IN THE MATTER OF A PUBLIC INQUIRY
THE POST OFFICE HORIZON IT INQUIRY

MRS NICHOLA ARCH, MR LEE CASTLETON, MS MILLIE-JO CASTLETON

MISS TRACY FELSTEAD, MRS SEEMA MISRA, MISS JANET SKINNER

SUMBMISSIONS ON COMPENSATION

31st May 2022

1. These submissions are made in response to the invitation from the Chair dated 9 May 2022.

2. These submissions are made at the request and on behalf of Mrs Nichola Arch, Mr Lee Castleton, Miss Tracy Felstead, Mrs Seema Misra and Miss Janet Skinner on whose behalf I am instructed in connection with their claims against the Post Office for further[1] compensation.

3. As yet, I am not formally instructed on behalf of Ms Millie-Jo Castleton, the daughter of Lee Castleton, to whom I have provided some informal assistance. The submission so far as made concerning her, is made at her request and in association with the submission on behalf of Mr Castleton.

4. Each of these individuals has given evidence to the Inquiry of the impact of the Post Office's actions upon their lives and the lives of their families.

5. Nichola Arch was prosecuted by the Post Office but, very unusually (years after her suspension from employment), acquitted at her trial. She was a claimant in the 'Bates' group litigation (i.e., Mrs Arch is a "GLO claimant").

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1 Not here used in the defined sense under the Chair's 9 May statement.

6. Lee Castleton is unique in his having been an unsuccessful defendant to a civil claim brought by the Post Office against him in 2006, on which judgment was given against him in January 2007 that is a reported judgment: *Post Office Ltd v Castleton* [2007] EWHC 5 (QB). It is the only reported civil judgment concerning Horizon until the GLO judgments, 12 years' later, of Mr Justice Fraser that are variously reported as *Bates and Ors. v Post Office Limited.* Mr Castleton, accordingly, is a "GLO claimant".

7. Nichola Arch and Lee Castleton are, accordingly, "Group C" claimants for "further" compensation in the way that that expression is used in the 9 May 2022 statement.

8. Millie-Jo Castleton's circumstances are unusual, though perhaps unlikely to be unique. She is the daughter of Lee Castleton. She has set out the harm inflicted upon her by the Post Office, consequent upon the wrong done to her father, in a statement to the Inquiry admitted in evidence on 19 May 2022.

9. Rhetorically, though relevantly, one may ask, what value is to be put, separate from physical harm, upon a lost and blighted childhood, unquestionably caused (inflicted) by the Post Office and its lawyers upon Millie-Jo Castleton through her father's experience?

10. The harm suffered by Ms Castleton is consequential and an indirect consequence of the Post Office's actions towards Mr Castleton. She falls into none of compensation schemes currently operating or envisaged.

11. Subject only to the wrong done to Lee Castleton being characterised as in the nature of an intentional tort (as distinct from mere negligence, for example, – but in this regard, Ms Anne Chambers of Fujitsu, whose evidence HHJ Havery Q.C. readily accepted at Mr Castleton's trial in the High Court in 2006, was referred by Mr Justice Fraser to the DPP in January 2020), Ms Castleton has a free-standing claim in tort against the Post Office for damages consequent upon the intentional wrong done to a third party (*viz* her father). These submissions are not addressed to that (legal) issue. It is presumed, until made clear to the contrary by the Post Office or BEIS, that her claim for compensation for the harm visited upon her by the Post Office through her father will fall within the compensation scheme understood to be in course of being established by BEIS for victims of the Post Office. That is to say the scheme for compensation not falling within either the HSS scheme or the scheme for those with preserved rights against the Post Office under the December 2019 settlement deed, that is to say, convicted claimants within the GLO civil litigation.

12. Accordingly, the approach in connection with Group C claimants for compensation should apply to Ms Castleton's claim for compensation. This should be confirmed.

13. Tracy Felstead, Seema Misra and Janet Skinner were each wrongfully convicted of offences and imprisoned. They all had their convictions quashed by the CACD on 21 April 2021. They are, accordingly, "Group B" claimants for "final" compensation within the meaning of that expression under the 9 May statement by the Chair.

The purpose of these submissions

14. The Chair has invited submissions upon 4 issues (other than for HSS claimants (not further considered here):

    a. The principles which are being applied/to be applied to the calculation of final/further compensation payments;

    b. The mechanism(s) by which final/further compensation payments are being/are to be calculated;

    c. The provision (if any) which is being made for applicants to obtain independent legal advice in relation to their claims;

    d. The procedure(s) which are being adopted to resolve disputes about the value of final/further compensation payments.

15. There are three schemes now in operation, or to be put in operation, for payment by the Post Office of postmaster[2] compensation:

    a. The HSS scheme. This is established and no comment is made about it, save that it is recognised that statements of principle have been made about it by BEIS that to some extent inform submissions made below.

    b. The scheme for convicted postmasters, who were claimants in the GLO civil litigation, whose convictions have been subsequently quashed. ("Final compensation" assessment.) This is established and is operating.

    c. Claimants whose compensation under the GLO settlement agreement are recognised as having received compensation that was inadequate to their

[2] Adopting the same generic meaning as in the Chair's statement.

circumstances and, consequently, was not fair. ("Further compensation" assessment.) This is to be established by BEIS and compensation principles to be finalised and published.

16. These submissions are principally addressed to the principles to be applied to the calculation of *further* compensation payments, with some additional comments where that scheme has a bearing on/impacts on the scheme for compensation for preserved claims, i.e., "final compensation" claims.

17. The compensation schemes, now in place or for "further" compensation to be put in place, constitute the third opportunity/attempt, and must be the last, for the Post Office to properly, and fairly, compensate its victims:

a. The first opportunity was under the mediation scheme established under the chairmanship of Sir Anthony Hooper, but from which the Post Office inexplicably withdrew in 2015, shortly after the February 2015 BIS Select Committee hearing at which Ian Henderson of Second Sight called for the production of criminal prosecution files. Mr Henderson explained to the committee that those files that he had reviewed suggested to him that there was insufficient evidence for prosecuting some of the defendants in question. The Post Office by its GC, and in the Committee by its CEO, refused (contrary to earlier assurances) to produce to Second Sight the prosecution files, and the Post Office shortly afterwards withdrew from the mediation scheme and terminated Second Sight's engagement. No explanation for this has, to date, been offered. (Most of the misgivings expressed by Second Sight in their 2013 interim report were subsequently shown to have been fully justified by Fraser J's judgments.) (Until the end of November 2020 it was not known or disclosed by the Post Office that the Post Office between 2013 and 2014 had undertaken, by Cartwright King LLP, solicitors who had previously acted as its prosecuting solicitors, a review of some 308 prosecution files, starting from January 2010. That review resulted, it seems, in not a single appeal – successful or otherwise. (Given that fact, and the result of the CCRC first referrals in April 2021, there are important questions raised as to the way in which the Cartwright King review was structured, its terms, and how it was conducted. – Was it structured to prevent/obstruct appeals?))

b. The second opportunity was in December 2019, at the time of the settlement of the GLO litigation claims. It is striking that the settlement negotiations were conducted by Herbert Smith Freehills LLP (also retained by the Post Office in appealing decisions of Mr Justice Fraser), rather than Womble Bond Dickinson, the firm that hitherto had conduct of the civil litigation. The government, including the prime minister himself, have acknowledged that the terms of the settlement were not fair to GLO claimants.

The principles that should apply to the calculation of final/further compensation payments

18. It is thought not likely to be in issue that the two overriding requirements for compensation to be paid by the Post Office to its victims are that such compensation should be both (i) fair and (ii) reasonable in the circumstances. Fairness and reasonableness are not merely aspirational but concepts that should have identifiable and ascertainable (measureable) content.

19. The present circumstances are challenging because of the absenceof findings by the court on individual claims. (In that respect the schemes are different from, say, the Lloyds/HBOS Reading IAU fraud compensation scheme.) That is the result of the December 2019 settlement that obviated the requirement for the court to make such determinations. The absence of individual-specific findings should plainly not now disadvantage postmasters.[3] A primary reason for this is that, absent the compensation schemes now in operation or to be put in operation, there are *prima facie* compelling grounds for the view that the Post Office secured the settlement agreement in December 2019 as a result of misleading both the claimants in the group litigation and the court:

a. By withholding/concealing important material evidence.

b. By misleading both the claimants and the court as to the reason for the non-appearance as a witness of Mr Gareth Jenkins as a technical expert for the Post Office.

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[3] For the purpose of these submissions, "subpostmaster" is given the same extended meaning as under the Chair's 9 May 2022 statement, unless otherwise indicated.

20. It is, accordingly, inappropriate to make distinctions between surviving or preserved claims for final compensation, that is to say claims by convicted claimants whose convictions have been quashed on appeal, specifically, claims for malicious prosecution that are expressly preserved against the Post Office upon the contingency of a successful appeal against conviction under the December 2019 settlement deed, and claims for further compensation based upon the express recognition of the inadequacy of compensation paid by the Post Office to GLO claimants (including but not limited to, after funding and other costs) under the settlement agreement of 2019.

21. The reason for such a distinction being inappropriate is that there is otherwise a danger of a mismatch/asymmetry between payments made:

a. To a convicted former claimant in the group litigation based upon *final compensation* for a hypothetical malicious prosecution claim, that would sound only in the tort measure of loss (but for the wrong); and

b. To a not-convicted GLO claimant whose claim for *further compensation* is unconstrained by any particular head/taxonomy of loss. For example, Lee Castleton's (exiguous) compensation of £28,500 was in settlement of a prospective claim for malicious prosecution (for a civil claim) but additionally claims for breach of contract (etc).

22. In crude terms, it will be seriously unsatisfactory for a convicted former GLO claimant to be disadvantaged in the *quantum* of their final compensation, as a consequence of their being constrained by classification and assessment of such a claim by reference only to the tort of malicious prosecution (where other claims were surrendered), as compared with a claimant for further compensation whose *various claims* are recognised as having been inadequately compensated under the settlement of December 2019 – with the result that such claims to (further) compensation are thereby, as it were, 'at large'.

23. Arguably, once it was accepted by government that the December 2019 settlement rendered the compensation paid to the GLO group claimants was unfair, as against compensation payable under the HSS scheme, there ceased to be a justification for treating convicted former GLO claimants separately, for the purpose of compensation, from those who had not been convicted. The over-arching requirement merely being that compensation now be paid is fair and reasonable to the injury suffered. That would include,

but not be necessarily limited to, for convicted GLO claimants, compensation in respect of losses assessed by reference (only) to malicious prosecution. While that boat may have sailed, it would be palpably unfair for those who had been convicted upon prosecution to be in a worse position, as regards compensation, from those who had not been convicted.

24. One of the more unsatisfactory aspects of the settlement reached in December 2019 in the civil litigation was that convicted GLO claimants (on the face of it[4]) surrendered all of their claims against the Post Office in consideration for the sole benefit (because they were expressly specifically excluded under the settlement terms from those to whom *any* financial compensatory payment was made by the Post Office) of a preserved, merely contingent, claim for malicious prosecution. (There are some grounds for the view that, in 2019, it was believed by the Post Office/the government that convicted claimants were unlikely to have their convictions quashed.)

25. Those who were convicted of offences (and had their claims stayed in the GLO litigation) would have been better served by not being parties to the GLO civil litigation. (The presentational advantage ('optics') of their being joined is obvious.)

26. It would be a manifest injustice if, as a matter of strict law (classification) convicted GLO claimants now were to be entitled to additional "final" compensation payments that were lesser in amount than payments to those not convicted, whose compensation is now acknowledged to have been inadequate and unfair in all the circumstances and consequently are able to claim for "further" compensation across the whole range of claims that they compromised under the December 2019 settlement. This ought to be expressly recognised and conceded by the Post Office/BEIS.

27. There is, accordingly, a requirement for a unifying compensatory principle that should apply to both formerly convicted claimants and other parties to the GLO civil litigation. Such a unifying principle is to be found in treating claims, whether for final compensation or further compensation, as analogous to claims for damages for fraud. The basis for that submission is explained below.

The approach to fair compensation should by analogy with a claim for damages for fraud

[4] And this is not to be treated as a formal concession.

28. The basis for, and advantages and consequences of, such an approach, that it is submitted will yield a fair result, are that:

a. The Post Office should in principle be liable for all losses suffered by its victims, not merely those that were reasonably foreseeable or (in contract) within the contemplation of the parties.

b. Losses should be recoverable subject to loss being evidenced (and where contingent on the action of a third, party, on the principle of 'loss of a chance' (that does not require to be evidence on balance of probabilities but rather on the basis of a real prospect)) and there being sufficient causal link between the Post Office's action and the victim's loss/harm suffered.

29. The difficulty that is envisaged, is what the relevant circumstances for the purposes of paying further or final compensation are.

30. For claimants for compensation who were convicted of offences whose convictions have been quashed, i.e. Group B claimants for 'final' compensation, the contingent basis for additional compensation is the preserved claim for malicious prosecution, preserved (it seems from comments made at the time he handed-down judgment on the Horizon Issues, at the instance of Mr Justice Fraser) under the December 2019 settlement deed settling the group litigation. Malicious prosecution is an intentional tort. Consequently, the approach to quantifying damages is in principle limited to that which applies to tort claims. Ordinarily the approach to such claims is as if the tort/wrongful conduct had not happened. But as noted, Group B claimants under the settlement of December 2019 gave-up, under the terms of the settlement, other claims available to them in the group litigation, including most obviously, their claims in contract.

31. Over-emphasis on the characterisation of the malicious prosecution classification of claims for compensation for those who were convicted of offences, but who have had those convictions quashed, is likely to, or at least foreseeably may, skew the compensation paid to those in Group B as compared with those in Group C.

32. The proposition that the compensation paid to claimants (for compensation) should be fair accordingly raises the anterior question - fair upon what principles?

33. It is for this reason that it is submitted that the proper and fair approach to compensation, in the circumstances, is to treat the claims for both further and final compensation as analogous to claims in fraud.

34. There are powerful reasons for treating the claims for (further/final) compensation as claims analogous to claims in fraud.

35. It is elementary that the object of damages is to compensate a person for loss suffered, so far as money can do it. In contract that is on the basis of what can be treated to have been within the contemplation of the parties on *Hadley v Baxendale* principles. Otherwise, damages are limited by what was reasonably foreseeable. These constraints do not apply in claims for fraud and the limitation by what was reasonably foreseeable has no application "*it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen*": *Doyle v Olby* [1969] 2 QB 158, 166-167 per Lord Denning.

Why is the fraud measure of damages appropriate for further/final claims to compensation?

36. There are two over-arching factors, or circumstances, that make assessment of further or final compensation on a basis analogous to a claim in fraud appropriate.

    a. Delay caused by concealment by the Post Office (concealment from postmasters (used in its generic sense) of its knowledge of flawed prosecutions, from not later than 2013, below).

    b. Harm caused by concealment by the Post Office (in effect concealment of Horizon problems identified by Fraser J in the Horizon Issues judgment).

37. Concealment was not inadvertent but deliberate. That is of course an assertion, not established by judgment. But the Post Office in engaging in the compensation scheme(s) is institutionally able to avoid findings to that effect. It should not be able to avoid the consequences by engaging in a process, but for which the December 2019 settlement would be vulnerable to a claim to set it aside - with all that would follow from that were it to be successful.

The harmful consequence of delay

38. The delay in claimants (for compensation) getting justice is a salient feature of the Post Office scandal.

39. Tracy Felstead was convicted and imprisoned in 2002 but had to wait 19 years for her conviction to be quashed in 2021. The original compensation she received for her imprisonment under the December 2019 settlement of the civil group litigation was £17,000. (The sum represents an affront to any sensible conception of justice.[5]) Nichola Arch was suspended from her employment in October 2000, she was charged with theft and prosecuted, but eventually acquitted, in April 2003. Her reputation and livelihood were nonetheless destroyed and her health irrevocably undermined. Janet Skinner's health has been undermined by the trauma of prison and subsequent court action taken against her by the Post Office in 2007. She remains unable to work. Seema Misra was prosecuted for theft in 2010 on the explicit basis that acceptance of her plea to false accounting would not be sufficient for the Post Office to seize her assets under a POCA confiscation order and that without confiscation the Post Office would be some £70,000 short as a consequence of the purported "shortfall" on her Horizon account. (In this regard the Court of Appeal appears to have fallen into error in considering that commercial considerations did not play any part in decisions by the Post Office to prosecute particular charges of theft.)

40. As to the delay in obtaining justice, its effects are, and have been, devastating for claimants. Ordinarily, someone like Tracy Felstead might reasonably have expected that her conviction should be quashed within a few years. (The material for doing so existed at the time of her trial.) That time in fact ended-up lasting her entire adult life, which the stain of conviction for dishonesty has irrevocably blighted, ruining her employment prospects and the hope of advancement in her chosen career. Many would say that the years between 20 and 40 may be expected to be the best and most fruitful years of one's life.

41. Millie-Jo Castleton has eloquently expressed how her entire childhood, from the age of 8 (she is now 26) was blighted by the false claim made against her father for £26,000 for "Horizon shortfalls". The Post Office recovered £321,000 in costs, bankrupting him, reducing him and his family to penury and resulting in her illness. The consequence was

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[5] The sum was in fact an *ex-gratia* payment (gift) by non-convicted claimants to those who were convicted but whose offences had not, in December 2019, been quashed who were expressly excluded from compensation then paid by the Post Office under the terms of settlement.

that she graduated, a year late following a degree course punctuated by regular admission to hospital, having a body weight of only 5 stones.

42. For all victims who suffered similarly these are 'stolen years'. Money itself will never constitute adequate compensation. Lord Rodger JSC, in *Attorney General's Reference No 2 of 2001* at [151], said of delay in the context of Article 6 ECHR (that includes time to determination of an appeal (below)): "By definition, the undue delay with its harmful effects occurs by the time the hearing comes to an end. The relevant authorities cannot remedy the situation and give the defendant his due by holding a fresh hearing - this could only involve still greater delay, prolonging the disruption to the defendant's life and so exacerbating the violation of his Convention right. But the fact that this particular breach of article 6(1) cannot be cured by holding a fresh hearing is not just some quirk of the Convention that happens to put the relevant authorities in a particularly awkward position. On the contrary, it stems from the very nature of the wrong which the guarantee is designed to counteract. If the responsible authorities cannot go back and start again, neither can the defendant. For both sides time marches on. When the authorities delay unreasonably, months or years of the defendant's life are blighted." He cannot have them over again; they are gone forever. By signing up to article 6(1) states undertake to avoid inflicting this kind of harm. Since the harm is irretrievable, the European Court of Human Rights … is correct to regard this right as being of "extreme importance" for the proper administration of justice[6]". (Underlining supplied.)

43. The Court of Appeal in April 2021 had nothing to say about this, perhaps because of insufficient time allowed for the appeals.

44. The relevant period of time under Article 6 begins when the person is charged and ends at acquittal or conviction, even where this decision is reached on appeal: *Wemhoff v Germany* [1968] ECHR 2 and *Eckle v Federal Republic of Germany* [1982] 5 EHRR 1, applied *Dyer v Watson* [2004] 1 AC 379 [76], [90].[7] (*Dyer,* a decision of the Privy Council, remains the leading UK authority.)

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6 *Guincho v Portugal* (1984) 7 EHRR 223, 233, para [38].

7 *König v Federal Republic of Germany* (1978) 2 EHRR 170 contains the first statement of a principle which has been repeated and applied in many later cases. In paragraph 99 of its judgment, at p 197, the court said: "The reasonableness of the duration of proceedings covered by article 6(1) ofthe Convention must be assessed in each case according to its circumstances. When inquiring into the reasonableness of the duration of criminal proceedings, the court has had regard, inter alia, to the

45. Importantly, *the burden of coming forward with explanations for inordinate delay is on the prosecuting authorities*: *Eckle v Federal Republic of Germany* 5 EHRR 1, 29, [80]. The Court of Appeal did not require any explanation from the Post Office as to why it had taken so long for the appeals to come on. Had it done so the Post Office would have been placed in some considerable difficulty, given the circumstances in which it had determined to cease prosecuting for Horizon Shortfalls after 2013.

46. Lord Bingham in *Dyer* at paragraph [52] explained that the test for "reasonable time" under Article 6 has two stages: "the first step is to consider the period of time which has elapsed. …the threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting states to explain and justify any lapse of time which appears to be excessive". (Emphasis supplied.)

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complexity of the case, to the applicant's conduct and to the manner in which the matter was dealt with by the administrative and judicial authorities. The court, like those appearing before it, considers that the same criteria must serve in the present case as the basis for its examination of the question whether the duration of the proceedings before the administrative courts exceeded the reasonable time stipulated by article 6(1)." *Dyer v Watson* [2004] 1 AC 379, (Privy Council) [37], [38]. In *Howarth v United Kingdom* (2000) 31 EHRR 861 the defendant had been interviewed by the Serious Fraud Office in March 1993 and charged in July 1993. Following conviction in February 1995 he had been sentenced in March to community service. He had appealed against conviction and the Attorney General had applied for leave to refer the sentence to the Court of Appeal as unduly lenient. The appeal and the reference had each been determined adversely to Mr Howarth in March 1997. The court held that the reasonable time requirement had been violated since no convincing reason had been given to justify the period of two years it had taken to deal with the appeal (p 867) paras [29], [30]: *Dyer* at para [46].

In *Eckle v Federal Republic of Germany* (1982) 5 EHRR 1, two separate criminal proceedings for fraud against the applicants had lasted for 20 years and 15 years respectively from the date of the initial complaint to the disposal of the final appeals. The court held that the "reasonable time" begins to run as soon as a person is "charged" within the meaning which is to be given to that expression for the purposes of article 6(1), and that the word "time" covers the whole of the proceedings in issue, including appeal proceedings: pp 27-28, paras [73]" [76]. The ECHR gave guidance on the meaning of the word "reasonable", at p 29, [80]: "The reasonableness of the length of the proceedings must be assessed in each instance according to the particular circumstances. In this exercise, the court has regard to, among other things, the complexity of the case, the conduct of the applicants and the conduct of the judicial authorities. The present case concerns sets of proceedings that endured 17 years and 10 years respectively. Such a delay is undoubtedly inordinate and is, as a general rule, to be regarded as exceeding the 'reasonable time' referred to in article 6(1). In such circumstances, it falls to the respondent state to come forward with explanations". Lord Bingham in *Dyer* said: "… with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable" [53]. (Emphasis supplied.)

47. The reason for this is simple. The state is responsible for delays attributable to the prosecution: *Orchin v UK* 6 EHRR 391. While there has been some discussion on whether this applies to private prosecutions, the better view is that it does.[8] A *private prosecutor*, by exercising the right and privilege of private prosecution, is thereby permitted to assume the mantle of the state. The prosecution of offences is a state and public function, regardless of how it is undertaken. It was a privilege that the Post Office, as prosecuting authority, abused.

48. It is a matter of regret that the Court of Appeal in April failed to consider either the inordinate delay in the appeals being heard or the reasons for the delay. As a matter of law, the court ought to have addressed these issues.

The Post Office's efforts to conceal continued from 2013 up to the GLO civil litigation

49. There are grounds for the view that the Post Office was actively engaged in concealment of its knowledge between 2013 and the judgment given by Mr Justice Fraser in December 2019 in the Horizon Issues trial. The following are of particular importance.

a. The "Ismay report" of 2010 (*Hamilton* paragraph [101]) appears not to have been disclosed by the Post Office in the *Bates* group civil litigation.

b. The "Detica report" (October 2013) appears not to have been disclosed by the Post Office either to convicted defendants or in the *Bates* group civil litigation. (*"…Post Office systems are not fit for purpose in a modern retail and financial environment. Our primary concern here relates to the difficulty in reconciling information from multiple transaction systems both in terms of timelines, structure and access."*) Detica independently confirmed misgivings expressed by Helen Rose.

c. A report by Helen Rose (a specialist fraud investigator) of 2013 was not disclosed by the Post Office to convicted defendants. It recorded her concern: *"I don't think that some of the system-based correction and adjustment transactions are clear*

[8] Should authority be needed, Lord Reading C.J. in *Rex v. Lee Kun* [1916] 1 K.B. 337, 341 observed: "… the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State."

to us [Post Office/fraud investigators] on either credence or ARQ logs. However, my concerns are that we cannot clearly see what has happened on the data available to us and this in itself may be misinterpreted when giving evidence and using the same data for prosecutions".

d. The Post Office's notification of risk to its insurers in August 2013 (revealed in November 2020) appears not to have been disclosed by the Post Office in the *Bates* group civil litigation. (It is likely that such notification would have generated an exchange of documents between the Post Office and its insurers.) Notification of insured risk in 2013 was of importance for what by necessary implication it recognised. (Notification of risk to the Post Office's insurers cannot have been legally privileged.)

e. The *material* in the Clarke Advice from July 2013 was *ex facie* disclosable by the Post Office to convicted defendants on established common law principles summarised by Lord Hughes JSC in *R (on the Application of Nunn) v Chief Constable of Suffolk Police* UKSC [2014] 37. This is regardless of any legal advice given to the Post Office in respect of that *material* to which LPP might arguably attach. The material, plainly of obvious importance and relevance, was withheld from disclosure to convicted defendants (e.g., Seema Misra at whose trial Mr Jenkins had given live testimony for the Post Office - it appears, *uniquely* (*per* the Post Office's leading counsel in March 2021).

f. The Post Office undertook a review of 308 prosecutions from 2013-2014. That important fact was not disclosed by the Post Office (Mrs Paula Vennells C.B.E. and Mrs Angela van den Bogerd (director)) to parliament in the BIS Select Committee in February 2015. At the committee hearing the key issue was the refusal by the Post Office of the request by the Post Office's appointed independent forensic accountants, Second Sight Support Services Ltd, to have access to and to review Post Office prosecution files. The Post Office's own review of the 308 prosecutions (post-January 2010) had itself been prompted by the July 2013 Clarke Advice, of which Second Sight knew nothing. (The obvious reason for Second Sight not being informed of the review is that its revelation would have entailed Second Sight finding out about the Clarke Advice.)

g. The Post Office's statement, from 2015 (thereafter repeated), that "*Horizon does not have functionality that allows Post Office or Fujitsu to edit or delete the transactions as recorded by branches*" without postmaster knowledge or consent, was false and misleading (contradicted by Mr Richard Roll (second statement) whose evidence Fraser J accepted).

50. The fact that in 2013 the Post Office's head of security introduced a protocol for the "shredding" of (unhelpful) documents (*Hamilton* paragraph [88]) is also plainly relevant to a policy of protecting the Horizon system against challenge/question. (Disclosed in the appeals in February 2021 immediately before the March appeal hearing.)

51. Those circumstances are separate from, but related to, two other remarkable circumstances:

a. The Post Office's strenuous resistance to disclosing the Fujitsu Known Error Log – a log that is kept updated for any maintained computer system of any size – and the Post Office's formal submission to the court in 2018 that the group claimants' request for it was a "red herring". Fraser J. found that the KEL was of fundamental importance. By that time, the Post Office's solicitors had acted for the Post Office from, at the latest, 2006 (Lee Castleton's civil trial.

b. The explanation given to Mr Justice Fraser in 2019 as the reason for Mr Gareth Jenkins not being called as a witness for the Post Office, in the light of what is revealed by the Clarke Advice of July 2013, was seriously misleading and substantially false. That would have been apparent to anyone with knowledge of the contents of the July 2013 Clarke Advice. The reason for Mr Jenkins not appearing in the GLO civil litigation as a witness for the Post Office is revealed in the Clarke Advice.

The Post Office maintained its attempts at concealment in the Court of Appeal

52. On 6 November 2020, by its counsel, the Post Office formally submitted, in writing, to the Court of Appeal that:

a. The CCRC's case on second category abuse of process was weak; and

b. "Fresh evidence" on the appeals should be restricted to the two judgments ("Common Issues" and "Horizon Issues") of Mr Justice Fraser.

53. Had the Court of Appeal acceded to those submissions, made as they were before disclosure of the Clarke Advice on 12 November 2020, the Clarke Advice would not have been a disclosable document on the appeals (nor would have been the subsequent revelation of the August 2013 "shredding advice").

54. The Clarke Advice was disclosed only because of a letter sent by Aria Grace Law on 27 October 2020 questioning late disclosure, given by the Post Office on 23 October 2020, that revealed that the Post Office main board had been advised in August 2013 by external solicitors (Bond Dickinson) about the incompleteness of evidence given by Mr Gareth Jenkins and of concerns about the completeness of disclosure given to defendants of Horizon material.

55. It was not then disclosed that counsel seeking exclusion of fresh evidence, other than the judgments of Mr Justice Fraser, on the hearing of the appeals, had advised the Post Office on both the contents and conclusions of the Clarke Advice in October 2013 (later revealed by Peters & Peters on 30 November 2020).

56. One of the consequences of the foregoing is that it would be apparent, and known, to anyone with knowledge of the conclusions of the Clarke Advice, including that Mr Gareth Jenkins, because he had put the Post Office in breach of its duty to the court and, additionally, was a witness whose credibility had been fatally undermined by the incompleteness of the evidence given by him and who should not be used as a witness for the Post Office again, that the reason given to Mr Justice Fraser by the Post Office in 2019 for Mr Gareth Jenkins not being called as a witness at the Horizon Issues trial in 2019 (a circumstance to which Mr Justice Fraser devotes a number of paragraphs of his judgment) was substantially false and misleading.

57. It is arguable that the December 2019 settlement was procured by fraud.

58. In the circumstances, while perforce the Post Office is not subject to particular findings, the entire history of its conduct in connection with Horizon is characterised by concealment and misrepresentation as to its knowledge of defects in and the unreliability of the Horizon system. Not only was this, in many if not all cases, the proximate cause of claimants for

compensation being falsely convicted or subject to other civil/enforcement process, but it was also the cause of the manifestly inordinate delay in the civil litigation and consequent appeals to the Court of Appeal upon referral by the CCRC in 2020. It is thought that, for example, had the Detica report been disclosed to the GLO claimants and/or had the material in the Clarke Advice been disclosed as it should have been (irrespective of any advice in connection with the known facts), and/or had the CCRC had disclosed to it the Clarke Advice in 2014, when it first started making its inquiries, the appeals to the Court of Appeal and all that has followed would have happened long ago. (The Post Office's leading counsel in the April 2021 appeals advised the Post Office upon its response to the CCRC in 2014.)

59. Little to date has been said about the review undertaken by the Post Office of 308 prosecutions after January 2010, upon the recommendation of Mr Clarke in his July 2013 Clarke Advice. That review was undertaken in response to matters addressed in the Clarke Advice. The fact of that review, undertaken by the Post Office between summer 2013 and 2014, resulted in not a single successful appeal. The review appears to have been carefully choreographed. In undertaking the review of Mrs Misra's prosecution in 2010 Mr Clarke in 2014 was not provided by the Post Office with the prosecution file. Had he seen it, he would have seen Mr Jarnail Singh's triumphalist email, circulated following Mrs Misra's conviction highlighting the critical role played by Mr Gareth Jenkins, whose evidence Mr Clarke himself had seriously criticised and questioned in his July 2013 advice. Mr Clarke advised against Mrs Misra being given further disclosure, including disclosure of the Helen Rose report.

60. The Cartwright King 2013-2014 review of Post Office prosecutions was not revealed to Second Sight, nor, perhaps more strikingly, was it disclosed to the BEIS Select Committee in February 2015 when the issue raised by Mr Ian Henderson was the possible unreliability of evidence in Post Office 'Horizon' criminal prosecutions. The review undertaken by external solicitors was plainly relevant and would have offered an obvious answer to and basis for declining Mr Henderson's request, but revelation of the Cartwright King review would have ineluctably led to the revelation of the reason for it, the Clarke Advice (the explanation given by Peters & Peters in November 2020).

61. In the circumstances, there are compelling grounds for the approach to compensation for victims of the Post Office being by analogy with a claim for losses consequent on fraud.

That is to say, principles of remoteness and foreseeability, otherwise applicable to damages claims, should be displaced and should have no application. This should be confirmed.

62. The Post Office should be liable to compensate for all losses to a claimant, subject to sufficient evidence of a causal connection between the Post Office's actions and the relevant harm/loss suffered.

63. There should be no difference in the approach to compensation between payments made to formerly convicted postmasters, who were parties to the group litigation, and those who were parties to that litigation and not convicted, consequent on the former class having claims for 'final' compensation assessed upon the basis of a hypothetical claim for malicious prosecution, when losses that may be claimed by those not convicted will not be subject to any such constraint or restriction.

Mechanism by which final payments are being/will be compensated.

64. These are issues which are primarily for BEIS/HSF. It goes without saying that there is a requirement for transparency. Furthermore, it is important that those making claims should know by what criteria claims are to be assessed. That is to say, claimants should know by what criteria claims are to be assessed before they submit a claim (transparency). The importance of this obvious requirement was painfully exposed in the Cranston review of the Lloyds/HBOS Reading IAU fraud compensation scheme.

65. It is noted, and welcome, that it appears that absence of documentary evidence is not being treated as a bar or impediment to claims. That is plainly right, given where responsibility for the effluxion of time lies.

66. It is obviously important that the process be as informal and untechnical as is consistent with principles of fairness and reasonableness. One of the principal benefits to the Post Office is that the schemes existing and contemplated avoid the Post Office becoming embroiled, prospectively, in years of litigation with inevitable commercial consequences that would follow.

67. To that end, it would seem that it ought to be possible for certain information to be published. Notably, for example:

a. The approach to general damages in the calculation of sums payable for imprisonment ought to be standardised for all those convicted and imprisoned and should be available. (It appears that in other compensation schemes, notably, Windrush, such information has been made available.)

b. The Post Office will have data on employee paybands for employees over time. Making these available to claimants will make accountancy calculations both more straightforward and more accurate.

Interim Payment

68. There is no principled basis for making interim payments available to GLO claimants for final compensation, i.e., to those whose convictions have been quashed, but not to claimants for further compensation where the amount recovered under the December 2019 settlement is acknowledged to have been unfair.

69. In justice and fairness, a mechanism should be put in place without further delay to enable claimants inadequately and unfairly compensated under the December 2019 settlement agreement to make a claim for an interim payment. In part, the compelling justification for such provision lies in the sheer length of time that it has taken to reach this point. Mrs Arch was suspended from her employment in April 2000. That is now more than 22 years ago. It was that event and her (wrongful) prosecution, despite her subsequent acquittal at trial, that has blighted her life and undermined her health. Lee Castleton, for years after the civil judgment against him in 2007, that the Post Office's solicitor promised, correctly, would "ruin" him, lived out of his car at remote places around the country in his obtaining work to support his family, whose circumstances were devastated by the Post Office in terms Millie-Jo Castleton describes. The judgment against Mr Castleton remains to be set aside (and his bankruptcy order annulled).

70. It offends any sensible sense of justice that no mechanism for interim payments exists for individuals who have suffered so grievously.

71. As submitted, the cause of delay in individuals obtaining justice, incontestably, lies with the Post Office. There is no principled basis for a mechanism for payment of interim sums on account of further compensation not being put in place forthwith.

Disgorgement/repayment of property subject to confiscation

72. For reasons that remain unclear, the issue of sums/property recovered by the Post Office under the POCA (or otherwise) against convicted claimants appears not to have been formally resolved. (It is understood that inquiries have been made, informally, of the Court of Appeal.)

73. The Post Office should be required to disgorge (with interest) sums/the value of property recovered by it as a result of its prosecutions and consequential asset recovery orders. Further, the Post Office should be required to account for all such recoveries and to provide a statement in that regard.

Professional assistance

74. Claimants to compensation should be entitled to claim the reasonable costs of professional assistance in formulating their claims. It is fanciful to expect claimants for compensation, in all but the simplest cases, to formulate and submit claims for compensation without professional assistance. This most obviously applies to medical assistance, in the form of medical reports, and also to accountancy reports. The cost-benefit to the assessment panel in claimants receiving such reasonable assistance, together with legal advice, is obvious.

Challenging awards

75. It is not known if it is intended to provide as a fall-back against not accepted awards, submission to compulsory arbitration, as under the HSS scheme. It is submitted that such a requirement is inherently objectionable. There are strong grounds for the mechanism to be agreed by (reasonable) consultation with stakeholders.

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31st May 2022