Post Office Horizon IT Inquiry

On behalf of Core Participants

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Further Submissions on Compensation

Introduction

1. Since sending our Submissions on Compensation on 22 June and the Annex on 24 June 2022, there have been two significant developments:

   a. Herbert Smith Freehills (HSF) have instructed Lord Dyson to lead a process of early neutral evaluation to help determine non-pecuniary loss for Category B claimants (which includes the CPs we represent). This has led to the understandable question: should the Inquiry leave the parties to find their own way forward for compensating Category B claimants (expressed more directly as "should the Inquiry butt out")?

   b. There have been a number of communications regarding compensation for Category C claimants, which indicate that BEIS began discussions with Freeths to establish a scheme, but have now opened out those discussions to other lawyers representing GLO claimants. In an email dated 9 July, BEIS envisages establishing an independent panel to determine claims.

2. These Submissions respond to those developments, and endorse the oral submission of Sam Stein QC on behalf of Howe & Co, in which he urged an

Interim Report to deal with the issue of compensation. We set out what we would invite the Report to say at the end of these Submissions, from paragraph 16 onwards. In answer to the question 'should the Inquiry butt out?', we say emphatically, 'no'.

3. In brief, we urge the Inquiry to recommend that the scheme which is now being discussed for Category C claimants should be open to Category B claimants, at their choice. Those who wish to continue their negotiations with POL should, of course, be free to continue with them. However, those Category B claimants who have no trust in POL, and who would prefer to seek compensation through a transparent scheme which opens up all possible heads of loss, should be free to apply to such a scheme.

4. We also ask the Inquiry to recommend that the new scheme be given tight and finite times to turnaround preliminary claims, but to leave open the possibility of further awards for punitive damages once the Inquiry's final Report is available.

Why the present situation must not continue

5. The arrangements which are springing up in response to the Inquiry's invitation to make submissions on compensation are ad hoc at best, chaotic at worst. There is no proper rationale for the two different compensation structures to apply to Category B and Category C claimants, except for the historic quirk that HSF and Freeths put them into different groups during the settlement negotiations. Questions of principle and process should be the same for both groups. The fact that some managed to avoid conviction while others did not is exactly the sort of distinction that can be accommodated within one scheme, in which the potential heads of loss are the same.

6. Category B claimants naturally have the deepest mistrust of POL. While some may nonetheless choose to negotiate with POL, it would be a further wrong

inflicted on them if they were obliged to do so because they have been locked out of a parallel scheme being set up for Category C claimants which could easily accommodate them. The compensation funds are all ultimately coming from BEIS.

7. Opposition to a scheme for Category B claimants sits very ill in the mouth of POL. When asked whether POL is to be the final arbiter of Category B claims, the response is that claimants are free to seek ADR, arbitration or ultimately litigation. This speaks volumes. POL says this in the wake of the way it conducted the Group Litigation, to a group of people who simply should not have to fight any more. If some of them would prefer to engage with a public, transparent process in which POL's only role is to pay the compensation, it behoves POL to agree, not to argue for the right to negotiate or fight in the usual way. This is not business as usual. POL has wrung Category B claimants out, so they have no reserves left for taking further action, and POL now wants to be free to use that to strengthen their negotiating position.

8. POL's right to negotiate or fight has been further undermined by their own failure to engage fairly with all Category B claimants. HSF's instructions to Lord Dyson appear to have been drafted with the involvement or at least the agreement of Hudgells, but Paul Marshall, who acts for the CPs we represent, was not even aware that Lord Dyson had been instructed until after the event.

9. Of course we would not wish to inhibit Lord Dyson's work from assisting with the determination of non-pecuniary losses, but by definition, his work will not resolve:

    a. principles for paying pecuniary loss, which means that Mr Marshall's submissions on delay/fraud and the effect on remoteness, will not be addressed. Incidentally, Mr Marshall's submissions did not seek to suggest that the Inquiry should make any findings as to fraud at this stage, which

would clearly be premature. His submissions as to fraud went to the principle of general recovery that proceeds from a substantiated claim. Ms Gallafent QC's submissions did not appear to appreciate this distinction. The very real possibility that the Inquiry (in due course) may make findings as to fraud is beside the point. The vital consideration is that it would be wrong to allow compensation to be circumscribed and finalised without accommodating such an outcome. Mr Marshall's suggestion, therefore, was that pecuniary loss should be assessed *as if* the case involved fraud.

b. process – this means that issues which have arisen during the HSS, with regard to how claimants are to prove their losses are likely to arise again. The problems with the HSS indicate that process is vital for ensuring that claimants get full and fair compensation.

c. punitive (aggravated/exemplary) damages - without any input from anyone other than POL / HSF, we do not see how this aspect of non-pecuniary loss can be satisfactorily dealt with through instructing Lord Dyson.

10. Meanwhile, BEIS and Freeths entered into discussions regarding Category C complainants in a similarly ad hoc fashion. Again, Mr Marshall, who acts for some Category C complainants, only become aware of the discussions after they had begun, and after Freeths had already written to his clients suggesting that they "re-instruct" Freeths. Freeths have also written to Category B complainants in similar terms to Category C complainants, attaching "FAQs" which include the following sentence:

"Please note that you are not obliged to re-instruct Freeths. If you do not instruct us this means that we will not be able to represent you in Stage 1 and we will not be able to pay your interim payment to you."

11. Given that Category B complainants are presently excluded from the envisaged Stage 1, and many are already being represented by other lawyers, this is a very unfortunate communication.

12. This procedural chaos does not bode well for just outcomes.

The locus of the Inquiry to intervene

> D: Assess whether the commitments made by Post Office Ltd within the mediation settlement – including the historical shortfall scheme – have been properly delivered.

13. This Term of Reference must be seen in light of the unsatisfactory nature of the mediation settlement, and Terms C and F, which ask the Inquiry to assess POL's cultural and governance turnaround. The question under Term D is not literally whether the mediation settlement has been carried out, but whether POL has provided full and fair compensation to all. An Interim Report is the best available mechanism for improving the prospects of a positive outcome, because at present, POL is not on the right path.

14. The problem, which cannot be perfectly solved, is how to ensure compensation is both just and swift. So far, the mediation settlement has assisted with neither of those aims. Mr Stein has warned that the HSS has the makings of a "scandal within a scandal". As for the GLO claimants, the mediation settlement was already clearly part of the scandal, as the Government has acknowledged, at least as far as Category C claimants are concerned.

15. The above developments risk creating a further travesty, particularly for Category B claimants. As set out in our earlier Submissions at paragraphs 10 and 11, it would be a grotesque paradox if Category B claimants were unable to claim under heads of loss which are open to other wronged subpostmasters. Yet it now appears that representatives for Category C claimants will be negotiating a new scheme, with heads of loss completely open for discussion, but from which Category B claimants are to be excluded. Their "without prejudice negotiations" are apparently to remain confined to settling their extant malicious prosecution claims.

Suggested recommendations for inclusion in an Interim Report

16. BEIS should expand the scope of the scheme currently under discussion with Freeths and others, so that Category B claimants can engage, should they choose to do so.

17. BEIS should ensure that all GLO claimants be notified of the discussions, and that all legal representatives of GLO claimants be treated equally in those discussions.

18. Claimants' reasonable professional expenses should be paid.

19. Category B claimants should be free to choose whether they continue to pursue without prejudice negotiations, or whether they end such negotiations by making an application to the scheme, with their choice to remain open until such time as they make a claim to the scheme.

20. The scheme should have transparent principles for calculating compensation, and transparent procedures that take account of the many difficulties which claimants face in providing records.

21. The scheme should, of course, make use of any published guidance arising from HSF instructing Lord Dyson.

22. Payments for pecuniary loss should be made on the basis that all losses caused by POL's actions are payable. Remoteness/foreseeability should not be permitted to limit claims, given the fact that POL's actions have blighted lives over a very long period of time, and caused "unreasonable" delay in righting wrongs (see para 9 of our original Submissions and Mr Marshall's submissions).

23. The scheme should pay preliminary claims within a tight and specified timetable from the point of claim to the point of making a preliminary award.

24. The preliminary award should make final payments on all heads of loss except for aggravated/exemplary damages. On that head, the award should be preliminary until the conclusion of the Inquiry, but there should be no right to claw back.

25. Applications to the scheme should remain open until at least the conclusion of the Inquiry.

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12 July 2022