

IN THE MATTER OF THE POST OFFICE HORIZON IT INQUIRY

NOTE ON BEHALF OF

POST OFFICE LIMITED

Introduction

1. This note sets out Post Office's views on the key issues affecting compensation payments (both interim and final) for those applicants under an Individual Voluntary Arrangement ("IVA") or a bankruptcy order, across both the Historical Shortfall Scheme ("HSS") (Section A) and the Overturned Historical Convictions ("OHC") (Section B) compensation mechanisms.¹ Post Office is proceeding on the basis that other Core Participants will be in a position to address the Inquiry on any such issues insofar as they may arise in the context of the Group Litigation Scheme.
2. Certain of the issues addressed below are the subject of ongoing discussions between the relevant parties. The status of these issues and the statistics relating to them are therefore liable to change. The information provided in this note reflects the position as of 12 January 2023. Post Office should be happy to provide further updates on such issues in due course, to the extent that doing so would be of assistance to the Chair.

A. HSS

¹ In accordance with the Chair's message of 16 December 2022, this note focuses on how bankruptcy, as opposed to corporate insolvency, impacts upon a person's entitlement to compensation. Post Office notes, however, that corporate insolvencies do give rise to certain issues in this respect, which it should be happy to address in further detail if it would be of assistance to the Chair.

3. In broad terms, in the HSS two key issues arise in respect of applicants who have at any point historically been party to an IVA or the subject of a bankruptcy order: (a) determining where the relevant cause of action vests and (b) providing full and fair compensation for losses attributable to a bankruptcy or IVA caused by a Horizon Shortfall (as defined in the Independent Advisory Panel's Terms of Reference).² These issues are addressed in turn below.

(a) Causes of action

Summary

4. In the HSS a bankruptcy gives rise to a complexity regarding which party has title to the relevant cause of action and is entitled to compensation. A cause of action which is not wholly personal in nature (itself difficult exhaustively to define, but generally including all causes of action relating to losses which extend beyond personal injury (including distress and inconvenience) and loss of reputation) transfers to the Trustee in Bankruptcy automatically if it exists at the time that the bankruptcy order is made or, in certain cases, comes into existence before the bankrupt is discharged (generally, 12 months after the bankruptcy order is made).
5. The HSS was established to compensate for Horizon Shortfalls. The cause of action in respect of such shortfalls is for breach of contract and arises at the time Post Office demanded repayment of a shortfall and/or this was paid to Post Office (depending on the facts of the particular case) from the postmaster in question (in breach of the implied terms set out in the Common Issues Judgment). As such, broadly, if a bankruptcy has commenced between that demand and/or payment and now, then the cause of action vests in the Trustee in Bankruptcy and it is for the relevant

² Terms of Reference of the HSS Independent Advisory Panel, paragraph 4(c): "*Horizon Shortfall means a shortfall in stock or cash at a postmaster's branch compared with the amount of stock or cash indicated on Horizon for that branch, where the shortfall may have been caused by previous versions of Horizon or a breach of duty related to such a shortfall on the part of Post Office*".

practitioner (the Trustee in Bankruptcy, including the Official Receiver when appointed as such, or the IVA supervisor) to pursue compensation under the HSS.

6. If a bankrupt has been discharged before the demand for and/or payment of shortfalls, it is irrelevant. In England, if the bankruptcy had been entered into after the cause of action is complete and has since been discharged, the cause of action remains vested in the person responsible for administration of the bankruptcy estate (in Scotland this is the case until four years after the discharge). The position under an IVA depends on the terms of the particular IVA.³

7. There is an exception to this analysis for solely 'personal' as opposed to 'non-personal' or 'property' losses. Causes of action for solely personal losses do not vest in the Trustee in Bankruptcy. Some offers under the HSS are entirely non-personal, and some are hybrid (a mix of personal and non-personal).⁴ For example, the former may be an offer solely in respect of shortfalls and interest, and the latter may be an offer containing elements in respect of personal injury or distress and inconvenience (although what is personal and non-personal will depend on the particular facts of the application). In order to ensure the correct division, in each case Post Office will be guided by the relevant insolvency practitioner, who is an officer of the Court and is subject to the Court's supervisory control, and their explanation of what is personal and what is non-personal on the facts of the particular application and offer. In other words, Post Office will ask the relevant practitioner to explain the division and will direct any questions from applicants about the division to them. Insofar as the relevant practitioner recovers personal losses in respect of a hybrid cause of action, the practitioner generally holds those on trust for the bankrupt (not for the estate). It is not as a matter of insolvency law for Post Office to ensure a correct division. Its obligation is to the person in whom the cause of action vests.

³ Distinct issues arise in respect of Scots Trusts Deeds, which Post Office should be happy to address further to the extent that doing so would be of assistance to the Chair.

⁴ In more unusual circumstances there may be an offer in respect of solely personal losses, for instance where no shortfall was actually repaid but the demand caused distress and inconvenience.

8. Whilst Post Office recognises that some unrepresented former postmasters take issue with this operation of the law, it does not understand it to be contentious that the above represents the legal position. Post Office is not aware of any objection to the approach outlined above as a matter of legal principle.

Statistics

9. Of the eligible HSS applications relating to individuals (including informal partnerships but excluding companies) accepted into the HSS by June 2022, 125 have at one stage had a bankruptcy (including a sequestration) or IVA issue or concern identified.⁵ Many of these issues have been identified in the light of colloquial references in application materials which needed to be properly considered to ensure so far as possible that no bankruptcy was overlooked (for example, a reference to a Horizon Shortfall making an applicant 'go broke').
10. Of these, on further investigation in 40 cases no relevant bankruptcy or IVA was identified. This investigation included searching the relevant public registers. This has meant that the application could be progressed with no complication due to a bankruptcy or IVA.
11. Of the 85 cases where a relevant bankruptcy or IVA event was identified:
 - (a) In 13 cases it has been determined that the cause of action vests in the former postmaster, as a result of one of the following reasons:

⁵ Although such issues are beyond the scope of this note, Post Office notes for completeness that one application in relation to a company has an insolvency issue.

- (i) The bankruptcy (sequestration) was in Scotland and has ended over four years ago. This accounts for six cases.
 - (ii) The bankruptcy occurred and was discharged before the relevant Horizon Shortfalls were demanded/paid. This accounts for two cases.
 - (iii) The bankruptcy had since been annulled. This accounts for three cases.
 - (iv) The IVA supervisor has confirmed that the cause of action vests in the respective former postmaster and not them. This accounts for two cases.
- (b) In 59 cases it has been determined that the cause of action vests in the Trustee in Bankruptcy. Of those cases:
- (i) In 56 cases the cause of action vests in the Official Receiver as Trustee in Bankruptcy.
 - (ii) In three cases the cause of action vests in a Trustee in Bankruptcy other than the Official Receiver.
- (c) In one case it has been determined that the cause of action vests in the IVA supervisor.

- (d) In 12 cases it is still being clarified where the cause of action vests. Of these:
 - (i) In eight cases a bespoke outcome letter has been sent in which the offer is conditional upon either the applicant or the insolvency practitioner providing additional documentation to confirm where the cause of action vests before the offer can be accepted.
 - (ii) In four cases it is still being clarified where the cause of action vests, and no offer has yet been communicated. Good progress is being made on all such cases.
 - (e) In respect of the applications not accepted into the HSS before June 2022:
 - (i) Of the 33 applications in relation to now-dissolved companies, nine of the companies had insolvent dissolution and three of the representative shareholders have a personal bankruptcy issue.
 - (ii) Since the HSS started to accept late applications, 146 have been received so far, of which in 10 cases a potential issue due to a bankruptcy or IVA has been identified and is currently being investigated.
12. As indicated above, it is important to note that these figures are not static. Work continues on all of these cases and circumstances continue to develop for some applicants. For example, one disputing applicant has recently informed Post Office that they were made personally bankrupt under a different name, which was therefore not previously identified by the bankruptcy searches conducted for all HSS applicants. This issue is currently being investigated.

(b) Bankruptcy caused by Horizon Shortfalls

13. Where a case is impacted by a bankruptcy, there is an important distinction to be drawn between cases where there is evidence that the bankruptcy was caused by Horizon Shortfalls and cases where there is no evidence of such a causal link. Where there is no link, it follows that there is no difference in approach required to determining full and fair compensation for the applicant in question. Accordingly, offers have been made and are being made in such cases as usual, with it being clearly explained to applicants that no compensation is being offered in respect of the bankruptcy in question.
14. However, in respect of cases where a causal link has been identified, the Independent Advisory Panel is in the process of finalising its view on how to determine full and fair compensation in such cases. Post Office expects to be able to begin making offers in these cases in early 2023 and will aim to make an offer in each such case by the end of March 2023. As with all applicants in the HSS, Post Office's objective will be to provide full and fair compensation.

B. OHC

15. Of the 83 claimants within the OHC, the claims of 10 of them involve bankruptcies, three involve annulled bankruptcies, two involve IVAs and one involves a debt relief order ("DRO"). In relation to the 10 bankruptcy cases, in six the relevant trustee is the Official Receiver, in three the trustee is Neil Dingley of Moore UK and in the final case (a recent Northern Irish case) the trustee is understood to be the Official Receiver in Northern Ireland.
16. In its email to the Inquiry of 4 January 2023 (timed at 16:13) Post Office explained that, together with Hudgell Solicitors, it was working to resolve issues affecting

compensation payments in three of the bankruptcy cases referred to at paragraph 15 above. Post Office is pleased to inform the Inquiry that the parties involved have since been able to reach a satisfactory resolution of these issues in principle. It therefore does not propose to address the detail of those issues in this note, although it will seek to notify the Inquiry in the event that any further issues arise in this respect.

17. The remaining cases have not raised any ongoing issues insofar as receipt of compensation is concerned (i.e. compensation payments have been made directly to the relevant postmasters).
18. Post Office welcomes the Chair of the Inquiry's indication that he wishes to take steps to resolve the issues identified above, and hopes that this note assists in identifying the scope of those issues. If the Chair would be assisted by any further detail or explanation of the background and paths to resolution of these matters, Post Office would, of course, be happy to assist.

16 January 2023