by Second Sight, appears to have been no more alive to the effects and implications of the Receipts and Payments Mismatch bug than was Mrs Misra's legal team at her trial in 2010. In an extraordinary passage, Swift concludes: "*We have seen nothing to suggest that these specific bugs identified have been the cause of wider loss to SPMRs in the Scheme cases or otherwise. We see no basis upon which to recommend any further action in relation to those identified bugs now.*" As so often, this exhibits a misunderstanding/wrong approach by Mr Swift Q.C.. the issue was not whether a bug caused *specific loss in a particular case*, but *the propensity of the bug and its known effects* – and whether these were consistent with the way in which a prosecution case was put – most obviously, for present purposes for example, at Mrs Misra's trial. The known *effects* of the Receipts and Payment mismatch bug were documented in the September memorandum. The memorandum itself exhibits recognition by Fujitsu (its author being Mr Jenkins) that the bug had implications for Post Office prosecutions. Mr Swift Q.C. appears not to have been provided with the September 2010 memorandum on the Receipts and Payments mismatch bug. Neither the Post Office nor Fujitsu (with whom Mr Swift plainly had discussions, from the various references to what he was told by Fujitsu and what Fujitsu explained – though

no reference to such meeting is made in the redacted Review under paragraph 10 to any meetings with Fujitsu) would disabuse him of his ignorance (in respect of the way the prosecution put its case at Mrs Misra's trial, for example).

27. In 2014 the Post Office effectively ceased prosecuting for Horizon shortfalls. It is difficult to resist the inference that that decision was related to the revelation by Mr Jenkins to Second Sight of the Receipts and Payments Mismatch bug in 2013 - and its *sequelae*.

28. It is impossible for a concluded view to be formed until later stages of this Inquiry, but the clear impression given is that the Post Office carefully managed, it might be said *curated*, disclosure that it gave, so that a full picture was never made available by the Post Office: (1) to those it had prosecuted (most importantly); (2) to Second Sight; (3) to Jonathan Swift Q.C.; or (4) to the CCRC.

29. It is, for example, frankly astonishing that Mr Swift Q.C. nor the CCRC were not provided with the Detica reports on "Fraud and Non-Conformance" – reports that it is now known were widely distributed at the highest level within the Post Office and almost certainly would have been considered at board-level.

Interference with rights of appeal as an abuse of process

30. It was previously submitted, so far as the Post Office acted *qua* prosecuting authority in a way such as to violate a defendant's Article 6 right to a hearing of an appeal within a reasonable time, that would constitute a free-standing intentional tort.

31. It may be that the better and simpler analysis is that any such interference by the Post Office constitutes an abuse of the process of the court, a long-recognised tort. Such an analysis is simpler because it accords with established precedent and principle and does not entail the novelty of relief under s. 8 of the Human Rights Act.

32. It is accepted that no final view can be taken prior to Stage 4 of this Inquiry (or perhaps even later), nonetheless, the argument is set out because the conclusion is that, unless account is taken of the argument, any payment of compensation may not reflect the true and full extent of the wrong inflicted upon, and the resultant harm suffered by, the Post Office's victims. That impacts upon the terms upon which compensation is to be paid.

Discussion

33. Abuse of process is a tort of some antiquity and obscurity. It originates in **Grainger v Hill** (1838) 4 Bing NC 212. Points were taken including that the action was bad for failing to show that the original action - the *assumpsit* (debt) claim - had concluded, and for failing to allege no reasonable or probable cause. The court held these points might have been relevant had the action been one of malicious prosecution or malicious arrest. The action in **Grainger** was a new action on the case - abusing the process of the law in order to obtain something (here, the ship's register) to which the Defendants had no right. It was not necessary to show that the main action had terminated or that it had been brought without reasonable or probable cause. Accordingly, it is not necessary in a claim of abuse of process for a claimant to show that the main proceedings have terminated in his or her favour, as in an action for malicious prosecution. Nor is it necessary to establish lack of reasonable and probable cause.

34. The decided cases suggest that an improper purpose or a desire to secure an collateral advantage in invoking the process of law will support a claim for abuse of process. This has variously been characterised as invoking a process of law:

a. *"to effect an object not within the scope of the process"*: **Grainger** (*loc. cit.*) p 221 *per* Tyndall CJ.

b. *"for an ulterior purpose"* **Grainger** at 224 *per* Bosanquet J.

c. *"a purpose not within the scope of the action (i.e. a "collateral" or, more helpfully, an "improper" purpose)"* **Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd** [2014] AC 366 para [62] *per* Lord Wilson JSC.

d. *"to achieve an end which is improper in itself"* **Goldsmith, Metall und Rohstoff AG v Donaldson Lufkin & Jenriette Inc.** [1990] 1 QB 390, 489 *per* Lord Denning MR (dissenting).

e. *for "a predominant purpose" other than that for which the legal process was designed* **Goldsmith**, 470 *per* Slade LJ,

f. *"to achieve something not properly available to the Plaintiff in the course of properly conducted proceedings"* **Broxton v McClelland** [1995] EMLR 485, 497 *per* Simon Brown LJ.

g. *"for the purpose of obtaining some wholly extraneous benefit other than the relief sought and not reasonably flowing from or connected with the relief sought"*: **Crawford Adjusters** para [149] *per* Lord Sumption JSC.

35. The manipulation or misuse of the process of the court by the prosecution is a recognised category of abuse of process.

36. It is submitted that it is relevant that the Post Office has repeatedly – it can be said *habitually*, in its prosecutions, exhibited a willingness to abuse court processes. This is plain from the judgment of the Court of Appeal in **Hamilton v Post Office** [2021] EWCA Crim 577, in which every one of the 39 appeals allowed, the Court of Appeal allowed the appeals upon both limbs of abuse of process – a circumstance without precedent. The second limb was conduct by the Post Office, as prosecuting authority, that was calculated to, or might have the effect of, undermining the integrity of the criminal justice system or was such as to jeopardize public confidence in the criminal justice system.

37. But the Court of Appeal's findings on abuse of process by the Post Office were limited to abusive conduct that affected the prosecution of defendants and their resultant convictions. The Court of Appeal had nothing to say about subsequent Post Office conduct and the delay in the hearing of the appeals to 2021 – a delay in some cases of almost 20 years, as was the case with Tracy Felstead. Presumably, the court was uninterested in the delay in the appeals coming on, and the reason for this, because that delay was not directly relevant to the (constricted issue of) safety of the original conviction.

38. It is submitted that there was a clear identifiable collateral and improper purpose and object for the Post Office in interfering with/obstructing defendants' rights of appeal. It was the same motive and purpose that operated and is to be seen in connection with its conduct of its original prosecutions. That object and those (several) purposes, that were related, were:

a. To protect Horizon from being exposed to be the unreliable and bug-ridden system that it was known, from its earliest days (1999), to be.

b. To avoid/protect against the catastrophic commercial consequences of such exposure, namely recognition that the Post Office could not distinguish between fraud and system error (a conclusion that is broadly implicit (and in connection with ATMs explicit) in the October 2013 Detica report).

c. To protect against the calamitous financial consequences of its prosecutions being revealed to be seriously flawed – a consequence that all-too-obviously has, disastrously for both the Post Office and the government as its sole shareholder, eventuated.

39. The full nature of the Post Office's strategy is yet to be examined by this Inquiry. It is, nevertheless, an available explanation, for the extraordinary delay in so many appeals coming on for hearing only in 2021 (and since), that the Post Office intended to keep from those it had prosecuted – *and from those against whom it had brought other legal process* – its knowledge that the basis for it having done so was fundamentally flawed. Accordingly, it structured its arrangements to that end and for that purpose.

40. It is plain that conduct by a prosecutor that has the effect of undermining the integrity of the criminal justice system or that puts at risk public confidence in it is such as to constitute abuse of process. It reflects the court's concern to protect its processes and the integrity of the criminal justice system against conduct that 'offends the court's sense of justice and propriety'.

Obstructing/inhibiting a right of appeal as obstruction of access to the court – abusive conduct

41. It is difficult to envisage a more clear-cut abuse of process than to intentionally interfere with, to inhibit or to obstruct, a convicted defendant's right of appeal. Doing so is an obstruction of right of a person's access to the court, a fundamental constitutional right – recognition of which is now statutory.

42. If, as it is submitted it did, the Post Office obstructed or intentionally interfered with a defendant's right of access to the court on appeal, that will support a claim for abuse of

process independently of, and separate from, any preserved claim for malicious prosecution – a cognate but distinct tort (above).

43. Further, a claim for abuse of process of that kind, that is separate from a claim for malicious prosecution, would independently support a claim for both aggravated damages and, more particularly, exemplary damages, so far as these are intended to be penal in effect for the conduct of the wrongdoer.

44. It is submitted that, so far as a claim for abuse of process of the kind contended for is made out, the court would be likely to impose substantial exemplary damages for (seemingly unprecedented) violation of rights by a prosecutor abusing its position in the way that it is suggested that the Post Office did, in protecting its own commercial interests by obstructing/interfering with defendants' rights of appeal. The impugned conduct here is plainly entirely separate and distinct from that connected with a person's prosecution.

Insolvency – bankruptcy

45. Mr Castleton's case is a paradigm of the insolvency consequences of the Post Office's misconceived and false claims against its postmasters. His case is too well known to require being summarised, less rehearsed, here. The judgment wrongly obtained against him by the Post Office is reported at **Post Office v Castleton** [2007] EWHC 5.

46. Judge Richard Havery Q.C. held "*Mr. Castleton accepts the accuracy of his entries in the accounts and the correctness of the arithmetic, and since the logic of the system is correct, the conclusion is inescapable that the Horizon system was working properly in all material respects, and that the shortfall of £22,963.34 is real, not illusory*" [as Mr Castleton had contended].

47. The judge did not explain what he meant by the expression "the logic of the system is correct". It was a conclusion reached on the basis of a witness statement of 14th September 2006 from Anne Chambers in which she stated at paragraph [16] that "*my conclusion was that there was no evidence whatsoever of any system problem*".

48. Mr Justice Fraser in his letter of January 2020 to Mr Max Hill Q.C., Director of Public Prosecutions, recorded Judge Havery's evaluation of Mrs Chambers as a witness and the statement quoted above, and commented:

> *"This relates to the Callendar Square bug. This evidence led to the conclusion by the judge that the Horizon system was not to blame and the losses claimed by the Post Office were caused by, and the responsibility of, Mr Castleton. Mrs Chambers herself in her e mail of 23 February 2006 had written an e mail stating, in respect of the Callendar Square bug (which is at F/333.1/3): "Haven't looked at the recent evidence, but I know in the past this site had hit this Riposte lock problem 2 or 3 times within a few weeks. This problem has been around for years and affects a number of sites most weeks, and finally Escher say they have done something about it." The relevant KEL for this bug, given the reference "JSimpkins338Q", identified that it related to problems with the Riposte part of the software and what was sometimes called the Riposte lock or unlock problem. This was when an unexpected error occurred in the software while attempting to insert a message. The KEL shows it ran from 2002, with other events occurring in 2003, 2004 and 2005. The entry in this KEL for September 2005 expressly states that: "this problem is occurring every week, in one case at the same site on 2 consecutive weeks".*
>
> *This did not form any part of the evidence of Mrs Chambers in the Castleton case. Indeed, the Callendar Square bug had affected 30 different branches, this number being identified by Fujitsu when the bug was investigated in 2005. This information was not provided to the court in the Castleton case even though, as her own e mail shows, Mrs Chambers plainly knew about it. Nor does there appear to have been any evidence from her during the Castleton case that there was a bug that "affects a number of sites most weeks".*
>
> *Mrs Chambers also knew about the TPSC 250 Report bug, another bug which does not appear to have been mentioned at all by her in her evidence in the Castleton case. This occurred during the years 2005 to 2009. Not only the PEAK, but the KEL itself was created by her and this defect required a software upgrade. The Technical Design Authority for the release note, dated 13 October 2005 and*

accompanying this upgrade, was Gareth Jenkins. Additionally, the entry in the table for bug 6, the remming out bug, shows that this occurred in 2007 and Mrs Chambers herself created the KEL for this. Her wider involvement in general is shown in the accompanying table, in respect of a great many of the bugs, and a number of these predate her evidence in the Castleton trial."

49. Fraser J considered Mrs Chambers to have given seriously incomplete, and therefore misleading (and by inference untruthful), evidence to Judge Havery.

50. As noted elsewhere, virtually every material finding of both fact and law by Judge Richard Havery Q.C. in his judgment against Mr Castleton was wrong, when considered in the light of the pellucidly clear and rigorous judgments of Mr Justice Fraser (notwithstanding collateral jurisdiction). The reason for this is that the court, as is now known, was misled by the Post Office and its witnesses.

51. As with those prosecuted, Mr Castleton had judgment given against him on a false case advanced by the Post Office at the High Court trial in 2006. It was known to be false, in that the Post Office was well aware of the repeated failures of the Horizon system and its unreliability – issues that were live and remained unresolved from the date of roll-out in 1999 – and which knowledge it was astute to conceal and keep secret from the court.

52. The Post Office in obtaining judgment on a basis known to be false, and by false evidence, obtained judgment against Mr Castleton by fraud.

53. In just the same way as convicted defendants were victims of malicious prosecution, so was Mr Castleton. Further, the Post Office obstructed his right of appeal in the self-same way as it did those whom it had prosecuted and caused to be wrongfully convicted. The Post Office's collateral commercial interest in precluding any appeal by Mr Castleton was the same.

54. In his evidence to this Inquiry, Mr Castleton has said that the costs order given against him in favour of the Post Office in 2007 (on a judgment given for the Post Office in £25,858) was in the sum of £321,000. He was unable to pay it and it resulted in his

bankruptcy. He was adjudged bankrupt in the Scarborough County Court on 23 May 2007.

55. Mr Castleton remains an undischarged bankrupt – though steps are being taken for annulment. (The judgment against him remains to be set aside, the Post Office being unwilling to accept liability for his costs.)

56. In his evidence to this Inquiry, Mr Castleton has said that at the time of his trial in 2006, Mr Stephen Dilley, a solicitor at Bond Pearce (now Womble Bond Dickinson), solicitors then acting for the Post Office, had stated that "we will ruin you". The Post Office did indeed ruin Mr Castleton. By its actions it blighted the livelihood and lives of Mr Castleton and his family, a blight that subsists to this day, 17 years after his trial and 19 years after his so-called branch 'audit' by the Post Office, in March 2004, when he lost his business.

57. The Post Office was content to take judgment against Mr Castleton knowing the fundamental factual basis and premise of Judge Havery's judgment to be false, and was content to see Mr Castleton, in its solicitor's word, "ruined" as a consequence.

58. It is submitted that Mr Castleton's bankruptcy in the face of his inability to pay the costs order made against him on the judgment given against him (that the Post Office has said was substantially attributable to his counterclaim (damages claimed in £11,250)) is indistinguishable from a bankruptcy/insolvency process brought maliciously: **Quartz Hill Gold Mining Co v Eyre** (1883) 11 QBD 674. The only issue being one of causation.

59. In Mr Castleton's case it is anticipated that no issue will be taken, but that the Post Office's false claim against him was causative of his bankruptcy (rather than, say, any underlying financial issue or problem with his Marine Drive, Bridlington, Post Office branch business).

60. In other cases it may be anticipated that the Post Office may seek to contest causation. A template for such an argument by the Post Office is provided by the compensation scheme in the HBOS/Lloyds Reading IAU fraud:

https://cranstonreview.com/Content/Documents/The%20Cranston%20Review_v2.pdf

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Sir Ross Cranston (following his review, that took seven months) noted, in his critique of the compensation arrangements provided for under the initial scheme overseen by Professor Griggs, that while claims for direct and immediate losses were generally accepted, paid and (sometimes amply) provided for, claims for consequential losses were invariably rejected. Sir Ross further observed that the implication from this was that payments were made on the basis that the relevant businesses would have failed in any event, with the result that the bank was not liable to pay for consequential losses. He considered this to be an unacceptable attempt on the part of the bank to disclaim responsibility for what had happened to victims of the fraud.

61. As noted at the start of these submissions, there is no existing consensus as to what claimants for compensation are to be compensated for. That is unsatisfactory and is the result of the rather haphazard way in which the government/BEIS initially resisted, but has later been driven to accept, a requirement for further compensation to be paid to Post Office victims who were participants in the GLO litigation. Resulting structural problems are unlikely to simply 'go away'.

62. It is trite that damages are available for malicious insolvency proceedings (*per* Bowen LJ in **Quartz Hill** at 693). The editors of *McGregor*, relying on a statement by Brett MR in the same case, at 684, state, without qualification, that "If pecuniary loss is shown in addition, there undoubtedly can be recovery for it" (44-010).

63. It is submitted, therefore, that so far as compensation for claimants who were/are bankrupted as a result of the Post Office's actions, payment of compensation should extend to include both:

a. general damages for the effects of insolvency;

b. and also special damage, where this can be demonstrated.

64. The latter, but not the former, may well overlap with other damages under other heads of loss. It is trite that the same loss cannot be recovered twice.

65. It seems that the scope for dispute is most likely to arise where causation might reasonably be in dispute. There is a strong argument for doubt in marginal cases being resolved in favour of the claimant (as in other areas – most obviously, such as in connection with the unavailability of documentation).

66. Insolvency is of course a class remedy for the benefit of creditors and priorities are regulated by legislation. While these cannot be disturbed, the writer's experience has been that:

a. The government Insolvency Service has been constructive and helpful;

b. Mr Castleton's trustee, less so (previous submission). (The trustee was resistant to Mr Castleton receiving an interim payment from BEIS, despite his debts having been discharged and his being entitled as of right in law to seek annulment of the order.)

Areas in which the Inquiry might assist the Post Office and its (claimant) victims

67. Accordingly, areas in which the Inquiry may be able to assist the Post Office and its victims are:

a. In connection with the issue of causation in insolvency cases where there is scope for argument as to whether the Post Office by its conduct was the cause of the bankruptcy of a particular individual. In cases such as Mr Castleton's there is no scope for reasonable/sensible argument. The Post Office and BEIS might be invited to accept that where it is not obvious that there would have been supervening insolvency in any event, doubt should be resolved in favour of the claimant.

b. While the class nature of bankruptcy is recognised and not open to dispute (as to priorities), trustees might be encouraged to actively seek to assist/to be proactive as they reasonably are able to be, within the legislative insolvency regime, in facilitating the payment of compensation to postmasters who have become bankrupt as the result of the Post Office's action – in the same way that the government Insolvency Service, from the writer's experience, appears to be.

68. A further issue on which the Inquiry may assist the Post Office and its victims, would be if there could be clarification as to what, if any, reliance is placed by the Post Office upon the 2019 settlement deed that brought the GLO litigation to an end. There is much to be said for it being treated for all purposes, within the BEIS and Post Office (overturned convictions) schemes for compensation, as non-binding. Doing otherwise is likely to provide fertile ground for dispute (below and 3(b) above) and delay. Clarification by the Post Office on this would be welcome – and if that is not agreed, identification of which parts of the December 2019 settlement deed are/are to be relied upon.

69. As has been noted, the schemes for compensation for not-convicted GLO claimants, on the one hand, and for GLO claimants who were convicted of offences and who had/have preserved claims for malicious prosecution, on the other, as a matter of law are capable of producing unintended consequences in terms of heads of recoverable loss – and thus compensation (see paragraph 3(b) above).

70. So far as the payment of compensation is concerned, the writer is likely not alone in being conscious of the window within which payment of compensation can – and must - be paid, understood to be by August 2024. It may appear optimistic, given the effluxion of time since the Court of Appeal's judgment in 2021, to expect that all those upon whom the Post Office inflicted harm will be able to submit claims capable of being paid within that period. Most obviously, in that regard, it is to be noted that the CCRC has recently invited applications from those convicted on Post Office prosecutions, of whom there appear to have been many hundreds.

71. The opportunity is taken to observe that in earlier submissions it was noted that Herbert Smith Freehills LLP has a supervisory role in the administration of the HSS compensation scheme for not-convicted non-GLO claimants. It was noted that HSF performs perforce a necessarily *adversarial* role in acting as solicitors retained by the Post Office in (preserved) claims for malicious prosecution and thus *must represent the Post Office's interests* in negotiating those claims. It is not obvious how those differing roles can be reconciled, so far as the first requires independence, given HSF's role in the GLO litigation. It appears that HSF may have been solicitors engaged by the Post Office (or possibly on behalf of UKGI) at or about the time that the Post Office applied

to invite Mr Justice Fraser to recuse himself as trial judge in the course of the Horizon Issues trial – and it may be that the government itself, as UKGI, had an interest in that issue (- it would be surprising, as the Post Office's owner, if it did not, though this remains unclear). That, and the timing and role of HSF in the GLO litigation, still remain to be clarified. This may become of importance, should the HSS scheme be used/referred to/relied upon by BEIS in structuring the BEIS scheme for GLO claimants.

72. It is arguable that there is increasingly becoming apparent a requirement for identifiable independence in oversight of the various compensation schemes, the kind of *unquestionable independence* that is a pre-requisite for full confidence. Such unquestionable independence, at present, is lacking. The explanation and assurance given by Minister Scully to Mr Kevin Hollinrake M.P. in 2020 seems increasingly unsustainable.

PAUL MARSHALL

Cornerstone Barristers
6th January 2023