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Our ref  
31043483

Date  
4 April 2023

By email to [GRO] [@cornerstonebarristers.com](mailto:[GRO]@cornerstonebarristers.com)

Dear Sir

**Post Office overturned convictions claim**

**Your clients:** [GRO]

**Our client:** Post Office Limited

**1. INTRODUCTION**

- 1.1 Thank you for your letter of 23 March 2023 in response to our letter of 2 March 2023. You also shared with us a copy of your letter of the same date to Mr Hollinrake MP, the Parliamentary Under-Secretary of State at the Department for Business and Trade ("DBT"), which raises some overlapping issues.
- 1.2 As a preliminary matter, we are bound to note that your correspondence (both to us and to Mr Hollinrake MP) inaccurately represents Post Office's position in several respects. Doing so does not advance the swift and fair resolution of issues relating to compensation.
- 1.3 Your correspondence also veers into the contents of discussions that are ongoing between your clients and Post Office that are without prejudice. Although we are happy to correspond with you on an open basis if that is your preference, given the policy considerations behind the without prejudice rule, we do consider it important that all parties respect the status of without prejudice communications.
- 1.4 Your letters of 23 March were written on an open basis and, as such, this response is likewise written on an open basis.

**2. ALLEGED DISPARITY IN COMPENSATION AVAILABLE TO GLO SETTLERS**

- 2.1 The thrust of your complaint appears to be that Claimants with overturned convictions who settled their claims in the GLO are worse off because their remaining claims are confined to claims for malicious prosecution.
- 2.2 We have some difficulty with that suggestion. Putting to one side the fact that the exception for malicious prosecution in the Settlement Deed was agreed, it is difficult to see how any

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alternative cause of action would give rise to damages over and above those already recoverable for malicious prosecution.

- 2.3 In our letter of 2 March 2023, we expressly requested that you identify the head(s) of loss which GLO settlers ought to be compensated for but which they are unable to recover as damages for malicious prosecution. You have not done so. Although we have noted your references to the tort of abuse of process, unlawful interference with the right of appeal and breaches of the Human Rights Act, unless you say that claims based on those concepts would sound in additional damages over and above those already available for the tort of malicious prosecution, then your concerns are unwarranted.
- 2.4. If you do say those claims would result in additional damages, please could you set out the additional damages said to be recoverable and explain the basis on which they would arise. Post Office will then, of course, consider them and let you know its considered position on each.
- 2.5. For its part, in making offers of compensation, Post Office does not propose treating GLO settlers any differently to non-GLO settlers save to ask that GLO settlers give credit for sums already received (as to which see below).

### 3. **DEDUCTIONS OF PAYMENTS MADE IN RELATION TO THE GLO SETTLEMENT DEED**

- 3.1 We note your assertion that Post Office is "*seeking to claw back (by set-off) from convicted claimants ...sums received by them from other non-convicted claimants who were compensated under the terms of the December 2019 settlement deed. . .*". Similarly, at page 7 of your letter to Mr Hollinrake, you have referred to Post Office "*seeking to . . . set-off, under the OHC scheme, sums paid*" in relation to the December 2019 Settlement Deed (as described in your letter of 10 February 2023).
- 3.2 This is an improper reference to the contents of without prejudice communications regarding compensation payments which we assume was included in open correspondence in error. However, putting that to one side, had you asked Post Office to set out its position in relation to the deduction of GLO receipts on an open basis, Post Office would indeed confirm that it considers that sums paid to convicted Claimants out of the global settlement paid by Post Office to settle the GLO proceedings do fall to be deducted from the compensation now being offered. If that were not the case, those Claimants would be compensated twice in respect of the same claims. We are surprised by your objection to this both as a matter of principle and of law.
- 3.3 As a matter of principle, making the relevant deductions will ensure that GLO settlers are fully restored to the position that they would have been in had they not been wrongfully prosecuted. Further:
  - 3.3.1 If compensation for overturned convictions did not take into account the sums already received by GLO settlers, that would create its own disparity in that GLO settlers would receive more than their non-GLO counterparts leading to inequality (a point which, in other contexts, you appear to agree with).
  - 3.3.2 Non-convicted GLO settlers are in no way disadvantaged: they will still be compensated in full under the DBT ex gratia scheme. The net financial effect is



the same as if the convicted GLO settlers had returned their GLO receipts to the Steering Committee for redistribution across the non-convicted Claimant Group.

3.3.3 Collectively, Post Office and DBT are not in any way financially better off: what they "save" by making deductions will simply be spent paying additional compensation to the non-convicted GLO settlers in the DBT scheme.

3.4 As a matter of law:

3.4.1 The fundamental principle governing damages is that a claimant is entitled to recover their actual loss and that financial gains accruing to the claimant that they would not otherwise have received must be taken into account.<sup>1</sup> This is an axiomatic principle in the assessment of damages and exceptions are construed narrowly.<sup>2</sup>

3.4.2 We acknowledge that there are some exceptions to this principle, including the "*benevolence exception*"<sup>3</sup> to which you refer. The benevolence exception applies where a claimant has received a gratuitous payment from a third party source (i.e. not the tortfeasor himself) as a mark of sympathy and assistance. Typical examples include financial support received from a charity or a family member.

3.4.3 We do not consider that this exception applies in this case. Here, the payments in question were made by Post Office itself and came from the global cash settlement made by Post Office under clause 2.1 of the GLO Settlement Deed.

3.4.4 The GLO Settlement Deed did not make any provision as to how the GLO Settlement Sum would be apportioned between GLO settlers. While it was noted that no cash payment was being made to or for the benefit of any "Convicted Claimant" under clause 7.1, it was equally acknowledged that it was open to the GLO settlers to agree between themselves how such sums would be apportioned and that Post Office had no control over that agreement.

3.4.5 Post Office is not privy to the terms agreed between the GLO settlers and those managing the litigation on their behalf as to how the GLO cash settlement would be apportioned between them. We would, however, be surprised if there was no contractual mechanism in place governing that apportionment or if the application of that agreed mechanism resulted in zero sums being allocated to the convicted claimants. If you contend otherwise, please can you explain the mechanism pursuant to which the settlement sum was apportioned, who in fact decided what share your clients received and confirm whether the non-convicted claimants were ever asked whether they were willing to make a gratuitous payment to the convicted claimants. The latter seems unlikely in circumstances where you have

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<sup>1</sup> *Gaca v Pirelli General plc and others* [2004] 1 WLR 2683 CA, paras 10 and 16.

<sup>2</sup> *Hodgson v Trapp* [1989] AC 807, 819

<sup>3</sup> See, for example, the discussion of this exception in *Pirelli General Plc v Jan Gaca* [2004] EWCA Civ 373, paras 13- 40.



stated elsewhere that the terms of the Settlement Deed were positively withheld from claimants like your client Mr Castleton on confidentiality grounds.

3.4.6 Please also provide copies of all relevant documentation evidencing the above including but not limited to:

- (A) all contractual documentation relevant to the apportionment mechanism agreed;
- (B) all documentation held by your client evidencing how the actual apportionment was carried out; and
- (C) all correspondence from the GLO Steering Committee to your clients relevant to the apportionment.

3.4.7 In any event, we do not consider that this situation is akin to the authorities involving the benevolence exception that you have relied upon. For example, the case of *Redpath v Belfast and County Down Railway* [1947] NI 167 (referred to in several of the judgments you have cited), involved monies paid to a victim of a railway disaster from a charity fund created by members of the public. The Court commented that part of the rationale for the exception was that, if such funds were deductible, then "*the inevitable consequence in the case of future disasters of a similar character would be that the springs of private charity would be found to be largely if not entirely dried up.*"<sup>4</sup> It is unclear how such a rationale would apply in this case given that the source of payment was the Post Office.

3.4.8 Similarly the dicta of Mr Justice Neuberger (as he then was) in *Hamilton-Jones v David & Snape* [2004] 1 WLR 924, which you have quoted, have limited application to the current situation. That case concerned the question of whether travel costs incurred by the claimant were recoverable in circumstances where those costs had been paid for by the claimant's mother "*out of natural love and affection*". Here, however, the source of funds was Post Office, and we expect those funds were apportioned in a fashion that was not simply gratuitous.

3.4.9 The case of *Dennis v LPTB* [1948] 1 All ER 779 in fact illustrates the inconsistencies in your position. In that case, the Court's award, which did not deduct the benefit received, was made conditional upon the claimant repaying the benefit it had received to the third party.

#### 4. **ADVERSARIAL, ATTRITIONAL LITIGATION**

4.1 You have also suggested to Mr Hollinrake MP that claimants are locked in "*attritional adversarial litigation*". That is incorrect.

4.2 There are no litigation proceedings on foot. By contrast, Post Office has proactively made available interim payments of £100,000 (later increased to £163,000 for those who had yet to receive compensation in respect of their non-pecuniary damages). Further, since the ENE, the majority of claims in respect of non-pecuniary damages have been settled, usually within 28 days of being made. Finally, in the interests of transparency and to make it easier to claim, Post Office has proactively shared with Claimants the principles it proposes applying when making offers for pecuniary claims and invited Claimants' feedback.

4.3 Such a process cannot be fairly described as attritional, adversarial litigation or a zero-sum game. While there may be some scope for disagreement regarding the application of the

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<sup>4</sup> [1947] NI 167 at 170.



legal principles to the assessment of quantum, the underlying objective – to ensure that all claimants are properly and fairly compensated for the injustice which occurred – is agreed.

- 4.4 Finally, we disagree with the suggestion that HSF has a professional duty to secure "*the worst deal possible*" for victims. As has been made clear in its public statements, Post Office considers that its interests are best served by in fact doing the right thing and making offers of compensation which are full and fair. Without waiving privilege, it would plainly not be a breach of professional duty for a solicitor to carry out an instruction to that effect.

5. **LEE CASTLETON**

- 5.1 Finally, we note that you have referred in your letter to Mr Hollinrake MP to the civil judgment against Mr Castleton which has yet to be set aside.
- 5.2 Post Office has been offering since the conclusion of the GLO settlement to sign a consent order setting aside Mr Castleton's civil judgment. Further, even though Mr Castleton's claim in respect of the costs of his civil trial was technically settled under the GLO Settlement Deed, DBT have confirmed that compensation in respect of that claim is available under the ex gratia DBT Scheme for GLO settlers. If you wish to wait until that claim has been dealt with by the DBT Scheme before proceeding with the set-aside of the judgment, that is a matter for you and your client. However, in circumstances where Post Office has repeatedly offered to take the steps necessary from its perspective to set the judgment aside, you cannot complain that Post Office is dragging its feet.
- 5.3 We further note that you have complained that the GLO Settlement Deed was withheld from Mr Castleton on grounds of its confidentiality until May 2020. We assume it is not being suggested that Post Office was responsible for any withholding of the Deed from your client. For the avoidance of doubt, Post Office was not and is not privy to the arrangements in place between the claimants in the GLO proceedings and those who represented their interests in connection with the settlement.

6. **CONCLUSION**

- 6.1 We hope the above helps to clarify Post Office's position and to correct any misunderstandings.
- 6.2 If following your response to this letter there remain any issues or areas of disagreement between Post Office and your clients as to the levels of compensation to which they are entitled in respect of their non-pecuniary losses (we await receipt of your clients' pecuniary claims), Post Office is content to refer those matters back to Lord Dyson for a further Early Neutral Evaluation if that would assist in resolving matters.
- 6.3 In the meantime, we will of course continue to engage with you in without prejudice discussions on a collaborative basis so that progress can continue to be made towards fair compensation payments to your clients as quickly as possible and we have written to you separately in relation to that.

Yours faithfully

*Herbert Smith Freehills LLP*

**Herbert Smith Freehills LLP**