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PAUL MARSHALL

2-3 GRAY'S INN SQUARE
GRAY'S INN
LONDON
WC1R 5JH

pmarshall GRO
Clerks: GRO

By email only:
simon.recaldin GRO

Thursday 5th September 2024

Dear Mr Recaldin,

Re: Horizon Shortfall Compensation Scheme
Mrs Gowri Jayakanthan v Post Office Ltd
Tax Direct (UK) Ltd (04871554 – dissolved 1 January 2009)

Thank you for your letter of 27 August 2024, which purports to be in reply to my letters of 11 June 2024, 9 July 2024 and 26 July 2024. The first two of those letters invited you to reconsider your rejection of Mrs Jayakanthan's claim for compensation under the Horizon Shortfall Compensation Scheme; the third invited you to concede that Mrs Jayakanthan, as a dependant of her late husband, Sivasubraniam Jayakanthan (hereafter "the Deceased"), has a freestanding cause of action against the Post Office pursuant to section 1 of the **Fatal Accidents Act 1976**, to which the Post Office has no defence as far as liability is concerned.

I am disappointed by your reply, because not only do you persist in pursuing a wholly unmeritorious argument based on the fact that the Deceased contracted with the Post Office through a company, Tax Direct (UK) Ltd, rather than as an individual, which I have already answered fully in my previous correspondence, but you have also totally failed to address either of the two further points I made to you in my most recent letter, of 13 August 2024, namely:

(i) that Mrs Jayakanthan has an unanswerable claim against the Post Office in her own right as a dependant under the Fatal Accidents Act 1976 and that, further:

(ii) had the Deceased not committed suicide as a result of the wrongful acts of the Post Office, he would have had his inevitable conviction quashed, and accordingly would have been eligible for very substantial

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compensation from the Post Office under arrangements made in connection with the **Post Office (Horizon System) Offences Act 2024**.

(1) Relevance of Deceased acting through corporate intermediary

I have already explained to you, in some detail, in my previous correspondence that, in normal personal injury and fatal accident litigation, the fact that a claimant acted through a limited company rather than as an individual (even a limited company which has subsequently been dissolved) does not prevent him from bringing a successful claim for damages, including damages for loss of earnings, it merely requires the claimant to ensure that the losses claimed are his losses as an individual, not losses of the company - to the extent that there is any difference between the two. It is no doubt for this reason, as I have already noted in my last letter, that the GLO Compensation Scheme expressly provides, in its published guidance and principles, for an individual postmaster who worked through a company that has ceased to exist to make a claim as a linked individual without needing to restore the company. I draw your attention to a relevant Question and Answer in the latest updated Q&As for the GLO Compensation Scheme (June 2024), that provides:

> "**Q. I was the director of a company which was part of the GLO. Can I apply to the Scheme?**
>
> A. Yes.
>
> **Q. The company is now in liquidation/administration – can I still apply?**
>
> A. Yes. If the company or a partnership has ceased to exist, it will not be necessary to restore it except in a limited number of circumstances, for example, when the company is set out as a community interest company. If appropriate, an offer of an ex gratia payment will be made to you and any other shareholders and directors of the company or partners of the partnership, which may have a legitimate interest in that payment. It is your responsibility to seek an agreement with them as to who will be the recipient of the payment and how it should be split between yourselves."

While Mrs Jayakanthan made her claim that you have rejected under the Horizon Shortfall Scheme, rather than the GLO Compensation Scheme, Government ministers have repeatedly stated, when commenting on compensation arrangements for victims of the Post Office, that all claimants for compensation should be treated in the same way under whatever scheme their claim has been brought so as to put them in the position they would have been

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in but for the wrongs done by the Post Office. Sir Wyn Williams has publicly referred to that commitment by the Government.

I observe that, in paragraph 11 of the report of Part II of its fourth meeting, held on 21st April 2023, the Horizon Compensation Advisory Board welcomed the fact that its terms of reference were being expanded to cover the Department of Business and Trade's oversight of other compensation schemes being delivered by the Post Office. The report continued:

> **"Controls to assure fairness between schemes**
>
> 'The Board noted the arrangements which DBT had in place to ensure that claimants <u>were treated in a similar way no matter which scheme applied to them</u>. These included a new Programme Board of officials focussed on ensuring fairness across schemes." (My emphasis.)

It seems this remains to be given effect.

You say in your letter that the fact that Tax Direct (UK) Ltd has been dissolved in this case "*creates additional complexity*" but that "*the Post Office is not taking the position that this is an automatic bar on redress. It is a complexity which would need to be addressed in any offer and settlement and in our view could be resolved appropriately*". In contrast, under the GLO scheme the use by Mr Jayakanthan of Tax Direct (UK) Ltd as the vehicle through which he contracted for the Post Office business would have been <u>irrelevant</u> – not an added 'complexity'.

In view of my repeated explanation of the law on this issue and your failure to provide any reasoned challenge to that explanation, **I very much hope that you will now concede that the fact that the Deceased carried on business through a limited company is entirely irrelevant to the issue of the Post Office's liability to compensate Mrs Jayakanthan**. While not conceding the point, I accept that the fact that the Deceased traded with the Post Office through Tax Direct (UK) Ltd, rather than as an individual, may in principle have some effect on the quantification of Mrs Jayakanthan's claim for financial dependency. That is largely a matter for accountancy and tax evidence. (HMRC has been asked to provide records held by it.)

(2) Horizon Shortfall or Not?

In your letter of 27 August 2024, you repeat that the purpose of the Horizon Shortfall Scheme is to resolve issues with current and former postmasters who believe that they may have been affected by shortfalls relating to previous versions of Horizon, as set out in the HSS's terms of reference. You accept that the only known document still in existence relating to the Deceased's case is the Post Office's own Investigation Report which you concede only *"points to the shortfalls, which was (sic) a shortage between the physical cash in the ATM machine and* *printouts from the ATM machine, not being related to the Horizon system"*. I presume that you accept that evidence merely pointing to a certain conclusion falls well short proof, even on a balance of probabilities. For that reason, you ask if Mrs Jayakanthan could provide *"further information…regarding the provenance of the Audit shortfalls."* Without discourtesy it is utterly unrealistic of you to imagine/expect that Mrs Jayakanthan is able now to provide any relevant evidence on the issue - almost 20 years after the event, when she played no active part and had no role in the running of her late husband's Post Office business (she was, at the time of his suicide, the mother and full-time carer for two very young children).

I note that the Investigation Report dates from 2005. That of course was at a time when the Post Office, while knowing of bugs errors and defects in the Horizon accounting system, routinely denied it. Further, it antedates by several years the Detica "*Fraud and Non-Conformance*" report of 2013, that identified the presence of an ATM machine at branch as a key indicator of a postmaster's risk of failing an audit. I notice that you have not addressed my questions as to whether, in their evaluation of Mrs Jayakanthan's claim (whether in her own capacity or through the liquidators of Tax Direct (UK) Ltd) either the Panel or Herbert Smith Freehills considered Detica's 2013 report and its findings relating to ATMs.

I note your reference to the remit of the Shortfall Scheme and the limitations as to what claims that scheme can address and redress. However, as I have already noted in previous correspondence, the terms of reference of the Shortfall scheme are arguably significantly narrower than those of any of the other compensation schemes for Post Office victims. For example:

(i) the GLO Compensation Scheme does not require applicants to satisfy the Post Office that their investigation, suspension and dismissal were based, either wholly or partly on Horizon evidence, merely that (a) they were claimants in the **Bates v. Post Office Ltd** GLO litigation and (accordingly) parties to the December 2019 Settlement Deed - and that (b) they were not convicted of a criminal offence on prosecution by the Post Office.

(ii) The relevant conditions for inclusion in the ambit of the **Post Office (Horizon System) Offences Act 2024** are yet more widely drawn, namely that the person whose conviction is to be quashed must have committed a relevant offence between stated dates in 1996 and 2018 at a time when they were carrying on a post office business and the Horizon system was being used for the purposes of that business. There is no requirement in the case of claimants under the 2024 Act for them to prove that flaws in the Horizon system were in any way to blame for their convictions.

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Having said that, my primary argument on behalf of Mrs Jayakanthan is that her claim does, or at any rate, should fall within the remit of the Horizon Shortfall scheme. The Deceased's business was using the Horizon system at the time when he was being investigated. As David Davis M.P. stated in his speech in the House of Commons in the second reading debate on the 2024 Act:

> *"The BAE Systems Detica report....is a six month review of the Post Office's fraud and non-compliance issues in 2013. It paints a picture of complete chaos in the Post Office's accounting systems – not just Horizon but all the accounting systems*
>
> ….
>
> *Note that it refers to 'systems' - plural - not just Horizon. The report goes on to say that ATM - cashpoint - accounting was clearly flawed and that 'removing the ATM reduces the risk of SPMR being suspended."*

Further, clear evidence as to the unreliability of the ATM accounting system was contained in the Second Sight report of 2015, since when there has been overwhelming evidence to the same effect from a stream of witnesses who have given oral evidence to Sir Wyn Williams in his Inquiry.

In these circumstances, it is surely self-evident that Mrs Jayakanthan deserves to be compensated for the injustice done to the Deceased by the Post Office. The only one of the various schemes that have been set-up to provide compensation to victims of the Post Office scandal under which she may be eligible is the Shortfall Scheme: she cannot claim under the GLO because the Deceased was not a claimant under the **Bates v. Post Office Ltd** litigation and she cannot claim either under the Overturned Convictions Scheme or the Post Office (Horizon System) Offences Act 2024 because the Deceased took his own life before he could be prosecuted and convicted by the Post Office – as he almost certainly would have been but for his death.

(3) Claim under the Fatal Accidents Act 1976

I am pleased that you recognize in your reply that *'if (further) information is not available'* as to the circumstances of the shortfall in the Deceased's business to support Mrs Jayakanthan's her claim under the HSS, the Post Office will be willing to consider the merits of a claim by her under the **Fatal Accidents Act 1976**, but I do not understand why you go on to say that you will be assisted by a *'fullsome (sic) explanation of the claim under the Fatal Accidents Act, and the evidence supporting the same'*. I have already provided that explanation in Section D of my letter of 13 August 2024.

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In the circumstances, I urge you to re-read Section D of my letter. In summary, my colleague Andrew Young and I are of the opinion that Mrs Jayakanthan has an unanswerable claim against the Post Office as a dependant under section 1 of the **Fatal Accidents Act**. This is on the basis that her late husband's death was caused by the Post Office's wrongful acts, neglect or default (including intentional wrongdoing) towards him in connection with its investigation on 4 March 2005 of alleged shortfalls at his business. Those acts included (i) the deliberate withholding from him of the Post Office's knowledge of problems and the wide-spread incidence of shortfalls and (ii) the unlawful nature of the conduct of the interview with the Deceased that resulted in his suicide. That includes misrepresentations made to him. It is perfectly obvious that Mr Jayakanthan was given to understand that he was obliged to make good the shortfalls identified, immediately, hence his recognition that he would have to sell his family home. The true legal position on the liability of a postmaster to make good shortfalls was explained by Fraser J. in **Bates v. Post Office (No 3: 'Common Issues')** [2019] EWHC 606 QB. That liability depended on fault (contrary to the Post Office's submissions). No fault on Mr Jayakanthan's part was established. Further, and very importantly, in his **Common Issues** ruling, Fraser J. held that the contract between the Post Office and its sub-postmasters was a "relational contract" as that term is understood as a matter of law. The Post Office owed <u>an implied duty of good faith</u> towards its postmasters and a duty to maintain and preserve their trust and confidence. The evidence in Sir Wyn Williams's Inquiry establishes that the Post Office routinely and habitually acted in breach of that duty (a duty that the Post Office sought to challenge on appeal, but on grounds rejected by Coulson LJ as having no real prosect of succeeding). Investigators routinely resorted to threats, intimidation and to misleading statements made to those subject to investigation for alleged 'shortfalls'. It is inherently unlikely that Mr Jayakanthan's interview, on 4 March 2005, at which he conceded that he might sell his family home to make good alleged losses, was any exception. No court, without compelling and cogent evidence, would accept that his interview was likely to have been conducted properly and in accordance with the law.

In his subsequent **"Horizon Issues"** judgment, Fraser J. found as facts the wide-spread unreliability of the Horizon system – and that it was "not remotely robust". The findings of fact by the judge are binding on the Post Office. Fraser J. found as facts that from1999 the Post Office knowingly and wrongly maintained to postmasters that the Horizon system and other Post Office accounting systems were robust and reliable and that in doing so it concealed (including "kept secret") the fact that numerous bugs, errors and defects had been found in its systems. The Post Office further failed to admit to postmasters that there was a material risk that shortfalls in a branch account might be caused by the Horizon and other accounting systems. It falsely asserted that the Horizon system and other accounting systems were unlikely to be the cause of shortfalls in branches. The withholding from the Deceased of all this information and the failure, on 5 March 2005, to make him aware of known flaws in Post Office accounting systems constituted multiple breaches of the Post Office's duty of good faith and of its duty to maintain and preserve the trust and confidence of the Deceased in the

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Post Office. The Post Office's conduct in immediately suspending the Deceased's contract and insisting that he should repay in full and without delay the alleged shortfall in his account, and in reporting him to the police on suspicion of theft, were additional breaches of contract.

Each and every one of these breaches of contract constitutes a *"wrongful act or neglect or default"* on the part of the Post Office for the purposes of section 1 of the **Fatal Accidents Act 1976.**

Those breaches of duty were the direct cause of the Deceased's death. Had he not been misinformed as to the reliability of the Horizon and other accounting systems operated by the Post Office and had he been informed that, under the terms of his contract, <u>he was only liable for losses that the Post Office could prove had been caused by his own negligence, carelessness or error</u> <u>and that no enforcement action could legally be taken against him unless and until this burden of proof had been discharged,</u> <u>he would not have been driven to take his own life</u>. This ought now to be conceded by the Post Office.

There was an inquest. There is no evidence that the Deceased was unhappy or depressed or suffering from any other disturbance of his mind, still less that he intended to end his own life, until the events of 5 March 2005.

Once causation is established, the Post Office is liable for the whole of Mrs Jayakanthan's (and her children's) financial and non-financial dependency for the rest of what would have been her joint life with her husband, which will be assessed on the basis of the normal well-known principles applicable to fatal accident claims. As you will readily appreciate, that is likely to be a substantial sum.

You have not, as yet, provided any response on behalf of the Post Office to this alternative claim. I now invite you to do so. You should bear in mind that Mrs Jayakanthan would only need to prove her case on a balance of probabilities. There is no evidence to contradict her case that, but for the Post Office's investigation and the conduct of the interview of the Deceased on 5 March 2005, Mr Jayakanthan would not have committed suicide.

As a matter of completeness, I make the point that Mrs Jayakanthan's claim under the **Fatal Accidents Act** is independent of her claim under the Shortfall Compensation scheme.

(4) Post Office (Horizon System) Offences Act 2024

I am surprised that you do not address - or even mention - the arguments that I have raised, under Section C of my letter of 13 August 2024, as to the implications of the enactment of the **Post Office (Horizon System) Offences Act 2024**. Put shortly, had the Deceased not committed suicide in 2005 and had survived until today, he would certainly have

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been convicted of an offence of theft or false accounting in connection with the shortfall allegedly identified at his branch – even had he repaid it (q.v. Tracy Felstead). He would therefore almost certainly have had any conviction quashed by the new legislation (had he not been a claimant in the GLO litigation), with the consequence that he would receive full compensation for all losses resulting from any conviction.

Therefore, although the 2024 legislation does not apply directly, either to the Deceased or, *a fortiori,* to Mrs Jayakanthan, the fact that it has been enacted is yet another reason why Mrs Jayakanthan should be awarded full compensation. That is necessary to ensure that there is equal treatment of all victims of the Post Office (above).

Finally, I refer you to the fact that the Horizon Compensation Advisory Board records in its report of its tenth meeting on 10 January 2024, attended by Minister Hollinrake, that the Board raised with the Minister *"the impact of possible errors in other IT systems affecting postmasters"* and the need for further work to be done on this issue in order to ensure that all victims of the Post Office scandal, including those affected by flaws in ATM systems, be properly exonerated and compensated. There is an urgent need for the Government and the Post Office to make good on this issue in the case of Mrs Jayakanthan – and no doubt others.

I therefore urge you now to make an admission of liability on the part of the Post Office without further delay. Declining to accept liability will give the impression, in all the circumstances, that the Post Office is simply obdurate.

As you know, Sir Wyn Williams will shortly hear evidence/submissions on the compensation schemes. I believe that this correspondence raises issues of importance in connection with the operation of the schemes, and am therefore copying this letter to him. The issues also engage directly with several matters about which the HCAB has previously expressed concern.

Finally, in accordance with your offer to Mrs Jayakanthan, would you please provide me with a copy of the Investigation Report of 2005 listed at Annex A to Mrs Jayakanthan's 30 November 2023 "Outcome Letter" in hard copy to my Chambers.

Yours sincerely,

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cc.
Sir Wyn Williams, Chair, Post Office Horizon IT Inquiry
Professor Christopher Hodges O.B.E., Chair, Horizon Compensation Advisory Board

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Simon Recaldin Esq.
Post Office Horizon Shortfall
Scheme

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