IN THE POST OFFICE HORIZON IT INQUIRY

SUBMISSIONS ON BEHALF OF THOSE REPRESENTED BY HOWE & CO

FOR THE COMPENSATION HEARING ON 27 APRIL 2023

INTRODUCTION.

1. We have been asked by the Chair to address the following issues:

(i) Bankruptcy issues,

(ii) Taxation issues

(iii) Factual progress update on the Historical Shortfall Scheme and Overturned Historical Convictions Scheme

(iv) Factual progress update on implementation and administration of the Group Litigation Scheme

2. We have taken the view that the Chair seeks a factual progress update on the three schemes primarily from DBT (formerly BEIS). However, a number of issues have arisen in individual compensations claims which are being dealt with by solicitors within Howe & Co. We have raised these issues towards the end of this document.

3. We would wish to respond, on behalf of our clients, to any updates provided from DBT/ POL at the hearing on 27 April 2023 and propose to do so at the oral hearing on 27 April 2023.

4. The focus of these submissions is on the GLO Scheme. This is for 2 reasons. Firstly, the majority of our clients were members of the Group Litigation. Secondly, our previous submissions as to the GLO Scheme have been necessarily limited due to the fact that no such scheme had been devised at the dates of the previous compensation hearings.

The GLO Scheme

5. On 14 March 2023 Howe & Co received a late draft BEIS/ DBT revised Principles and Guidance, an application form and a claimant Q&A.; albeit that BEIS had provided an incomplete and provisional draft for the purposes of the Inquiry on 7 December 2022.

6. We have taken instructions upon and considered this documentation. However, we should note that, whilst there was consultation at earlier stages as to the type of scheme that should be put forward[1], the GLO Compensation Scheme Guide and Principles ('GLO Scheme') (which was published on 23 March 2023) was not prepared in consultation with Howe & Co, nor, to the best of our knowledge, with other solicitors representing Core Participants in the Inquiry.

7. Had Howe & Co had any meaningful input into the design of the Scheme, we would have sought provisions to facilitate resolution of claims within a short timeframe and also had input on a range of issues including the 'banding' in relation to heads of claim.

8. Our clients have also noted that the timing of the publication of the GLO Scheme represents, in their view, yet another example of tangible progress being made as a result of the Inquiry continuing to monitor the issue of compensation through holding regular hearings.

[1] Howe & Co responded to an initial consultation letter of 2 September 2022 by way of representations dated 28 September 2022.

9. The issue of fair compensation is urgent, not least because SPM claimants are continuing to die without being compensated. We ask on behalf of our clients that the Inquiry continues to conduct hearings and that the Chair continues to publish progress updates.

BANKRUPTCY ISSUES

10. The underlying principle behind any scheme for compensation is that the claimant should be placed back in the position that they would have been had the conduct for which compensation is to be provided not taken place.

11. There are a number of reasons why the GLO Scheme, as currently drafted, fails to meet those objectives. In particular, the Scheme imposes unnecessarily onerous procedural and evidential hurdles and fails to incorporate any timetable. Neither does it take account of relatives of SPMs, who were affected by the scandal.

12. For the purposes of the hearing on 27 April 2023 we maintain that the GLO Scheme fails to afford sufficient protection to those who were made bankrupt *inter alia* through the facilitation of applications for annulment or recission. Neither is adequate provision made for those who have been required to enter into IVAs.

13. The GLO Scheme, as recently published, deals with bankruptcy as follows:

> *5.7. Bankruptcy/insolvency*
>
> *5.7.1. Losses suffered if you underwent bankruptcy or insolvency proceedings as a result of a Horizon Shortfall may be claimed as a Consequential Loss.*
>
> *5.7.2. For such a claim to be successful you will have to provide evidence that you were bankrupted/declared insolvent (as appropriate), the value of the loss claimed and that the bankruptcy/insolvency was due to the Horizon Shortfall*

(rather than other intervening events/general financial hardship/other factors.)

5.7.3. The types of documents that you should provide with your claim if possible include the following:

• copy of bankruptcy order or IVA documentation;

• copy of notice of bankruptcy in appropriate newspaper;

• financial/accounting evidence to demonstrate that the Horizon Shortfall was the reason for the bankruptcy/insolvency e.g.: - bank statements;

- accounts;

- cash flows (historical and forecast);

- business plans (historical and forecast);

- management information (historical and forecast);

- *details of all creditors at the time of bankruptcy/insolvency; and*
- *if the bankruptcy/insolvency process has concluded, details of payments made to creditors.*

6.7.4. If you were made bankrupt as a result of the Horizon Shortfall, you may be able to claim for:

• Diminution in value to your estate or assets because of the bankruptcy.

• Other consequential pecuniary loss, e.g. if you suffered a financial loss as a result of harm to your credit and reputation by reason of bankruptcy.

• General damages (anticipated to be in the range of £20,000 to £60,000.)

• The expenses of the bankruptcy (including annulment costs already incurred.)

• The statutory interest payable to your creditors.

6.7.5. Where Post Office was the original petitioning creditor in your bankruptcy, aggravated damages may also be claimed. These are anticipated to be in the range of £10,000 to £25,000.

6.7.6. You should provide a calculation showing how the amount being claimed has been quantified.

6.7.7. If you would like to seek an annulment, the Scheme will cover the reasonable legal fees associated with you doing so, e.g. court fees. This request should be facilitated by your legal advisor. You can provide an estimate of the costs in your application form, or if after the submission of your application form, by emailing glo.compensation@beis.gov.uk.

14. A number of issues arise from this section of the scheme, and we have noted below that the scheme imposes an unduly heavy evidential burden upon applicants.

Delay in producing the GLO Scheme

15. The Chair will recall addressing Counsel at the hearing on 8 March 2023 in connection with the sad news that one of our clients, Isabella Wall, had died. Counsel informed the Chair that Ms Wall had died before any final payment had been made under the *ex gratia* scheme, let alone final compensation.

16. The case of Isabella Wall highlights why the continuing delays by DBT are so harmful to many of our clients. More SPMs may not live to enjoy the compensation which the scheme is intended to deliver unless matters proceed with urgency. The Inquiry will be aware from our earlier submissions that many of our clients are elderly and/or suffer with health issues.

17. Our clients do not understand why this scheme was not prepared sooner. The Inquiry will note, from submissions that we made on 2 December 2022, that Howe & Co has been calling for a compensation scheme since February 2021. In fact, Howe & Co assisted many SPMs in seeking compensation over a decade ago in the failed Post Office mediation.

18. Indeed, on 22 October 2021 Howe & Co wrote to the Chief Executive of Post Office Limited and asked for confirmation that POL would start work immediately to establish a reparation scheme for SPMs and other persons affected by the Horizon IT Scandal. The letter clarified that any future holistic scheme should not exclude claimants in the Group Litigation.

19. Eighteen months have passed since the writing of that letter. Unfortunately, the development of the GLO Scheme has stretched out over many months. The Chair cautioned against exactly this kind of delay in August 2022 in the Chair's Progress Update on Issues relating to Compensation, paragraph 166 of which stated: (our emphasis)

> *166. It is anticipated that the Scheme for delivering compensation to eligible Claimants in the Group Litigation will emerge following proper discussions and negotiations between the Claimants' representatives and officials of BEIS.* ***Those discussions and negotiations should be undertaken within weeks and should not stretch over many months. The announcement that further compensation would be paid to Claimants in the Group Litigation was made nearly 5 months ago.***

20. The Chair will recall from submissions of 2 December 20222 that it has been the position of DBT and POL that those who were made bankrupt as a consequence of the Horizon IT scandal were more complex than other claims and would take more time to resolve.

21. We strongly objected to this stance because our bankrupt clients felt that they were being 'held at the back of the queue', notwithstanding that their financial situations were in many cases extremely serious. After the initial delays in providing interim payments had resolved, our clients still received unfair outcomes. We understand from Peter Wall that approximately 40% of Isabella

Wall's interim payment was taken by her Trustee in Bankruptcy and had not been restored to her at the time of her death.

7 August 2024 - expiry period of financial payments

22. It should be uncontentious that delays in the GLO Scheme could result in the scheme failing to compensate large numbers of SPMs. This is because of the limited timeframe under which the Scheme must operate. Paragraph 39 of the Chair's Statement on Issues relating to Compensation, January 2023 states:

> ***39.First, all claims under the scheme must be resolved by 7 August 2024. The funding for payments under the scheme has been obtained by the Government in reliance upon statutory provisions which dictate that the funds must be used for their allocated purpose by that date. That means that approximately 550 claims will have to be considered in the course of the next 20 months. The experiences gained in administering the HSS and OHCS demonstrate how challenging this will be.***

23. We wish to highlight that the delay by DBT in establishing the scheme has created a very real concern for our bankrupt clients and those who are subject to IVAs.

24. Essentially, there is now significant time pressure for bankrupt and IVA affected clients to progress through the newly formed scheme to final payment within 16 months. We ask that the Chair considers whether a timetable should be imposed on DBT to ensure that the clock will not run down in relation to this very important Scheme.

Delays in obtaining disclosure

25. The reason why it is now necessary that there be some sort of time management structure, is that bankrupt/ IVA affected SPMs are required to discharge a more

onerous evidential burden than applicants who are not burdened with trustees or officeholders.

26. Indeed, one of the key principles of the GLO Scheme is that the onus will be placed on applicants to produce evidence that claimed losses were incurred and that the cause of the loss was Horizon. Applicants who have been subject to bankruptcy must include details documentation to support their claims and are additionally required to demonstrate that the bankruptcy/ insolvency was due to the Horizon Shortfall, rather than other intervening factors.

27. We have noted in our earlier submissions that it is not reasonable that the very institutions which were responsible for the scandal (and DBT remains the owner of POL), should seek to place burdens on the victims of the scandal.

28. However, it should be clear that where POL was the petitioning creditor, liability will be relatively straightforward. Disclosure of documents remains an important issue for this type of case. Many applicants to the Scheme may no longer have access to all of the documents that they need and will need to rely on disclosure from POL to establish their claims.

29. There will be other cases where POL may not have been the petitioning creditor, but where individual applicants will maintain that but for their having to repay POL upon demands made as a result of Horizon shortfalls, they would not have become bankrupt or insolvent.

30. In all these cases disclosure will be particularly important. The Inquiry will recall that very many SPMs have given unchallenged evidence to the effect that they were denied access to their documents and records, upon having been suspended following an audit.

32 weeks for disclosure

31. In view of this urgency, we are concerned to note that BEIS/DBT informed us by email dated 8 March 2023 that '*POL explained the constraints that mean the full set of disclosures will take 32 weeks*.'

32. Essentially, our clients now understand that POL will take 7-8 months to complete the disclosure process in respect of each individual claim. This delay is potentially very serious given the hard stop of 7 August 2024 of the GLO Scheme. Whilst we have obtained disclosure on behalf of our clients through the making of subject access requests under the Freedom of Information Act, it is likely that many SPMs who are subject to bankruptcy and IVAs will be unable to access the documents that they need from POL to effectively access the GLO Scheme. This is a major deficiency of the Scheme.

33. We therefore ask that DBT/POL takes the following steps:

(i) POL expedites the disclosure process through allocating sufficient further resources to do so; and/or

(ii) DBT confirms that it will take steps to ensure that funding for the scheme will be available beyond 7 August 2024.

Proposed Timetable

34. In the Claimant Q&A, DBT states:

> *We hope that most cases can be resolved before the end of 2023. All payments will be made by August 2024 at the latest.*
>
> *The time taken to investigate and assess each claim will be heavily dependant on the facts of that claim and the volume of documentation involved. While it is difficult to provide an accurate estimate at this stage, we envisage it could*

take several months for individual case outcomes to be reached and communicated. We will progress all claims as quickly and efficiently as possible.

You will receive regular updates regarding you claim vis the claims facilitators.

35. It appears that DBT is uncertain as to how long the process will take. We suggest that DBT provides an indicative timetable, and that BEIS agrees to provide monthly updates to the Inquiry.

36. Our clients are understandably anxious that a degree of certainty is provided as to how DBT will utilise the limited time that is available to ensure that payments under the scheme are made by August 2024.

37. The above provides a powerful rationale for the Chair to continue to hold regular review hearings on the progress of compensation matters.

The Opinion of Catherine Addy KC

38. We have read the opinion of Ms Addy KC, which sets out a comprehensive and very helpful summary of the relevant law in relation to bankruptcy and IVA issues. Our clients are grateful to the Chair for seeking advice on these matters.

Causes of action which only relate to personal losses.

39. We understand from Ms Addy KC's opinion that where an SPM wishes to bring a claim for loss and damage arising from the POL scandal, damages relating to 'pain felt by the bankrupt in respect of his body, mind and character and without immediate reference to his rights of property' do not vest in a trustee. This appears to be the effect of Heath v Tang and another [1993] 1 WLR 1421 (see Opinion at 12 (v)(c)).

40. However, this principle will only apply where there is a distinct cause of action which only gives rise to damages that are purely personal in nature. It cannot apply where the cause of action arises from financial and personal losses combined (Ord v Upton [2000] Ch 352).

41. Notwithstanding the principles set out in Ord v Upton, Ms Addy KC confirms at paragraph 36 of her opinion that it is possible that claims could be advanced with multiple causes of actions, which had arisen on different dates. Hence, it is also possible that some causes of action may have vested in the officeholder and others in the individual SPM.

42. It seems from Ms Addy KC's opinion that there will be a narrow category of cases where an SPM makes a claim for personal injuries and reputational losses which arose before bankruptcy. This might apply in cases where the bankruptcy was attributable to other factors. Individual SPMs without representation might not be aware of this matter.

Multiple causes of action

43. Furthermore, there is another narrow band of applicant identified at paragraph 36 of the Opinion, who would be able to bring claims based on multiple causes of action, some of which would not lead to recoverability by the officeholder.

44. We note that Ms Addy KC has advised that POL must not do anything to assist in any breach of trust where POL knows that an SPM may bring a claim for damages that are personal to the bankrupt, it should seek to ensure that it does not do anything which might assist in bringing about a breach of trust by the officeholder.

45. In light of the above, we take the view that DBT should prepare a schedule of potential cases or situations where an officeholder will not be entitled to damages

and seek to obtain agreement with Trustees as to the extent of the rights of trustees in the various applications that will be made under the Scheme.

46. It would be regrettable if, notwithstanding the clarification provided by leading counsel, SPMs were detrimentally affected by the relevant aspects of the opinion not being communicate to trustees.

The position of officeholders in relation to the *ex gratia* scheme

47. Significantly, paragraph 62 of Ms Addy KC's opinion contains confirmation of leading counsel's view that SPMs who might in the future benefit from the *ex gratia* GLO Scheme would receive payments which would not constitute property which would automatically form part of the estate in bankruptcy.[2] Two caveats are applicable in cases where a bankruptcy may have been discharged on terms which entitled an officeholder to a future payment.

48. However, Ms Addy KC notes that an individual insolvency practitioner has asserted a contrary position. If a dispute arises in this context, then Ms Addy KC states that such issues can be resolved by reference to Section 303 of the 1986 Act and an application for directions from the court.

49. A question arises as to who should pay for any necessary application to resolve the issue, should the need to do so arise.

50. We suggest that DBT should consent to being joined in any action as an interested party and should agree to meet the costs of any SPM, who is required to take action under section 303 of the 1986 Act.

51. Alternatively, it should be incumbent on DBT to commence proceedings under section 303 to ensure that the matter can be resolved prior to the expiry of the August 2024 deadline.

[2] RE a Bankrupt (No 145 of 1995) as cited by Ms Addy KC

52. This is an important issue which DBT should be asked to address at the hearing on 27 April 2023.

The position in Scotland

53. At paragraph 4 of her opinion, Ms Addy KC confirms that she is not qualified to advise in relation to Scottish insolvency law. She notes that POL has identified six cases of bankruptcy (sequestration) in Scotland.

54. We consider that it would assist the Inquiry to understand in equal detail the position in relation to Scotland and we respectfully suggest that the Inquiry might give consideration to obtaining an opinion from an appropriate Scottish barrister in relation to how the issues raised by Ms Addy KC would operate in Scotland.

55. It might also be appropriate, for completeness, for the Inquiry to seek advice as to the position in Northern Ireland. Indeed, the position of SPMs facing entering into an IVA is starkly illustrated later in these submissions in relation to Fiona Elliott, who is from Northern Ireland.

Annulment

56. We note from the GLO Scheme that DBT will support applications for annulment of bankruptcies through payment of the costs in relation to those applications.

57. Annulment is obtained under Section 282 of the Insolvency Act 1986 on the basis that (a) on the grounds existing at the time the order was made, the order ought not to have been made or (b) the bankruptcy debts and expenses have all, since the making of the order, been paid or satisfied. The fact that a bankrupt has been

discharged will not preclude the court from making an annulment order if such an order is appropriate.[3]

Where POL was the petitioning creditor

58. Ms Addy KC states at paragraph 22 of her opinion that if POL was a petitioning creditor and the bankruptcy order should not have been made because the debts claimed were not due and owed by the SPM, the court will very likely require the petitioning creditor to bear all of the costs of the trustee.

59. This scenario would indeed place many bankrupted SPMs in the position that they would have been in but for the scandal. An annulment on these terms may, in some cases, almost amount to a 'clean slate' in relation to a large part of the financial aspects of a claim.

60. It is therefore important that affected Core Participants are able to apply for annulment within a reasonable timeframe.

61. To this end, we ask that POL provides (i) a list of all of the cases in which it secured bankruptcies of SPMs as petitioning creditor and (ii) witness statements in those cases confirming that the orders should not have been made.

62. This exercise will not be unduly onerous and would enable solicitors firms, such as Howe & Co, to apply for annulments on a relatively sure footing without attendant risk of costs and delay.

63. We maintain that this action is entirely appropriate in the context of a scandal, for which POL bears responsibility.

[3] S 282 (3) - See Opinion of Ms Addy KC at para 19.

Where POL was not the petitioning creditor

64. We anticipate that there will be some SPMs who applied for their own bankruptcies or in respect of whom other organisations (such as banks) were petitioning creditors. In those cases, payment of costs will be more discretionary on annulment.

65. We ask that POL (i) provides a list of those cases where this situation might arise and (ii) that POL/BEIS confirm to the Inquiry that the Scheme will pay the costs of the bankruptcy where the SPM applied for their own bankruptcy or the application was made by another party, but where the Horizon shortfall or actions of POL materially contributed to the SPM or the other party making the application.

66. This action would assist in resolving what might become lengthy and costly disputes in a number of cases in the circumstances whereby all payments under the Scheme must be made by August 2024.

Recission

67. We understand from paragraph 34 of Ms Addy KC's opinion that rescission of bankruptcy may be brought about pursuant to Section 375 of the 1986 Act, under which the court will exercise a discretionary power.

68. The courts have emphasised that recission is not to be used as a "backdoor" to annulment under Section 282. Recission will be relevant to the position of SPMs because there will be cases where it would not be possible to argue that *'on any grounds existing at the time the order was made, the order ought not to have been made'.* Yet, the court would be able to view the situation with hindsight and determine that the order ought to be rescinded. Ms Addy KC provides an example at paragraph 24 of her opinion, where a judgment debt has been set aside on its merits.

69. We submit that it is arguable that recission might apply where the judgment debt that led to bankruptcy arose as a consequence of the Horizon scandal. In the event that any SPM applies for recission on this basis, we would suggest that POL agrees to cover the cost of that application.

70. We note that there is no reference to applications for recission in the GLO Compensation Scheme Guidance and Principles. The Scheme is deficient in this respect and we submit that the scheme should be amended to cover this eventuality.

71. Annulment and recission are particularly important for SPMs because generally these remedies would enable any claim by an SPM to vest in the SPM. Furthermore, as Ms Addy KC notes at paragraph 50, any order for annulment or recission would go some way to mitigating ongoing stigma and adverse credit ratings.

72. It is therefore important that POL/BEIS modify their scheme to provide the funds for SPMs to receive legal advice on these matters and facilitate the making of such applications for annulment and recission where appropriate.

Malicious Prosecution of bankruptcy

73. Ms Addy KC refers at paragraph 27 of her opinion to the potential for an SPM to bring a tortious claim for malicious prosecution of bankruptcy proceedings. Ms Addy states that this potential would depend on the individual case.

74. We accept that such cases would be rare, fact specific, and would relate to situations where bankruptcy proceedings had been determined in a bankrupt's favour. However, it would be open to SPMs to bring such an action in certain circumstances.

75. We ask that the Scheme is amended to make provision for the making of such a claim in appropriate circumstances.

IVAs

76. Ms Addy KC states in her opinion that an IVA (entered into under Part VIII of the Insolvency Act 1986) can only be undone in limited circumstances. Ms Addy KC states that it is not possible to generalise as to what assets will or will not be caught by IVAs. This is because the scope for making applications to the court will be limited because all IVAs are governed by their individual terms.

77. However, there may be circumstances under which an SPM might be able to seek to set aside an IVA. We therefore ask that the Scheme is amended to include a scenario in which, upon an SPM seeking to make such an application, DBT would pay costs of (a) the provision of expert advice as to whether an SPM who is the subject of an IVA may make an application to the court and (b) the costs of any such application to the court in the event of positive advice having been received.

78. Ms Addy KC's view is that as IVAs operate on their individual terms, it is not possible to generalise in relation to what assets will or will not be caught by them. However, whilst the potential for applications by SPMs remains present; that matter should be reflected in the Scheme through the incorporation of an appropriate degree of flexibility or discretion on the questions of IVAs.

75. In particular, cases involving those who are subject to IVAs (or those at risk of having to enter into such an agreement) must be considered by specialists as individual cases.

76. This issue is especially urgent for one of our clients, Fiona Elliott, who is facing the prospect of having to enter into an IVA, and who requires advice on how to proceed with her compensation claim.

Certainty in relation to payments of forensic accountants' fees under the Scheme

79. Section 5.8 of the GLO Scheme states that legal and professional fees will recoverable.

80. Paragraph 6.7.6 states that applicants must provide '*a calculation showing how the amount being claimed has been quantified'.*

81. This anticipates the use of forensic accountants as it will be necessary for applicants to demonstrate how the claims have been quantified. We have considered DBT's Tariff of Reasonable Legal Costs dated February 2023, to which reference is made at paragraph 30 of the GLO Compensation Scheme Application Form. The Tariff confirms that claimant's lawyers will be authorised to commit costs of up to £7000 for advice from a forensic accountant and £3000 for advice from a medical expert. These amounts may increase in complex cases, which include where a Claimant became bankrupt or subject to an IVA.

82. We take the view that the Scheme should expressly state that claims for accountancy professionals' fees bankrupt clients will be accepted as recoverable without any need for solicitors to provide further justification.

The positions of our clients who have been made bankrupt

83. At the time of writing we have not been able to obtain authorisation to disclose the details of clients who have been made bankrupt and subject to IVAs, and who will be affected by the GLO Schemes.

84. As our instructions stand, we are in a position to note that two clients whose claims under the *ex gratia* Scheme might be adversely affected due to their having been made bankrupt in the past as a consequence of *the* Horizon scandal.

85. Our clients' cases are somewhat complicated and we do not have full instructions from them. We will endeavour to address our clients' cases in more detail either in a supplementary note or at the hearing on 27 April 2027.

TAXATION

86. The GLO Scheme materially states as follows:

4.2. Taxation

4.2.1. Payments made under this scheme are exempt from Income Tax, Capital Gains Tax and National Insurance Contributions.

4.2.2. Your claimed losses should be quantified net, i.e. after the deduction of the tax which would have been due at the time. This is to put you back into the same after-tax position you would have been in had there been no breach. If you are unable to work out the net calculation in your application form, you should state that your claim has been made gross of tax and DBT will make the relevant after-tax deductions.

4.2.3. If you would like a tax expert to help you with the calculations, the Scheme will cover the reasonable legal cost of up to £1,000. This request should be facilitated through your legal advisor.

4.2.4. Interest applied to claims will not be subject to any tax deductions.

4.2.5. HM Revenue and Customs will not collect any tax that may have been due on payments made already by way of interim payment under the Scheme as well as on future payments.

4.2.6. Please note separate guidance will be issued shortly for company claimants.

Insufficient funding for tax consultant/ expert

87. Paragraph 4.2.3 (highlighted above) raises a significant concern for our clients. We do not see how a sum of £1000 would suffice to enable solicitors acting for SPMs to instruct a tax consultant deal with matters of a complex historical nature, where there may very well be an insufficiency of documents.

88. The Inquiry may recall that POL sought unreasonably to limit the fees for solicitors in the HSS Scheme. That decision was overturned after the matter had been raised with the Inquiry. The sum of £1000 for taxation advice is derisory and places an unreasonable burden on applicant to the GLO Scheme, who may be affected by taxation issues.

89. We suggest that the Scheme is amended to provide for the provision of reasonable costs.

Indemnification of tax liability

90. There is a significant possibility that the impact of taxation on settlement sums will not place SPMs back in the position that they would have been in, had the scandal not taken place. In such circumstances, we submit that POL/ DBT should indemnify affected SPMs against tax liability.

PROGRESS UPDATES

91. We have indicated at the outset of these submissions that we consider that the Chair has sought updates from DBT and POL and that we will respond to those

updates in due course. However, as indicated at the outset of this document, there are some matters which we would wish to bring to the attention of the Chair.

The GLO Scheme

92. Firstly, we have identified a fundamental problem with the scheme insofar as if an applicant is dissatisfied with an offer, he or she will not be entitled to a review as of right. Rather, the scheme operates a filtering process, whereby a facilitator can choose whether to admit or refuse an applicant who wishes to refer an offer of compensation to the panel.

93. We do not accept that facilitators should act as conduits to enable an applicant to access an appeal hearing. Neither do we accept that it is appropriate for DBT to impose additional layers of bureaucracy into the Scheme where there are already significant time constraints.

94. Furthermore, we maintain that the Scheme fails to provide a right to request an oral hearing.

95. It is inherent in the nature of all three compensation schemes that some cases might be particularly complex and that a panel would need to ask questions or receive particular responses from representatives.

96. Such cases are better suited to hearings than determination on the basis of written submissions. Indeed, where large sums of money are involved cases will often become sufficiently complex to warrant oral hearings. Howe & Co would have requested this facility, as a matter of fair procedure, had Core Participant representatives been involved in the design of the GLO Scheme.

The Historic Shortfall Scheme

Delays in obtaining expert evidence

97. Howe & Co act for ten Claimants, who are making applications under the Historical Shortfall Scheme (HSS). The operation of the scheme has resulted in delays, which are causing our clients significant anxiety.

98. Delays in the scheme have arisen from the obstacles in obtaining expert evidence. When instructing a psychiatrist or forensic accountant; we have been required to make a request and send the medical notes (where a medical expert is requested). HSS has proceeded to assess the request and issue a decision in due course. The process is unnecessarily time consuming.

99. The HSS Dispute Resolution Team advised Howe & Co, by email of 13 April 2023 (the date of these submissions), that, "*The Historical Shortfall Scheme legal fees process is currently under review, this also includes forensic and medical expert fees. We will revert to you in due course with further information."*

100. Furthermore, the delays in obtaining authorisation for experts have caused difficulties elsewhere within the Scheme. For example, solicitors are frequently asked to arrange Good Faith Meetings (GFM), but without the benefit of expert evidence, such meetings are premature. The lack of expert evidence has prejudiced the ability of representatives to properly address how the HSS should assess loss of earnings and loss of retail. This is a significant issue for our clients.

Applicability of Network Transformation Scheme Payments – dicta in Common Issues judgment

101. A common statement set out in offer letters from the HSS is as follows:

'*A fair approach to losses arising from termination is to take into account the sums Post Office paid historically to postmasters who received a Leavers Payment under the Network Transformation Scheme (also referred to by Mr Justice Fraser in the Common issues judgment) and other similar schemes; namely, the equivalent of three months remuneration for the notice period plus 26 months' remuneration.'*

102. Our understanding is that that Fraser J did not consider causation issues and therefore the reliance by HSS on the 'Network Transformation Scheme' as a settled conclusion on causation for the assessment of loss of earnings is misplaced. We note that the guidelines from DBT on the new GLO scheme also refer to 26 months.

103. We acknowledge that a multiplier/ multiplicand approach will often be adopted in assessment of quantum for future losses. However, it is important that POL appreciates that 26 months does not represent any kind of definitive or accepted ceiling.

Loss of earnings claims

104. We consider that some of our clients' cases, on their individual facts and medical evidence, will involve losses of earnings well beyond the 26 months period of assessment, upon which HSS appears to rely. This is because many of our clients suffered from psychiatric injuries. Furthermore, some of our clients became so immersed in debt it took several years to get back to the position that there were in but for the termination of their contract with Post Office.

Procedural delays - The case of Fiona Elliott

105. We wish to draw to the attention of the Inquiry case of Fiona Elliott, which demonstrates that the HSS does not operate in an efficient or applicant focussed manner. A good faith meeting was in Ms Elliott's case for 15th November 2022. Subsequent evidence was lodged with HSS on 7th December 2022. On the 3rd January 2023 a request from HSS was made for an additional document, which was provided on 6th January 2023. We understood that the matter was to be considered by the panel again on the 11th January 2023.

106. However, it transpired that the meeting arranged for 11th January 2023 was actually a consideration of the case by members of the HSS team rather than the panel. We were informed by email dated 18 January 2023 that our client's case would go back before the panel. HSS informed us as follows:

> *We don't have any dates for when this will happen and will update you on the progress of this case w/c 27th February if not earlier.*

107. Our client was subsequently informed by HSS that her case would be put back before the panel in the week commencing the 27th March 2023. As at 13 April 2023 we have not received any revised offer following the panel's assessment. The delay has impacted on our client financially, and she is particularly concerned at the level of delay in her case because she is facing bankruptcy or being forced to enter into an IVA.

108. Howe & Co were not provided with any good reason why our clients' case was not put before a panel in January 2023.

109. In relation to the HSS, we ask that the Chair seeks clarity from POL as to how the panels are set up, why delays relating to panel assessments have occurred and why HSS requires solicitors to seek authority on the instruction of experts. These are all matters which are impacting significantly on the resolution of our clients' HSS claims within a reasonable timeframe.

The Overturned Convictions Scheme

Non-pecuniary losses

110. Regrettably there have been delays in processing our clients' overturned conviction cases, notwithstanding the evaluation which has been provided by Lord Dyson, which has been of considerable assistance.

111. Howe & Co act for 5 clients in relation to the overturned convictions scheme. On 19th October 2022 HSF requested evidence in respect of the non-pecuniary aspect of each claimant.

112. A further request was made for receipt of our clients' statements by 1 December 2022 dealing with five heads of loss, as follows:

(a) Mental distress and damage to reputation;
(b) Loss of liberty;
(c) Loss of congenial employment;
(d) Aggravated damages;
(e) Exemplary damages;

113. The head of loss of personal injury could not be considered by the deadline as it was necessary to instruct a psychiatrist. On 23 December 2022 we received three

offers (excluding personal injuries). Early in January 2023; we received similar offers in the remaining two cases.

114. The major problem that has arisen is that POL and HSF have indicated by letter dated 24 February 2023 that their client's understanding is that the GLO settlement sum should be deducted at the final settlement stage.

115. We maintain that the purpose of the 2019 Settlement Agreement specifically excluded claims relating to malicious prosecution. Our primary position is that there should be no scope for such deductions in the claims for malicious prosecution, which are reflected by the Overturned Convictions Scheme.

116. The relevant clauses in the 2019 Settlement Agreement are as follows:

> *7. Convicted Claimants*
> *7.1 The Parties acknowledge that:*
> *7.1.1 amongst the Claimants are some individuals who have been convicted of criminal offences (the 'Convicted Claimants') of which approximately 32 have referred their cases to the Criminal Complaints Review Commission (the 'CCRC');*
> *7.1.2 the Convicted Claimants cannot proceed with their claims in the Action for Malicious Prosecution, or with claims which would be barred by res judicata by reason of their conviction, unless those convictions are overturned.;*
> *7.1.3 as part of the settlement set out in this Deed, the Defendant has not made, or agreed to make, any payment to or for the benefit of any Convicted Claimant; and*
> *7.1.4 if, for reasons of expediency and to facilitate the settlement of the Action as a whole, those Claimants who are not Convicted Claimants elect to share any part of the Cash Settlement Sum to which they may be entitled with any Convicted Claimant, though not giving either express or implicit approval to such a course, the Defendant acknowledges it is unable to prevent it.*

117. Our secondary point on this potential dispute is that there is a lack of clarity particularly in respect of the schedules to the 2019 Compromise.

118. We accept that the Inquiry will consider the conduct of the group litigation within Phase 5, commencing in autumn 2023, and that the Settlement Agreement will be considered during that phase. However, it is important to note that there appears to be a dispute between the parties as to the scope of the settlement agreement and whether any compensation paid to litigants related to malicious prosecution.

119. We ask that the Inquiry considers this discrete matter within Phase 5, as it has a direct bearing on compensation issues which arise in relation to the Overturned Convictions Scheme.

120. In the meantime, we have written to POL's legal representatives, Herbert Smith Freehills and suggested that once we have received our clients' files from their former representatives Freeths LLP, that this issue should form the subject of mediation.

Pecuniary Losses

121. There have also been delays regarding the assessment of pecuniary losses. After a conference call on the draft principles and processes around pecuniary losses on 22nd November 2022, we received an email from HSF on 1 December 2022 setting out (on a without prejudice basis) the likely heads of loss. On 5 April 2023 HSF agreed a basis upon which Howe & Co may inform the Inquiry of these matters:

122. Accordingly, we can inform the Inquiry as follows:

1. Draft principles and a draft process has been shared by POL with Claimant representatives;

2. The process includes a suggestion of an independent assessment procedure where agreement cannot otherwise be reached;
3. The hope is that there will be discussions between POL and those representing the Claimants over the coming weeks to see where agreement can be reached in respect of both the principles and the process;
4. In the meantime POL is continuing to process both Non-pecuniary and Pecuniary claims as they receive them.

123. It is regrettable that the basis for assessment of pecuniary loss is still at a relatively early stage. We are currently working with our clients in order to collate the necessary evidence to progress their claims. Inevitably some claims will be easier to process than others. The delay in obtaining the guidelines from POL has been frustrating for our clients.

The GLO Scheme

124. On 15 March 2023 Howe & Co wrote to DBT, seeking clarification and guidance on the GLO Scheme. We raised timetabling issues and problems concerning disclosure of evidence to SPMs.

125. We also raised concerns in relation to the lack of and mechanism for an applicant to refer his or her case to the panel, and the role of claims facilitators in such referrals and the lack of any provision for oral hearings.

126. The letter materially stated as follows:

> *The reason for seeking this clarity, and why this matter is very important, is because a claimant can only proceed to an exceptional review by an independent reviewer if there is an error or irregularity in the Panel's final assessment. If no final assessment takes place, there can never be an independent exceptional review. Therefore, what is the procedure (assuming that the claims facilitator controls the process of access to the final Panel) if a*

claims facilitator refuses to allow a claimant to proceed from 'first assessment' to 'final assessment' before the Panel?

We put on record that we and our clients are unhappy with the present wording in the various guidance, which seems to exclude the ability of any claimant, independent of the claims facilitator, to obtain a final review by the Panel and for that matter, even a first review by the Panel is something that seems to have been left solely in the control of the claims facilitator. There must be a right for any claimant who is unhappy with an offer made at first offer, to trigger in his or her own right a final assessment by the Panel.

Furthermore, your most recent guidance seems to suggest a potential disadvantage to a claimant who is legally represented, as opposed to a claimant who is not legally represented. The GLO Compensation Scheme Principles and Guidance from February 2023 states, at paragraph 3.5.14, that the claims facilitator "will refer" a non-legally represented claimant's award to the Panel before it is accepted. It seems that automatic rights of access to the Panel are open to some claimants but not others, and this inherent unfairness is not received well amongst all the victims of the scandal.

Restorative Justice - General point in relation to family members

127. The Inquiry may be aware the Infected Blood Inquiry has determined that compensation should be open to family members of those affected by that scandal.

128. Furthermore, on 11 April 2023 a significant settlement package was announced in relation to over 900 bereaved family members, survivors and local people affected by the Grenfell fire. The settlement includes a restorative justice based package, which is intended to be for the benefit of, not just the victims and survivors of the Grenfell fire, but also the community and family members of those affected.

129. We see these developments as an appropriate measure in accordance with principles of restorative justice, upon which we have addressed the Inquiry in our December 2022 submissions. Our concerns included, our clients being able to

access suitable treatment for significant mental health diagnoses that are being made, particularly where access to treatment has been problematic due to the impact on services arising from Covid 19.

130. We invite the Chair to consider whether the compensation schemes relating to the Horizon scandal should incorporate similar measures. The Inquiry will recall evidence in Phase 1, for example, to the effect that many children of SPMs suffered adverse mental health and financial impacts as a consequence of the actions of the Post Office.

131. Our letter of 15 March 2023 set out the issue as follows:

> *We are aware from clients that spouses (many of whom worked with the claimant in the relevant post office) and children of the family suffered and continue to suffer from for example depression/anxiety and obsessive compulsion disorder symptoms as a result of the impact of the horizon scandal on their family's financial well-being and their mental health. Those mental health difficulties arise from the termination of parents' and/or partners' contracts with the Post Office. Furthermore, if such loss is assessed on behalf of the family member, are those damages held on trust by the claimant or can other family members make a separate application to you for their losses arising from the impact on the family business? Will any damages be paid to the We make a further point about the impact and need to compensate close family members impacted by the Post Office Horizon scandal.*

132. We consider that restorative justice forms an important part of the process of compensating SPMs for the many ways in which they have suffered as a consequence of the actions of POL in this scandal. We rely on our earlier submissions of 2 December 2022 on this issue which, for ease of reference we repeat herein:

> *We call upon the Post Office and their owners, the Department of Business, establish and implement a full restorative justice process.*

We submit that such a process should not be limited to meetings so that harms visited on subpostmasters can be acknowledged and apologies tendered - but that the process should additionally include the establishment of a restorative justice fund established, separate from compensation payments, that will provide for matters including:

- *ongoing psychiatric and counselling support for subpostmasters and their families;*
- *bursaries to assist with the retraining of subpostmasters and for the education of their children whose education was disrupted by this scandal;*
- *a tangible memorial scheme to mark this largest miscarriage of justice in British legal history; that sympathetically records the experiences of subpostmasters and how profoundly they and their communities were failed by this scandal;*
- *restitution and restoration of reputation: In many cases subpostmasters' reputations were traduced in their local communities and regionally. Subpostmasters' reputations must also be restored within their own local communities through engagement with those communities and the local press; and*
- *an entrepreneurial fund.*

Subpostmasters, the victims of this scandal, were important small businesspeople and entrepreneurs in communities throughout the United Kingdom. They not only provided vital services to those communities but also employment for others. They also generated profits for their own benefit and the benefit of their families and, via taxation, for the public purse.

Many, with the right support, would once again embark upon business, creating employment for themselves, their families and for others in their communities, providing services in communities across the country and contributing to the public purse via taxation from the profits generated from their hard work.

We submit that restorative justice must also be tangible and ongoing. This scandal cries out for a restorative justice process, and we urge Post Office Limited and BEIS to volunteer to engage in its creation, or, in the alternative for the Inquiry to recommend such a process and fund.

CONCLUSIONS

133. We take the view that bankruptcy cases should be fast tracked by DBT and that the department should provide an indicative timetable.

134. Furthermore, the Scheme is deficient for a number of reasons, *inter alia*, it fails to deal with rescission applications, it imposes an unrealistic limit on the provision of taxation advice and it fails to enable annulment/ recission applications to be made in a reasonable timeframe. We consider that the suggestions that we have made in the paragraphs above may resolve a number of these matters. However, the most urgent matter is the delay and the realistic possibility that the Scheme will not have concluded before the 7 August 2024 deadline.

135. We have addressed a number of further issues relating to the lack of effective operation of the three schemes, by way of a progress update.

136. We will make oral submissions through Counsel on these points and matters raised in other Core Participants' written submissions at the hearing on 27 April 2023.

13 April 2023

SAM STEIN KC

CHRISTOPHER JACOBS

HOWE & CO