Post Office Horizon IT Inquiry

On behalf of Core Participants
Nichola Arch, Lee Castleton, Tracy Felstead, Seema Misra, Vijay Parekh, Sathyan Shiju and Janet Skinner

Submissions to the Compensation Hearing dated 27 April 2023 & Coda on Unanswered/Unresolved issues from 8th December 2022

1. These submissions are in response to the Email from the Inquiry dated 23 March 2023, inviting submissions on specific issues relating to compensation. We follow the headings of those issues below. Arising from those specific issues, our overall argument is that the present situation is untenable. There is no prospect of the SPMs receiving fair compensation if the three different compensation programmes are permitted to run their course along different lines. There is a complete absence of transparent, consistent principle, which is already leading to an array of outcomes, some of which seem highly questionable. If the Government does not step in to give all SPMs the option of applying to an independently administered scheme, the Post Office scandal will run for many more years to come, and further litigation is all too possible. The reputation of Government, Corporate Governance and both civil and criminal justice will be dragged further into the mire by this discordant triplet of inconsistent schemes. To the charge, 'they couldn't even get compensation right' there is no real defence, a situation that must not be allowed to continue.

2. In our compensation submissions dated 22 June 2022, we submitted that the Post Office, advised by HSF, could not be trusted to deliver fair compensation in the context of fundamentally litigious negotiations, and that BEIS (now DBT) should take over the payment of compensation for all SPMs, in accordance with fair and transparent principles. The events of the last 9 months cause us to reiterate those submissions, on the same basis: SPMs should be able to choose. Those who want to continue with their private negotiations should be free to do so, but they should have the option of joining a fair and transparent scheme under the aegis of, and answerable to an Independent Commissioner, ideally a retired High Court Judge.

Bankruptcy

3. The issue of bankruptcy exposes the fundamental flaw in the OHC Scheme. The Settlement Deed, negotiated by HSF, severely constrains the position of Convicted Claimants (GLO claimants who had been convicted of criminal offences). Their only preserved legal claims are for malicious prosecution, so the Post Office will not pay any damages unless they flow from that cause of action. As a result, it is possible that some Convicted Claimants who were made bankrupt will be barred from claiming up to £300,000 which would otherwise have been available to them, and may still be available to other SPMs.

4. At paragraphs 43 to 46 of her Opinion, Catherine Addy KC has identified what appears to be a rare cause of action for damage to credit and reputation caused by the stigma of bankruptcy. This cause of action arises where there has been a wrong in contract or tort that has led to bankruptcy. On the facts of the case Ms Addy KC cites, the negligence of United Counties Bank led to Mr Wilson's bankruptcy. There is a clear distinction between the cause of action which arose on those facts vis-à-vis the tort of malicious prosecution which arises when a

petitioning creditor wrongfully pursues bankruptcy proceedings. The quantum for damage to credit and reputation may be the same or similar, but the distinction arises from how the bankruptcy proceedings came about.

5. This distinction may become very important to bankrupted Convicted Claimants. If the Post Office was not the original petitioning creditor in the bankruptcy, but it was nevertheless the Post Office's wrongs which caused the bankruptcy, the terms of the Settlement Deed would bar any *Wilson* claim; whereas, a similar claim would not be barred if the Post Office was the original petitioning creditor, because that would be a preserved claim for malicious prosecution.

6. The quantum for a *Wilson* claim is significant. The House of Lords found that general damages of £305,493.06 (in today's terms) were not excessive. In her paragraph 49, Ms Addy KC has identified a number of reasons why damages in a modern *Wilson* claim may be lower, but she nevertheless takes the sum approved in that case as a valid starting point.

7. We do not represent any of the bankrupted Convicted Claimants, so we do not know whether any of them have *Wilson* claims, as opposed to additional malicious prosecution claims, but given the stance taken so far in negotiations with Paul Marshall (who is acting for all of those we represent), it is clear that the Post Office will not concede a *Wilson* claim if it is raised. This illustrates the inherently adversarial nature of the OHC Scheme negotiations, in which the SPMs continue to be out-gunned by the institution which wronged them, and the "Global Law Firm" firm which has protected its interests ever since it attempted to challenge the "Common Issues" Judgment of Mr Justice Fraser, even advising on the wholly misconceived and unmeritorious application to recuse him, during the "Horizon IT Issues" trial.

8. The problem is further illustrated by the contrast with the case of Vijay Parekh, who we do represent. If a *Wilson* claim is made on his behalf by Mr Marshall, the Post Office will not be able to rely on the Settlement Deed to reject it, because Mr Parekh's then trustee in bankruptcy refused to allow him to join the GLO. This twist of fate means that his claim under the OHC Scheme is at large. It is absurd and manifestly unfair that the Convicted Claimants should be in a less advantageous position than Mr Parekh, and quite possibly many others who have yet to secure successful appeals against their convictions.

9. The *Wilson* case also helps to identify – and hopefully redress – early concern about the developing GLO Scheme. Section 5.7 of the published guidance[1] deals with bankruptcy, and gives the following indications on anticipated quantum:

    a. General damages for bankruptcy - £20,000 to £60,000

    b. Aggravated damages where the Post Office was the original petitioning creditor - £10,000 to £25,000

10. These ranges appear to be out by an order of magnitude. There is nothing in Ms Addy KC's reasoning to suggest that the *Wilson* damages for loss of credit and reputation should be brought down to a component within general damages of between £20,000 and £60,000, with no more than £10,000 to £25,000 as aggravated damages for malicious prosecution where the Post Office was the original petitioning creditor. Note that for all claims, not just those relating to bankruptcy, the guidance suggests non-financial damage to reputation is worth between £1,000 and £10,000,[2] so the small sums attached to the stigma of bankruptcy are not made up for elsewhere.

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[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1145098/glo-guidance-principles.pdf

[2] Para 5.9.5

11. Lee Castleton will be making a claim under the GLO Scheme, so this guidance applies to him. He only had one creditor, and his bankruptcy flowed directly from the Post Office enforcing the £321,000 costs order which was wrongfully imposed on him. The stigma he and his family suffered have already been described to the Inquiry. A benchmark of £300,000 in damages could hardly be described as excessive in the Castleton case any more than it was in the Wilson case.

12. Overall, the bankruptcy issues are illustrative of the irrationality and injustice of permitting the Post Office to negotiate its own settlements through the OHC Scheme. There is simply no justification for the following situation:

    (i) a claim at large under the OHC Scheme could include general damages for the stigma of bankruptcy against a maximum derived from *Wilson* in the order of £300,000;

    (ii) a claim by a Convicted Claimant under the OHC Scheme could only include an element of damages for the stigma of bankruptcy if the Post Office was the original petitioning creditor, and could therefore be said to have maliciously prosecuted for bankruptcy (as well as maliciously prosecuting in the criminal courts);

    (iii) a claim under the GLO Scheme could include general damages for the stigma of bankruptcy, but the indicated maxima would be £60,000 if the Post Office was not the original petitioning creditor, and up to £85,000 if it was.

13. Although the indicated sums set out in the DBT guidance need radically re-thinking, that is made possible by the fact that they are in the public domain. Allowing the Post Office to continue to conduct unsupervised, private and litigious negotiations via the same firm that negotiated the Settlement Deed in

the first place is wrong, and we will provide further examples of the wrongfulness below.

Taxation

14. We have read the correspondence between the Chair and the Government on this issue, and the public correspondence between Dan Neidle and the Post Office. It is shameful that the Post Office, through HSF, has concluded settlements which do not make suitable provision for taxation. This is further proof that settling compensation must be taken out of the Post Office's hands, unless the SPM specifically chooses otherwise, so claims can be concluded in accordance with fair and transparent principles. The longer the Post Office is permitted to pursue its own course, the more likely it becomes that a further scandal will emerge, and all the claims will need to be re-opened. Regretfully, it already seems likely that some of the settlements reached should be re-opened in order to ensure fair provision for taxation is achieved. This typifies a thoughtless, lowest common denominator approach by the Post Office, and unsatisfactory advice (or no advice) being provided to the vulnerable SPMs.

Factual Update on the HSS and OHC Scheme

15. We have no updates to bring to the Inquiry's attention with regard to the HSS, except to say that given the way that HSF is furthering the Post Office's interests in litigious negotiations with those who have overturned convictions, we have grave concerns about their role as administrators of the HSS. Justice cannot be seen to be done in these circumstances.

16. Regarding the OHC Scheme, we return to ongoing problems arising from the flawed GLO Settlement Deed. We represent a number of the Convicted Claimants who did not receive any compensation from the Post Office under the Settlement Deed because it was said that the principle of *res judica* prevented it. The JFSA subcommittee decided to re-distribute some of the

compensation paid to those who were not convicted, so the Convicted Claimants received *ex gratia* payments from the other GLO claimants, but they received nothing from the Post Office. Nevertheless, they are now barred from bringing any claims, apart from their position with regard to malicious prosecution, which was preserved.

17. Given that the Convicted Claimants received nothing from the Post Office in return for giving up their rights, if the Deed were a contract it would be void for want of consideration. Despite that, in correspondence with Mr Marshall, HSF on behalf of the Post Office has confirmed that the Post Office relies upon its rights therein.

18. Even worse, it is attempting to claw back the *ex gratia* payments which the unconvicted claimants made to the Convicted Claimants from their compensation. This is plainly wrong, as can be illustrated with reference to those we represent: Under the Deed, the Post Office paid (inadequate) compensation to Nichola Arch, Lee Castleton and others (Group A) for breach of contract. It refused to pay any compensation to Tracy Felstead, Seema Misra, Janet Skinner and others (Group B) for breach of contract, but Group A gave some of the money they received to Group B, *ex gratia*. Now that Group B are making quite separate claims for malicious prosecution, the Post Office is attempting to claw back the sums Group B received from Group A. This is an attempt to get back money which it gave to a different group of litigants for a different cause of action.

19. This error of logic and law is of a piece with the way the Post Office, represented by HSF, has mishandled taxation.

20. It is also of a piece with an attitude that simply fails to recognise how far the Post Office has to move in order to right the wrongs. The approach seems to be

and to have been, 'pay as little as you can get away with.' Truly pitiful sums, described as 'exiguous' by Mr Marshall, have been tendered.

21. Standing on the terms of the Settlement Deed simply does not allow for Convicted Claimants to be awarded fair compensation. There are two clear reasons for this which have emerged so far.

22. First, there is the possibility of damages for the tort of intentionally interfering with or obstructing the right of appeal. We made the case for this cause of action at the compensation hearing on 8 December 2022. As with the potential *Wilson* claims, this may be available to Mr Parekh and others who were not part of the GLO, but will not be available to Convicted Claimants under the terms of the Deed. If the next Phase of the Inquiry brings forward evidence that from 2013 there was an intentional interference with SPMs rights of appeal, it would be abhorrent for the Convicted Claimants to be prevented from seeking the redress available to others.

23. Second, we have recently submitted applications to represent the three Convicted Claimants who had their convictions overturned at Southwark Crown Court shortly before the decision in *Hamilton and others*. The Chair addressed their situation when considering interim compensation in paragraphs 91 to 93 of the Chair's Progress Update, dated 15 August 2022. Despite those remarks, the Post Office never did award any interim compensation to them, and it has now made final offers to all three in the region of the sums offered to other Convicted Claimants by way of interim compensation. They are made on the basis that Post Office considers their claims for malicious prosecution to be weak. The lack of any interim award has driven Parmod Kalia and Teju Adedayo to accept this as full and final compensation (although Mr Kalia refused to accept the assertion that it was fair, and Ms Adedayo may have expressed similar reservations).

24. This has made real the concern identified by the Chair: because the Post Office was the final arbiter of whether to award interim compensation, it has been able to use its power, once again, to put pressure on two of its victims to accept a final offer, because they simply were not able to sustain their position in the adversarial process without any interim financial redress. We do not yet have full instructions, but we understand that by contrast Vipin Patel has been able to hold out, and he does not intend to accept the offer, but in the meantime he has received nothing.

25. If they were not Convicted Claimants they would have had other claims to pursue. The breaches of contract which the Post Office settled in the GLO are the reason that others have claims under the HSS. Likewise, those of the 555 who were not convicted are now entitled to have those breach of contract claims supplemented to fair levels by the GLO Scheme. It cannot be right that these three are barred from pursuing those same claims, and thereby from having access to a more impartial process for deciding whether their "confessions" truly are reliable support for the allegations Post Office made against them. The only mechanism they have available to them is another court action, coming on top of their original prosecutions, the GLO litigation, and their appeals to Southwark Crown Court.

26. Although all the Convicted Claimants have been barred from pursuing breach of contract claims, it is particularly pernicious for these three who the Post Office chooses not to recognise as having valid malicious prosecution claims. It is acting as sole arbiter to deny them any interim payment, while offering a sum in full and final payment which is similar to the interim payments offered to others. It seems likely that this was calculated to incentivise settlement and prevent negative headlines from court proceedings. If Mr Patel has the mental and financial resource to take this further, it would be surprising if he were not, at some stage, offered a larger sum than that which Mr Kalia and Ms Adedayo

accepted, and there can be no justice in that. This unseemly and unfair process of litigious negotiation simply should not be allowed to continue.

Factual Update on the Group Litigation Scheme

27. In the bankruptcy section above we raised serious issues with regard to quantum. These cannot be understated. The mere fact that there are many SPMs and there was only one 'Mr Wilson' must not lead to injustice for those who were made bankrupt.

28. More broadly, there is a wealth of case law on the quantum that should attach to loss of reputation, which the Guidelines currently suggest should be worth no more than £10,000. We have no expertise in this area, and will not opine on it, save to say that quantum must be set with regard to principle, not the exigencies of DBT's budget, and the fear that numerous claims for an appropriate sum will place too much of a burden on it.

29. We would also like to raise the fact that it took a strongly worded and lengthy letter from Mr Marshall to ensure that Nichola Arch was accepted as a legitimate claimant to the GLO Scheme. Despite the fact that she was prosecuted more than 20 years ago, DBT initially saw fit to rely on a lack of documentary evidence from Ms Arch's prosecution to suggest that it may not have relied upon Horizon evidence. This situation has now been rectified, and we are pleased to report that Ms Arch's longstanding, consistent and public explanations of the Horizon evidence that was used against her have been accepted. Nevertheless, that this happened at all suggests a tendency towards the same pettifogging attitudes which have beset many compensation schemes. We hope that by identifying this early error of approach, the Chair will be assisted to ensure that this Scheme is free of this type of officialdom from now on.

Coda: 8th December 2022

30. Finally, we return to the questions posed on 8th December 2022 [Transcript, p.75/22 onwards:

There are two issues. The first is the continuing and inexcusable delay in delivering compensation to the wronged, to the innocent, and that will also include whether the awards proffered are even remotely approaching acceptability

The second, which is inextricably entwined with the first, is whether POL will accept that it deliberately denied, obstructed and delayed appellate rights, needlessly, unjustly and wrongly prolonging the suffering of those that it had devastated, either by civil judgments and bankruptcy, or criminal convictions.

31. The first issue remains unresolved, and evidence continues to mount that 'rock-bottom deals' or inadequate sums are being struck or awarded owing to inequality of arms, or upon 'broad brush' principles.

32. The second issue was a direct question to test the candour, integrity and remorse of the Post Office – and the continuing silence of the Post Office does not augur well for either (a) disclosure or (b) compensation. **The question as to deliberate and tortious suppression of appellate rights was framed in the context of an additional head of damages, we touch upon at paragraph 20 above, and the subsequent silence indicates that Post Office has no intention of conceding the point or paying any damages in respect of it.**

33. It is submitted that this approach falls into a pattern of deliberate non-disclosure, seen in both Bates/GLO and Hamilton. No concessions are made, no helpful clarification or admission that might narrow the issues and allow the Inquiry to focus, e.g., exclusively on Fujitsu's role in this catastrophe.

34. It is also consistent with the litigation strategy taken in *Hamilton and others*, when the Post Office did all it could to oppose, or suppress the limb 2 abuse of

process ground, just as the Post Office now refuses to concede tortious obstruction of its victims' rights of appeal.

35. Leading counsel for Ms Felstead, Mrs Misra and Ms Skinner contended at a Directions Hearing[3] to be allowed to argue Second Category Abuse of Process, or 'limb 2' that:

It would be wrong in principle for the court to permit the respondent effectively to preclude argument on Ground 2 by its concession that Ground 1 is not opposed….

AND

the public interest required consideration of the complete picture. The respondent should not be able to sidestep the issue raised in Ground 2 by conceding the appeals on the basis of Ground 1. She referred to the decision of the Supreme Court in R v Maxwell [2011] 1 WLR 1837 , and in particular to the judgment of Lord Dyson JSC, who said at [13] that in the second category of abuse of process –

"… the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will offend the court's sense of justice and propriety .. or will undermine public confidence in the criminal justice system and bring it into disrepute … ."

36. The Respondent, in that hearing, opposed the limb 2 ground of appeal by making an assault on the findings of the CCRC, which was criticised for unjustly 'extrapolating' the findings of Fraser J, and that its factual submissions based upon the judgments of Fraser J did not (of themselves) amount to a limb 2 abuse in any event. The Respondent also submitted that the Court should not perform the role of an Inquiry, and so subtly sought to restrict the jurisdiction of the Court of Appeal, thus:

[3] [2021] EWCA Crim 21, 2021 WL 00137312, Judgment 17th Jan. 2021

It is respectfully submitted that if, having evaluated the fresh evidence (i.e. the High Court findings), the Court is satisfied that the convictions are unsafe, it is not its function then to continue to conduct what would in effect be a wide-ranging enquiry into conduct spanning eight years (Tracy Felstead was convicted in 2002, Janet Skinner in 2007 and Seema Misra in 2010). In the alternative, it is unnecessary to receive further evidence and hear argument when the statutory test is met. In relation to second category abuse, it is of note that both the CCRC's reasons, and the Appellants' grounds, are general and wide-ranging as opposed to case-specific. The Respondent has conceded case-specific second category abuse of process in four cases before the Court (Hughie Thomas, Allison Henderson, Alison Hall and Josephine Hamilton)……

It is submitted that in the uncontested cases of these three Appellants, if the statutory test is met then there is no need to receive yet further evidence concerning second category abuse of process. It is akin to the situation whereby those representing an appellant raise a number of grounds of appeal but if they are successful on one of the grounds, the Court need not consider the remainder.

37. In relation to second category abuse of process it is no exaggeration to state that the Post Office demonstrated an obdurate degree of opposition, and became entrenched, so that no concession as to the viability, indeed merits of limb 2 was ever made, in spite of what the Post Office knew, and had long known about its conduct in relation to Horizon.

38. Instead, *in terrorem* advocacy was advanced, the 'Doomsday' picture of an untriable issue, or at least an issue that was untriable in a timely fashion:

It is submitted that if the Appellants were permitted to "amplify" the CCRC's reasons on second category abuse as they propose, or to argue them as new grounds, that would involve the Court having to consider applications to receive and, if received, would involve the Court examining a considerable quantity of fresh material which Fraser J did not consider in his two judgments, resulting in the inevitable expenditure of a

considerable amount of court time and resources. It is submitted that it is unnecessary and inexpedient to consider the receipt of fresh evidence beyond the High Court judgments when the Respondent has conceded these convictions are unsafe.

Moreover, whether the Court is unpersuaded by the CCRC's reasons for second category abuse of process (either in law or fact) or whether the Court determines that the convictions of the three Appellants are unsafe on unopposed grounds of first category of abuse, it is submitted that there is no foundation upon which these Appellants can amplify, or indeed should be permitted to advance, any further grounds of second category abuse.

39. As the Inquiry is aware from subsequent resolution of the Appeals, this submission did not hold water. Leading counsel for the Appellants had never suggested that the ambit of the evidence be enlarged, and was content to try the matter on the 'Common' and the "Horizon IT" judgments.

40. An advocate to the Court was appointed (Louis Mably KC) to make independent submissions on the powers of the Court, and its approach. His submissions were upheld. They have a bearing on the approach that needs to be taken to both compensation for all available heads of damage, and, we would submit, disclosure.

41. Mr Mably QC submitted that in deciding whether the court should permit argument on Ground 2, the overarching principle is that the court should act in the interests of justice. Factors to be considered relate to the efficient and expeditious administration of justice and the interests of **an appellant in being vindicated on as wide a basis as possible**. **The legitimate interests of an appellant, and the wider public interest, may militate in favour of deciding an additional ground. Reputational interests of the appellants may be important.** (emphasis added)

42. Mr Mably set out issues which were critical for the Court to consider when determining whether to hear argument on an additional ground, many of which apply to ensuring that all heads of damage are considered:

    i) The article 6 rights of the appellant; …

    v) Whether the additional ground relates to an issue which should be resolved in order to maintain public confidence in the criminal justice system;

    vi) Whether the additional ground raises a legal issue which may be important in other cases;

    vii) The desirability of an appellant, even though his or her appeal will in any event succeed, being able to seek appropriate vindication; …

43. We submit that the Post Office's refusal to answer the question asked on 8 December, or to concede any issues in the instant Inquiry, and thereby limit the compensation offers it is making, is akin to its attempt to prevent the Court of Appeal from hearing argument on limb 2. It is a damage limitation exercise.

44. For the avoidance of doubt, and for the specific reasons advanced above, the Chair is invited to continue keeping a close watch on the subject of compensation. The Chair's supervision is essential to ensure that the Post Office complies with its duty of disclosure so that the victims of both civil and criminal miscarriages of justice can be appropriately vindicated, and compensation settlements can be reached in accordance with transparent, unimpeachable principles. The misfeasance of a public corporation which subjugated its victims over a period of decades must lead to fair compensation.

Edward Henry KC, Mountford Chambers &

Flora Page, 23 ES Chambers

6 April 2023