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In the matter of the Post Office Horizon IT Inquiry

OPINION

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1. The circumstances which have given rise to the Post Office Horizon IT Inquiry have been well documented and I will not endeavour to summarise them, save to note that (as is now well known) various criminal proceedings and civil proceedings and other actions were taken by the Post Office[1] against many subpostmasters or subpostmistresses ("**SPMs**") based upon Horizon system data which the Post Office previously contended was indisputable and which has now been proved to be unreliable because of the "*number, extent and type of impact of the number of bugs, errors and defects*"; I refer to [975] of the Judgment of Mr Justice Fraser in *Alan Bates & Others v Post Office Limited* ***(Judgment (No.6) "Horizon Issues")*** [2019] EWHC 3408 (QB), subsequently cited and relied upon by the Court of Appeal Criminal Division in *Josephine Hamilton & Others v Post Office Limited* [2021] EWCA Crim 577 at [50].

2. As the Inquiry is aware, following Mr Justice Fraser's earlier decision on certain issues concerning the contractual arrangements between the SPMs and the Post Office (*Alan Bates & Others v Post Office Limited* ***(Judgment (No.3) "Common Issues")*** [2019] EWHC 3408 (QB)) and the circulation to the parties of *Judgment (No.6) "Horizon Issues"* in draft form, the Group Litigation between a number of SPMs and the Post Office was settled pursuant to the terms of Settlement Deed dated 10 December 2019 ("**the Group Litigation Settlement Deed**").

3. In consequence of such civil and criminal litigation and following the Group Litigation Settlement Deed, certain compensations schemes have been established, or are in contemplation, and I have been asked to advise the Post Office Horizon IT Inquiry Chair, Sir Wyn Williams, in relation to particular issues which have arisen for the Inquiry's

[1] In its various incarnations over time.

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consideration in circumstances where a number of the SPMs who suffered hardship as a result of the actions of the Post Office and wish to claim compensation under the various schemes have been the subject of formal insolvency proceedings. In particular, I have been provided with a list of preliminary questions referable to (1) the Historic Shortfall Scheme ("**HSS**"), (2) the Overturned Historic Convictions Scheme ("**OHCS**") and (3) the intended Group Litigation Scheme ("**GLS**"), as well as a further question related to Clause 11 of the terms of Group Litigation Settlement Deed.

4. Whilst the Note submitted to the Inquiry on behalf of the Post Office dated 16 January 2023 ("**the Post Office Note**") makes reference[2] to an awareness of one application for compensation in relation to a *company* with an insolvency issue, the other cases identified and the questions which I have presently been asked to address all concern issues of *personal* insolvency (being, for these purposes, situations in which the individual SPMs were either made bankrupt, whether or not such bankruptcy was subsequently annulled, or SPMs who are or were the subject of an Individual Voluntary Arrangement ("**IVA**") entered into pursuant to Part VIII of the Insolvency Act 1986[3]). I note however, that *if* the underlying contractual arrangements were with an incorporated company (whether or not it has since been the subject of insolvency proceedings), different issues would arise for consideration. For completeness, I should also note that whilst reference is made in the Post Office Note (at [11(i)]) to an awareness of six cases in which the "*bankruptcy (sequestration) was in Scotland*", I am not qualified to advise in relation to Scottish insolvency law and, accordingly, this Opinion is limited to matters which arise under the law of England and Wales.

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[2] In footnote 5.

[3] Although reference is also made in the Post Office Note to one SPM having been the subject of a Debt Relief Order, I have not been asked to consider such form of insolvency proceeding and, given the limited circumstances in which they may arise, I suspect that there will be few, if any, other such orders made in respect of SPMs. A Debt Relief Order is a concept which was brought into effect from 6 April 2009 and may only be made pursuant to Part 7A of the Insolvency Act 1986 where the Official Receiver is satisfied that the conditions specified in and pursuant to Schedule 4ZA to the Act are satisfied. Prior to 1 October 2015, those conditions required that the total amount of the debtor's debts did not exceed £15,000 and that their assets did not exceed £300, from 1 October 2015 the limits were changed so that the total amount of the debtor's debts could not exceed £20,000 and their assets could not exceed £1,000 and from 29 June 2021 onwards they were raised again to £30,000 for maximum indebtedness and £2,000 for maximum property value: *Insolvency Proceedings (Monetary Limits)(Amendment) Order 2009, SI 2009/465; Insolvency Proceedings (Monetary Limits)(Amendment) Order 2015, SI 2015/26; and Insolvency Proceedings (Monetary Limits)(Amendment) Order 2021, SI 2021/673.*

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5. In order to address the specific preliminary questions that have been raised in a sufficiently comprehensive manner, it is useful to address first some relevant issues of personal insolvency law in more general terms. This Opinion therefore contains the following sections:

   (A) Assets vesting (or which may vest) in the bankruptcy estate of an SPM pursuant to the Insolvency Act 1986 (**"the Act"**), including any 'after acquired property'.

   (B) The effect of an SPM being discharged from bankruptcy.

   (C) The effect of any bankruptcy order against an SPM being annulled or rescinded.

   (D) Assets which are subject to an IVA entered into by an SPM.

   (E) The preliminary questions raised in relation to the following:

      (1) The HSS;

      (2) The OHCS;

      (3) The GLS; and

      (4) Clause 11 of the Group Litigation Settlement Deed.

(A) Assets vesting (or which may vest) in the bankruptcy estate pursuant to the Act, including any 'after acquired property'.

6. Upon a bankruptcy order being made, pursuant to section 291A(1) of the Act (which was introduced by the Small Business Enterprise and Employment Act 2015) the official receiver immediately becomes the first trustee of the bankrupt's estate unless the court appoints another person at that time. Thereafter and in accordance with appropriate procedures, the official receiver may be replaced as the trustee in bankruptcy by a suitably qualified insolvency practitioner. (Prior to 2015, there were 3 different ways in which a trustee in bankruptcy could be appointed[4]: at a general meeting of the bankrupt's creditors, by appointment of the Secretary of State, or by the court where an insolvency practitioner's report had been submitted under a debtor's own petition or the there was a supervisor of a failed IVA.) For convenience and where the difference is not material, I will refer to the official receiver in their capacity as trustee in

[4] See *Barker v Baxendale-Walker* [2018] EWHC 2245 (Ch) @ [37]. In that case Chief Insolvency and Companies Court Judge Briggs also held (at [41]) that the Court had an additional free-standing power to appoint a trustee in bankruptcy pursuant its inherent jurisdiction in bankruptcy.

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bankruptcy and any such appointed insolvency practitioner as "**the officeholder**" or "**the trustee**".

Vesting in the officeholder

7. Section 306 of the Act provides (and has always provided) for the automatic vesting of "*the bankrupt's estate*" in the relevant officeholder in the following terms:

> *"(1) The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee.*
> *(2) Where any property which is, or is to be, comprised in the bankrupt's estate vests in the trustee (whether under this section or under any other provision of this Part), it shall so vest without any conveyance, assignment or transfer."*

8. In so far as is material for present purposes, "*the bankrupt's estate"* is defined by section 283 of the Act in the following terms:

> *"(1) Subject as follows, a bankrupt's estate for the purposes of any of this Group of Parts comprises—*
>
> *(a) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy, and*
>
> *(b) any property which by virtue of any of the following provisions of this Part is comprised in that estate or is treated as falling with the preceding paragraph.*
>
> *(2) Subsection (1) does not apply to—*
>
> *(a) such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation;*
>
> *(b) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his family.*
>
> *This subsection is subject to section 308 in Chapter IV (certain excluded property reclaimable by trustee).*
>
> *(3) Subsection (1) does not apply to—*
>
> *(a) property held by the bankrupt on trust for any other person, or*
>
> *(b) the right of nomination to a vacant ecclesiastical benefice.*
>
> *(3A) Subject to section 308A in Chapter IV, subsection (1) does not apply to—*

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... [certain tenancies]

(4) References in any of this Group of Parts to property, in relation to a bankrupt, include references to any power exercisable by him over or in respect of property except in so far as the power is exercisable over or in respect of property not for the time being comprised in the bankrupt's estate and—

(a) is so exercisable at a time after either the official receiver has had his release in respect of that estate under section 299(2) in chapter III or the trustee of that estate has vacated office under section 298(8), or

(b) cannot be so exercised for the benefit of the bankrupt;

and a power exercisable over or in respect of property is deemed for the purposes of any of this Group of Parts to vest in the person entitled to exercise it at the time of the transaction or event by virtue of which it is exercisable by that person (whether or not it becomes so exercisable at that time).

...

(6) This section has effect subject to the provisions of any enactment not contained in this Act under which any property is to be excluded from a bankrupt's estate."

9. In relation to subsection 283(6), section 417(2) of the Proceeds of Crime Act 2002 ("**POCA**") makes specific provision for property which is the subject of various types of order pursuant to that legislation to be excluded from the bankrupt's estate. In turn, Sections 306A to 306C of the Act make specific provision for property which is the subject of such orders to automatically vest in the trustee as part of the bankrupt's estate in the event of such orders being released, satisfied, discharged or quashed.

10. As regards after-acquired property, meaning property, which is acquired by, or has devolved upon, the bankrupt since the commencement of the bankruptcy (which is the date on which the bankruptcy order was made – see section 278(a) of the Act[5]) and which therefore has not automatically vested in the officeholder pursuant to section 306 of the Act, section 307 of the Act materially provides:

"(1) Subject to this section and section 309 [which specifies a time limit for providing the relevant notice, of 42 days beginning with the day on which such property

[5] Section 278 provides:
"*The bankruptcy of an individual against whom a bankruptcy order has been made –*
(a) commences with the day on which the order is made, and
(b) continues until the individual is discharged under this Chapter."

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comes to the knowledge of the trustee], ***the trustee may by notice in writing claim for the bankrupt's estate any property which has been acquired by, or has devolved upon, the bankrupt since the commencement of the bankruptcy***.

(2) ***A notice under this section shall not be served in respect of—***

(a) *any property falling within subsection (2) or (3) of section 283 in Chapter II* [see above],

(aa) *any property vesting in the bankrupt by virtue of section 283A in Chapter II* [which provides for the revesting in the bankrupt of the bankrupt's or their family's home after a period of 3 years if no relevant steps have been taken in relation to such property by the trustee],

(b) *any property which by virtue of any other enactment is excluded from the bankrupt's estate, or*

(c) *without prejudice to section 280(2)(c) (order of court on application for discharge),* ***any property which is acquired by, or devolves upon, the bankrupt after his discharge***.

(3) *Subject to subsections (4) and (4A)* [which are not material for present purposes], ***upon the service on the bankrupt of a notice under this section the property to which the notice relates shall vest in the trustee as part of the bankrupt's estate; and the trustee's title to that property has relation back to the time at which the property was acquired by, or devolved upon, the bankrupt***.

...

(5) *References in this section to property do not include any property which, as part of the bankrupt's income, may be the subject of an income payments order under section 310."*

(**my emphasis**)

11. As regards any "*income payments order*", section 310 of the Act provides that the court may make an order "*claiming for the bankrupt's estate so much of the income of the bankrupt during the period for which the order is in force as may be specified in the order*". However, subsection 310(1A) provides that such an order may only be made on an application instituted "*(a) by the trustee, and (b) before the discharge of the bankrupt*". There are further restrictions in section 310: the court may not make an income payments order the effect of which would be to reduce the income of the bankrupt below what appears to the court to be necessary for meeting the reasonable

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domestic needs of the bankrupt and his family (ss310(2)); and the period specified in such order *"(a) may end after the discharge of the bankrupt, but (b) may not end after the period of three years beginning with the date on which the order is made"* (ss310(6)). Once made, an income payment order will either require the bankrupt to pay the trustee an amount equal to that claimed by the order or require the person making the payment to pay so much of it as is subject to the order directly to the trustee instead of the bankrupt (see ss310(3)) and, once received by the trustee, such sums form part of the bankrupt's estate (see ss310(5)). For the purposes of section 310, *"the income of the bankrupt comprises every payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled, including any payment in respect of the carrying on of any business or in respect of any office or employment (despite anything in section 11 or 12 of the Welfare Reform and Pensions Act 1999)**]** any payment under a pension scheme but excluding any payment to which subsection (8) applies* [being payments by way of minimum guaranteed pension within the meaning of the Pension Schemes Act 1993]".

Meaning of "property"

12. As for the definition of "*property*" itself, section 436 of the Act provides that, "*except in so far as the context otherwise requires (and subject to Parts VII and XI) – "property" includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property*". However, as was stated by Lord Justice Newey in *Gwinnutt v George* [2019] EWCA Civ 656 at [10(vi)], *"The explanation of property given in section 436 is not in truth a definition of the word property since the section only sets out what is included: Ord v Upton [2000] Ch 352, 360, per Aldous LJ".* Whilst it is intentionally very wide in scope, there are relevant limits:

    (i) As further explained by Lord Justice Newey in *Gwinnutt v George* (at [10(viii)]), *"the fact that a possibility has a realisable value will not necessarily render it property: The chance of receiving a legacy from a relative a man might sell before*

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his bankruptcy, but still, if not sold by him, that chance would not pass to his assignees[6]*: Johnson v Smiley (1853) 17 Beav 223, 230, per Romilly MR*".

(ii) Similarly, in *Agarwal v Canara Bank* [2017] BPIR 842, 864, at [98], Chief Registrar Baister considered it to be –

> "*trite law that a beneficiary under a discretionary trust has no beneficial interest and nothing to which a trustee in bankruptcy can succeed under sections 283(1) and 306 Insolvency Act. He has no more than a hope or expectation, and 'A mere hope or possibility is not "property" within s 436', as the learned authors of* Muir Hunter *opine (see para 3–624 for the material relied on in support of that proposition; see also the passage at para 416 in Vol 5 of the 2013 edition of* Halsbury's Laws *to like effect)."*

(iii) Likewise, in *Re a Bankrupt (No 145 of 1995)* [1996] BPIR 238[7], Knox J held (on appeal) that an award made by the Criminal Injuries Compensation Board, which the bankrupt had applied for before being made bankrupt following serious injuries which she sustained as a result of a criminal assault, did not vest in her trustee in bankruptcy in circumstances where the award was not made until after the date of the relevant bankruptcy order. As Knox J explained (at 239 and 240), at the date of the bankruptcy order, she had only a prospect of receiving such an award and no right to sue for the award or even, when it was made, to recover the award:

> *"What matters is that there is no right in a citizen who suffers injuries as a result of a criminal assault to enforce any form of award from the Criminal Injuries Compensation Board.*
>
> *The prospect of getting such an award has variously been described in argument as a hope and a spes which is the Latin word for the same thing but it is not, and this is again common ground, a thing, in action or, to speak law French for a second, a chose in action."*
>
> *"Treating the matter purely as a matter of construction I am quite unable to accept that the word 'property' when it is used in the definition of property is intended to describe anything other than an existing item. In other words I do not accept that it is susceptible of referring to something which has no present existence but may possibly come into existence on some uncertain event in the*

[6] Being the term by which the relevant bankruptcy officeholders were then known.
[7] Also known as *In re Campbell (A Bankrupt)* [1997] Ch 14

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future. There seems to me to be a very clear distinction between two situations. The first is when there is a contingent interest in property, for example, the right to receive £50,000 under a legacy contingently on attaining the age of 'X' years when one is 'X' minus 'Y' years old. That is an interest which is contingent and future but, if there is a trust fund – which I assume in my example there is – there is existing property in respect of which there is a contingent interest. That seems to me to be quite different from the second situation, the possibility of achieving an interest in something which presently does not exist but may exist in the future."

(iv) By contrast, in *Ward v Official Receiver* [2012] BPIR 1073, District Judge Khan held that a payment made by a bank following a complaint made by Mr Ward to the Financial Ombudsman in relation to the misselling of PPI policies, such complaint having been made after he was discharged from bankruptcy but in relation to PPI polices in respect of loans which predated the bankruptcy order, vested in the officeholder pursuant to sections 283 and 306 of the Act. The Judge in that case considered that such payment fell within the definition of property in section 436 "*for two reasons: either that the payment was an interest incidental to property or alternatively it was a thing in action*". In particular, he considered (at [13]-[14]):

"*[13] … The right to complain about the mis-selling of the PPI policy and to receive the payment in respect of the policy arose from the policy itself. The policy was paid for by Mr Ward prior to his bankruptcy and accordingly it would be a species of property within the meaning of s436 of the 1986 Act. With that would be vested the right to complain and the right to receive payment in a consequence. Accordingly the payment amounts to an interest incidental to property.*

[14] If I am wrong to form that view or by way of alternative it seems to me that it is a thing in action. It becomes a thing in action in the following way. … the essential basis of the claim is a claim [in] damages for misrepresentation. The right to make that claim for misrepresentation arose when the misrepresentation was made, when the contracts were taken out. Those were taken out before the making of the bankruptcy order. The right for Mr Ward to make a claim for compensation arose at that time, not from when he made the claim."

(v) Furthermore, there is a long line of authoritative case law which has established that certain personal claims, although they are 'things in action', do not fall within the meaning of "*property*" for the purposes of falling within the bankrupt's estate.

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a. In *Wilson v United Counties Bank Ltd* [1920] AC 102 (HL), a case which was then considered to involve 2 distinct breach of contract claims, one being that Major Wilson had suffered damage and loss to his credit and reputation and the other being that he had suffered financial loss to his estate, both as a result of the same negligent failure of the bank to look after his business whilst he was away on military service during the First World War, the House of Lords unanimously held that the claim for damages for injury to his credit and reputation had not passed to his trustee in bankruptcy (the Major having been made bankrupt in the meantime). At p130, Lord Atkinson cited and relied on *Beckham v Drake* (1849) 2 HL Cas 579):

"*In Beckham v Drake Erle J said: "The right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect to his body, mind, or character, and without immediate reference to his rights of property. Thus, it has been laid down that the assignees [8] cannot sue for breach of promise of marriage, for criminal conversation, seduction, defamation, battery, injury to the person by negligence, as by not carrying safely, not curing, not saving from imprisonment by process of law". Maule J said: "There is no doubt that the right to bring an action for an injury to the person, character or feelings of a bankrupt, does not pass to the assignees, and that the right to bring an action for the payment of money agreed to be paid to a bankrupt does pass: ….*"

b. In an even earlier case, *Howard v Crowther (1841) 8 M&W 601,* Lord Abinger CB (with whom the other 3 members of the court agreed) had said*:*

"Nothing is more clear than that a right of action for an injury to the property of the bankrupt will pass to his assignees; but it is otherwise as to an injury to his personal comfort. Assignees of a bankrupt are not to make a profit of a man's wounded feelings; causes of action, therefore, which are, as in this case, purely personal, do not pass to the assignees, but the right to sue remains with the bankrupt."

c. That the current insolvency legislation should continue to be interpreted in accordance with such authorities (others having been cited in *Wilson v United Counties Bank Ltd* to the same effect) was confirmed by Lord Justice Hoffmann (as he then was) giving the Judgment of the Court of Appeal in *Heath v Tang*

[8] Being the term by which the relevant officeholders were then known.

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and another [1993] 1 WLR 1421. Referring to such earlier authorities, he stated (at p1423):

"*The property which vests in the trustee includes "things in action": see s 436. Despite the breadth of this definition, there are certain causes of action personal to the bankrupt which do not vest in his trustee. These include cases in which "the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without immediate reference to his rights of property": see Beckham v Dale* [sic] *… and Wilson v United Counties Bank Ltd … . Actions for defamation and assault are obvious examples. The bankruptcy does not affect his ability to litigate such claims. But all other causes of action which were vested in the bankrupt at the commencement of the bankruptcy, whether for liquidated sums or unliquidated damages, vest in his trustee."*

13. Complexity arises in those cases where the same cause of action gives rise to multiple heads of damages, only some of which can be considered to be purely personal and thus falling outside of the estate in bankruptcy. In such cases, the cause of action itself will vest in the officeholder but they will hold the right to recover (and will receive) any personal damages on trust for the bankrupt personally. In this regard it is to be noted that many of the earlier cases, such as *Wilson v United Counties Bank Ltd*, took the approach that there were different causes of action in those circumstances, such that the personal claims were either distinct or severable from those for financial loss. However, it is now clear that there is a material distinction to be drawn between different causes of action and different heads of damage:

(i) In *Stock v London Underground Ltd*, the issue was whether a payment into court under the old RSC could be made in respect of only certain losses claimed as a result of damage caused by negligent tunnelling. Having cited Lord Justice Diplock's analysis in *Letang v Cooper* [1965] 1 QB 232 at p 242, that '*a cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person*', Lord Justice Pill (with whom Lord Peter Gibson agreed) held:

"While they are dramatically different in size and nature, the different money claims made in this case are no more than heads of damage arising from the

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same claim. They constitute a composite claim and are not separate causes of action."

Lord Justice Peter Gibson, adding a few words of his own, similarly stated:

""Cause of action" was defined by Brett J. in Cooke v Gill (1873) L.R. 8 C.P. 107 at p. 116 as "every fact which is material to be proved to entitle the plaintiff to succeed, — every fact which the defendant would have a right to traverse". That, as Millett L.J. pointed out in Paragon Finance v D.B. Thakerar & Co. [1999] 1 All E.R. 400 at p. 405, is in substance the same as Diplock L.J.'s definition in Letang v Cooper [1965] 1 Q.B. 232 at p. 242, which Pill L.J has cited. Whilst some damage must be alleged or proved in order to succeed in a claim in negligence, the averment of different heads of damage does not give rise to different causes of action in respect of each head. As the judge observed, in a personal injury case the fact that the plaintiff claims in respect of the defendant's negligence damages for pain and suffering as well as damages for loss of earnings does not mean that two causes of action are being asserted."

(ii) Such analysis was subsequently applied in the bankruptcy context by the Court of Appeal in the important case of *Ord v Upton* [2000] Ch 352. Mr Ord had been made bankrupt after experiencing negligent medical treatment and, after being discharged from bankruptcy, he issued a writ against the doctor. Liability was accepted and, as his claim included damages for loss of earnings as well for pain and suffering, he applied to the court (pursuant to section 303 of the Act) for directions in relation to the entitlements of himself and the officeholder (Mr Upton) in respect of the damages payable. Lord Justice Aldous (with whom Lord Justices Mantell and Kennedy agreed without further comment), whilst noting that he had not found the resolution easy[9], held (at 360G - 361C):

" I accept that Mr. Ord's claim can be categorised as being one for personal injury, but that hides the true nature of the claim. The cause of action is for negligence. The result of that negligence is damage. The compensation awarded will be money and the objective will be to get at the sum which will put the injured party in the same position as he would have been in if he had not sustained the wrong. The injury is actionable at the time physical harm is done, but the court when assessing the damages looks at the position as it is at the date of the trial. … In this case the heads of damage will include pain and suffering and loss of past and future earnings.

[9] At 358E.

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In modern parlance Mr. Ord's claim is a single cause of action. However, I cannot accept Mr. Doyle's submission that the cause of action is personal. It is a claim for damages for injury to his body and mind and also his capacity to earn and can therefore be considered as a "hybrid" claim, in part personal and in part relating to property. I have come to the conclusion that such an action vested in the trustee. It would only have remained with Mr. Ord if it fell within an exception established by the authorities to be excluded from the definition of property now found in section 436 of the Act of 1986. To do so it must relate only to a cause of action personal to the bankrupt. All causes of action which seek to recover property vest in the trustee whether or not they contain other heads of damage to which the bankrupt is entitled. The authorities to which 1 now turn lead to that conclusion."

(iii) Consequently, expressly recognising that "*it would not be right in modern times to say that two causes of action arose in Wilson v United Counties Bank Ltd [ref]*" and following *In re Kavanagh; Ex parte the Bankrupt v Jackson (The Trustee)* [1949] 2 All ER 264 (in which the Court of Appeal had held that recovered damages for loss of credit and reputation and for damage to business arising from a bankrupt's claim against his solicitor for breach of confidence and breach of contract were required to be shared with the officeholder, with the bankrupt only being entitled to keep the proportion attributable to injury to credit and reputation), Lord Justice Aldous held (at 369-370):

"the court [in In re Kavanagh] *considered that there were a separate right of property in respect of the claim for damage to the estate, being property within the definition of the Act, to the right to the damages for injury to credit which derived from a claim personal to the plaintiff. That separation can arise in most, if not all, types of action. For my part I cannot see that there is any difference in kind between the type of action there being considered and an action for negligence for personal injury resulting in different heads of damage. That being so, any damages awarded may have to be split between a trustee in bankruptcy and the bankrupt. It follows that Mr. Ord should retain the right to the damages for pain and suffering and the right to the damages for past and future earnings vested in the trustee. That leaves the question of how those rights are to be enforced. I believe that* ***when there is but one cause of action which includes a head of damage relating to property, then the cause of action vests in the trustee as it does not fall within an exception to the general rule. If so, the right to recover the damages which are personal and any damages recovered are held on a constructive trust for the bankrupt by the trustee****."*

(**my emphasis**)

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14. Notably, the Judge at first instance in the *Ord v Upton* case had held that the claim for loss of earnings *up to the date of the applicant's discharge from bankruptcy* vested in the officeholder and that the claim for pain and suffering, loss of amenity, loss of mobility and all losses after the date of the discharge vested in Mr Ord. Only Mr Ord appealed, contending that the cause of action vested in him entirely and that he was entitled to receive the damages for loss of earnings which the Judge below had held formed part of the estate in bankruptcy: it is apparent from the law report that the officeholder did not cross-appeal the Judge's decision in relation to Mr Ord's entitlement in respect of damages for losses *after* the date of discharge, he merely supported the Judge's original decision. Nevertheless, it is clear that the Court of Appeal considered that *all* of the damages for loss of earnings (i.e. including those which were calculated by reference to the period post discharge) properly fell within the estate in bankruptcy. The decision is therefore not authority for any proposition that claims for loss of earnings should be split referable to any period pre or post either the bankruptcy order or discharge date. Instead, the unanimous view of the Court of Appeal (relying upon *In re Bell (A Bankrupt)* [1998] BPIR 26, a decision of Warren J in the British Columbia Supreme Court and authorities cited therein) was that, as 'loss of future earnings' was a head of damage attributable to the cause of action that had arisen prior to the making of the bankruptcy order, the right to *all* such damages vested in the officeholder:

> *"In my view Warren J. is right in the way he categorised the claim for damages for loss of earnings. The cause of action accrued in the present case when the negligent act or acts took place. Damages, claimed by Mr. Ord for loss of earning capacity, will be assessed at the date of trial in the light of what happened and what will happen. They will be awarded so as to compensate Mr. Ord for damage to his earning capacity which is a capital asset.*
> *... The cause of action is for negligence. He seeks compensation for the damage done to him by the negligent acts. That compensation is assessed under a number of heads, one of which relates to past and future loss of earnings. That as pointed out by Warren J. will be a sum of money to compensate him for damage to his earning capacity.*
> *The authorities are only consistent with the conclusion that the trustee is entitled to the damages for past and future loss of earnings and is not entitled to the damages for pain and suffering. As there is a single cause of action, it vested in the trustee."*[10]

[10] At 370G – 371B

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See also the earlier extract cited in paragraph 13(iii) above, in which Lord Justice Aldous stated that "*the right to the damages for past **and future** earnings vested in the trustee*" (**my emphasis**).

15. Accordingly, in order to identify whether a particular cause of action vests as part of the estate in bankruptcy and/or whether the right to recover particular damages and any such damages received by the officeholder will be held by the officeholder on trust for the bankrupt, it is necessary to identify whether what is under consideration is (i) a distinct cause of action which only gives rise to damages that are purely personal in nature or (ii) a cause of action which merely includes a right to recover, as one or more head(s) of damages, compensation which is purely personal in nature in addition to other losses. In the former instance, the cause of action will not vest as part of the estate in bankruptcy whereas in the latter instance, following *Ord v Upton*, the cause of action (provided it arose either (a) prior to the making of the bankruptcy order or (b) prior to the discharge of the bankrupt and is the subject of an effective notice pursuant to section 307 of the Act[11]) will vest in the officeholder but any right to recover personal damages and any such damages received will be held on trust for the bankrupt. If however, the relevant cause of action arose only *after* the date on which the bankruptcy order was made and is not the subject of an effective notice pursuant to section 307 of the Act[12], it will not have vested in the officeholder.

(B) The effect of an SPM being discharged from bankruptcy.

16. Pursuant to section 278 of the Act, the bankruptcy of an individual commences on the day which the bankruptcy order is made and continues until the individual is

[11] See above. There is also a theoretical possibility that a cause of action which gives rise to damages for loss of income and/or any cash proceeds of such an order might be made the subject of an income payment order under section 310 of the Act. I raise such possibility, which would (so far as I am aware) be a novel argument, purely for completeness and without expressing any view as to whether any such argument would be likely to succeed. My instructions do not refer to any such order having been made and I am not aware of any direct authority on the point. However, I would not discount such possibility, although the circumstances in which an income payment order may be made are limited to those which I have identified in paragraph 11 above and accordingly, assuming such an application has not already been made, could not affect any SPMs who have been discharged from bankruptcy in any event.

[12] Or any income payment order (see fn above).

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"*discharged*"[13]. Ordinarily, under the current provisions of the Act, a bankrupt is discharged from bankruptcy at the end of the period of one year beginning with the date on which the bankruptcy commences; see ss 279(1) of the Act. However, the court may order such period to cease to run until the end of a specified period or the fulfilment of a specified condition, but such an order may only be made where the bankrupt has failed or is failing to comply with an obligation under Part IX of the Act; see ss 279(3)-(4). However, such one-year period was only introduced by the Enterprise Act 2002 (**"EA 2002**") and came into effect in April 2004. In respect of bankruptcy orders made prior to that date, the relevant period was 2 years "*where a certificate for the summary administration of the bankrupt's estate has been issued and is not revoked before the bankrupt's discharge*" and 3 years in any other case, with like powers for the court to extend the period on the application of the official receiver, and discharge could only be by order of the court on an application made after a period of 5 years if the person had been an undischarged bankrupt at any time in the period of 15 years preceding the making of the bankruptcy order; see ss 279-280 as then in force. In relation to undischarged bankrupts as at the commencement date of the relevant provisions substituted by EA 2002, Schedule 19 made various transitional provisions which resulted in the possibility of such bankrupts being discharged at an earlier date than would otherwise have been the case.

17. In any case, for present purposes, the effect of being discharged from bankruptcy is the same: Pursuant to section 281 of the Act, where a bankrupt is discharged,

> *" the discharge releases him from all the bankruptcy debts, but has no effect—*
>
> *(a) on the functions (so far as they remain to be carried out) of the trustee of his estate, or*
>
> *(b) on the operation, for the purposes of the carrying out of those functions, of the provisions of this Part;*
>
> *and, in particular, discharge does not affect the right of any creditor of the bankrupt to prove in the bankruptcy for any debt from which the bankrupt is released."*

18. There are various prescribed exceptions to the debts from which a discharged bankrupt is released (e.g. those which are incurred in respect of fraud, certain liabilities arising in

[13] See fn 5 above.

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respect of family proceedings) but for present purposes the material point is that discharge does not affect the continuing functions of the officeholder in respect of the estate in bankruptcy. Accordingly, assets which vested in the officeholder pursuant to section 306 or 307 remain so vested notwithstanding the bankrupt's discharge. However, as noted above, the fact that a bankrupt has been discharged will preclude the officeholder from serving any valid notice pursuant to section 307 of the Act in respect of any property which is acquired by, or devolves upon, the bankrupt after that date or from thereafter making any application for an income payment order pursuant to section 310 of the Act.

19. As identified in Section C below, the fact that a bankrupt has been discharged will not preclude the court from making an annulment order if such an order is appropriate.[14]

(C) The effect of an SPM's bankruptcy order being annulled or rescinded.

20. Section 282 of the Act provides the Court with the power to annul a bankruptcy order and its terms are self-explanatory. In so far as material, it provides as follows:

"(1) The court may annul a bankruptcy order if it at any time appears to the court—

(a) that, on any grounds existing at the time the order was made, the order ought not to have been made, or

(b) that, to the extent required by the rules, the bankruptcy debts and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured for to the satisfaction of the court.

...

(3) The court may annul a bankruptcy order whether or not the bankrupt has been discharged from the bankruptcy.

(4) Where the court annuls a bankruptcy order (whether under this section or under section 261 in Part VIII [annulment of a bankruptcy order on the approval of an IVA]*)—*

(a) any sale or other disposition of property, payment made or other thing duly done, under any provision in this Group of Parts, by or under the authority

[14] See s.282(3) recited in paragraph 20 below.

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of the official receiver or a trustee of the bankrupt's estate or by the court is valid, but

(b) if any of the bankrupt's estate is then vested, under any such provision, in such a trustee, it shall vest in such person as the court may appoint or, in default of any such appointment, revert to the bankrupt on such terms (if any) as the court may direct;

and the court may include in its order such supplemental provisions as may be authorised by the rules."

21. It should be noted that the jurisdiction to annul is discretionary and not available as of right, even where the ground relied upon is section 282(1)(a). As the Court of Appeal made clear in *Oraki v Dean & Dean (a firm)* [2013] EWCA Civ 1629, bankruptcy is a class remedy and each case must turn on its facts. It is unlikely to be granted if, even though section 282(1)(a) is satisfied, the individual is insolvent in any event. Delay may be relevant and annulment can be granted on conditional terms. There is also a presumption that the officeholder is entitled to be paid for the work which they have properly undertaken, notwithstanding the subsequent annulment. Where the incidence of those costs (and indeed the costs of the petition and the annulment application) should lie on an application under section 282(1)(a) will be a matter for the discretion of the court to be exercised in accordance with conventional costs principles.

22. If, in an individual SPM's case, the Post Office was the petitioning creditor and the bankruptcy order should not have been made (because the debts claimed were not in fact due and owing from the SPM), it would very likely be made to bear all of the costs. As stated by Lady Justice Arden in *Oraki v Dean & Dean* at [66]:

"Usually, when the court makes an annulment order on the ground that the bankruptcy order ought never to have been made, it will go on to order that the petitioning creditor should pay the costs of the trustee. Assuming that the petitioning creditor can pay these costs, this order will have the effect that the burden of the expenses is transferred from the innocent estate to the culpable party."

23. However, if the individual SPM was made bankrupt at their own behest (albeit with reference to presumed debts based on Horizon Shortfalls and in the absence of which they would not have been unable to pay their debts as the fell due – such that section

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282(1)(a) could be said to be satisfied) but the Post Office was not a party to the relevant proceedings[15], it may be difficult for the Court to impose any such obligation and the SPM would likely have to defray the officeholder's costs in order to secure annulment. Whether or not they were entitled to recover them from the Post Office would then depend on whether they were recoverable as a head of damage pursuant to a relevant cause of action. As was explained in *Oraki v Dean & Dean*, by Lord Justice Floyd at [40]:

> *"... when considering whether to make an order that the bankrupt pay the trustee's costs in the light of an actual or anticipated annulment under section 282(1)(a), the court needs to be careful to examine the matter not only from the perspective of the bankrupt, but also from the perspective of the trustee. The court has an unfettered discretion to decide whether, and if so by whom, the trustee's costs should be paid. Normally, a trustee who has acted properly can expect to have his reasonable remuneration provided for. In my judgment, there is no general rule that the trustee's costs cannot be ordered to be paid by a party who has successfully applied to annul his bankruptcy when that party is entirely innocent* vis a vis *the petitioning creditor."*

In that case, whilst the petitioner was the blameworthy party, it did not have the ability to pay the officeholder's fees and thus the individuals were compelled to provide security for their payment as a condition of securing annulment.

24. The court also has a separate discretionary jurisdiction, pursuant to section 375 of the Act, to "*review, rescind or vary any order made by it*" in the exercise of its jurisdiction under the relevant Parts of the Act. Whilst the courts have emphasised that such jurisdiction should not be used as a back door route to circumvent the stringent requirements of section 282 for annulment[16], there can be cases where it cannot be said that "*on any grounds existing at the time the order was made, the order ought not to have been made*" but where, viewed with new hindsight, the bankruptcy order ought to be rescinded. An example might be where a petition was based upon a default judgment which has subsequently been set aside on the merits. As the judgment debt

[15] Note that since 6 April 2016 an individual seeking their own bankruptcy can do so by means of submitting such an application to the Adjudicator rather than by the presentation of a petition to the court. However, the fact that the bankruptcy order was made by the Adjudicator rather than the court does not affect the court's statutory annulment jurisdiction.
[16] See e.g. *Inland Revenue Commissioners v Robinson* [1999] BPIR 329

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existed when the bankruptcy order was made, it could not be said that on any grounds existing at the time the order was made, it ought not to have been made.

25. However, such exceptional discretion to review or rescind must be exercised in accordance with settled principles[17] and the factual circumstances must be considered in each individual case. In the exercise of such jurisdiction, the court has the ability to weigh up a wide range of circumstances and will not simply consider whether with hindsight the order should not have been made. For example, in the case of *HM Revenue and Customs v Cassells* [2008] EWHC 3180 (Ch), a bankruptcy order had been made upon the petition of HMRC in 2003 based upon income tax assessments which were valid at the time but in circumstances where HMRC later accepted that no tax was due. Given the assessments were valid and binding upon Mr Cassells at the time, the bankruptcy order could not be annulled pursuant to section 282(1)(a) and Mr Cassells could not satisfy section 282(1)(b) (in large part due to the officeholder's fees which had been incurred in the meantime). Although the Judge at first instance rescinded the bankruptcy order on the ground that the failure of HMRC in September 2004 to inform Mr Cassells that he was not liable for the tax deprived him of the opportunity to apply under s.282(1)(b) for an annulment of the bankruptcy order at a time when the overall costs were not excessive, the then Chancellor overturned such rescission on appeal. Not only was there no evidence that Mr Cassells would have made such an annulment application at the time, even had he done so there was no evidence that he could have successfully done so even then. Mr Cassell's discharge had also been suspended on the

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[17] See the often cited Judgment of Mr Justice Laddie in *Papanicola (as Trustee in Bankruptcy) v Humphreys* [2005] EWHC 335 (Ch) at [25], where the relevant principles were summarised in the following terms:
"(1) The section gives the court a wide discretion to review vary or rescind any order made in the exercise of the bankruptcy jurisdiction.
(2) The onus is on the applicant to demonstrate the existence of circumstances which justify exercise of the discretion in his favour.
(3) Those circumstances must be exceptional.
(4) The circumstances relied on must involve a material difference to what was before the court which made the original order. In other words there must be something new to justify the overturning of the original order.
(5) There is no limit to the factors which may be taken into account. They can include, for example, changes which have occurred since the making of the original order and significant facts which, although in existence at the time of the original order, were not brought to the court's attention at that time.
(6) Where the new circumstances relied on consist of or include new evidence which could have been made available at the original hearing, that, and any explanation by the applicant gives for the failure to produce it then or any lack of such explanation, are factors which can be taken into account in the exercise of the discretion."

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grounds of non-cooperation, which was regarded as a relevant consideration, as was (importantly) the existence of other unpaid creditors who might lose any remedy given the expiration of limitation periods due to the passage of time. In those circumstances, and especially given the prejudice to such other creditors, the appeal was allowed and the bankruptcy order reinstated. Accordingly, whether or not any SPM (or the Post Office if it was a party to the original petition) could successfully seek rescission of a relevant bankruptcy order would depend upon the individual factual circumstances.

26. It has been stated judicially that the difference between annulment and rescission is that the effect of an annulment "*means that the bankruptcy order was never made at all*" whereas "*rescission is a retrospective termination of the bankruptcy*"; see *Hoare v Inland Revenue Commissioners* [2022] EWHC 775 (Ch), Peter Smith J at [2]. This distinction *might* be considered relevant for reputational or other reasons: in Mr Hoare's case it was a material distinction because commercial arrangements which he had with third parties had clauses that might expose him to pay substantial sums of money triggered in the event of a bankruptcy order having been made, and on his appeal the rescission of the bankruptcy order by the Registrar was set aside and the bankruptcy order annulled instead. However, the distinction is unlikely to affect whether the right to claim or receive compensation is vested in the SPM (where such compensation has not yet been paid). Once any bankruptcy order is annulled or rescinded, unless the compensation has already been received and defrayed by the officeholder in the payment of creditors or expenses, for such purposes it will be as if the bankruptcy order never existed.

27. Depending on the grounds of any annulment or rescission of the bankruptcy order, another potential consequence is that, subject to the individual factual circumstances otherwise giving rise to the existence of such a claim against the Post Office, it would enable the individual to then bring a tort claim for malicious prosecution of bankruptcy proceedings[18]. In order for the Post Office to be liable to such a claim it would have to

[18] It has long been recognised that such a claim exists: see *Johnson v Emerson* (1871) [LR] 6 Exch 329 and *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674, [1882] WN 27. It was previously thought to be an exceptional tort along with malicious prosecution of criminal proceedings. However, following the decision of the Supreme Court in *Willers v Joyce and another* [2016] UKSC 43 (decided 5-4 and departing

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have been the Petitioner in the bankruptcy proceedings (or, possibly, to have at least filed a Notice of Intention to Support the Petition pursuant to the Insolvency Rules[19]). However, assuming the factual grounds to found such a tort otherwise exist, prior to the annulment or rescission of the bankruptcy order such a claim cannot be brought because it is necessary first for the bankruptcy proceedings to have been determined in the SPM's favour: it is a constituent element of such tort that the bankruptcy proceedings were pursued without reasonable or probable cause and that is a finding which is precluded where there is a subsisting bankruptcy order. As it was put by Lord Justice Simon Brown in *Tibbs v Islington Borough Council* [2002] EWCA Civ 1682 at [22], it is –

> *"quite impermissible for a clamant in malicious prosecution proceedings, to raise within them a collateral challenge to the outcome of the underlying proceedings, whether a criminal conviction or, as here, a concluded bankruptcy process. The complainant in this action cannot, in short, seek to question the correctness of the outcome of the bankruptcy proceedings."*[20]

As I explain further in Section E(2) below, any such cause of action could therefore not have vested in the officeholder but would belong to the SPM.

(D) Assets which are subject to an IVA entered into pursuant to Part VIII of the Act.

28. An IVA entered into pursuant to Part VIII of the Act and the corresponding parts of the applicable Insolvency Rules[21] is, in effect, a binding statutory contract between the individual and their creditors which takes effect in accordance with its individual terms.

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in such respect from the previous decision of the House of Lords in *Gregory v Portsmouth City Council [2000] 1 AC 419, HL(E)*) the tort of malicious prosecution now extends to encompass all civil court proceedings. Consequently, it may now be that cases such as *Johnson v Emerson* (1871) [LR] 6 Exch 329 and *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674, [1882] WN 27, and possibly *Grainger v Hill (1838) 4 Bing (NC) 212*, are now better regarded as instances of the same, rather than any distinct, form of tort of malicious prosecution.

[19] In *Tibbs v Islington Borough Council* [2002] EWCA Civ 1682, the Court of Appeal expressly left open the question of whether such status as a supporting creditor would suffice to found a claim for malicious prosecution of a bankruptcy petition, or whether it would be necessary for the supporting creditor to have taken over carriage of the Petition by being substituted as the Petitioner.

[20] Similar statement was made by Lord Justice May at [15], using the language of "*abuse*". Although the bankruptcy had been annulled in that case, Ms Tibbs could not go behind the basis on which the bankruptcy had been annulled by the court (which included payment of part of the debt claimed by the supporting creditor, so their involvement in the proceedings could not be said to have been without reasonable or probable cause).

[21] The Insolvency Rules 1986 were later replaced by the Insolvency Rules 2016.

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They are a concept which was introduced only in 1986. Although some of the procedure for their creation has changed over time, the effect of an IVA has not materially altered. Once approved in accordance with the requisite statutory requirements, section 260 of the Act provides that it *"takes effect as if made by the debtor at the time the creditors decided to approve the proposal"* and binds every person who in accordance with the rules was entitled to vote (or would have been entitled to vote if they had had notice) *"as if he were a party to the arrangement"*.

29. It cannot be undone other than pursuant to an application made to the court and such an application may only be made in limited circumstances: if it unfairly prejudices the interests of a creditor of the debtor or there has been some material irregularity in relation to the procedure (see section 262 of the Act). Once an IVA has taken effect, the person who is for the time being carrying out the functions conferred upon the nominee by virtue of the approval of the IVA is known as *"the supervisor of the voluntary arrangement"*. Whether, and if so what, assets may have vested (or may in the future vest) in the supervisor for the benefit of the creditors who are bound by the terms of the IVA, will be a matter to be determined in each individual case by reference to the specific terms of the relevant IVA Proposal; see e.g. the analysis in *Re Bradley-Hole* [1995] 1 WLR 1097 where Mr Justice Rimer had to consider, amongst other things, whether assets which had been included within an IVA Proposal were held by the supervisor on trust for those creditors and thus fell outside the ambit of the estate in bankruptcy when a subsequent bankruptcy order was made - the answer depended upon the particular terms of the relevant IVA.

30. Given that IVAs operate in accordance with their individual terms, whilst there are some standard forms in use within the market (see for example the different versions of *"Standard Conditions for Individual Voluntary Arrangements"* that have been published over the years by the *Association of Business Recovery Professionals* (**R3**)), it is not possible to generalise in relation to what assets will or will not be caught by them. However, it is not uncommon for such proposals to include terms which (1) provide for any property (other than specified Excluded Assets) which would form part of the debtor's estate in a bankruptcy as at the date of the commencement of the IVA to be

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subject to such IVA and regarded as an asset thereof and (2) make provision for the supervisor to claim after acquired property as an asset of the IVA; see for example Versions 2, 3 and 4 of the Standard Conditions published by R3 in November 2004, January 2013 and January 2018 respectively.

{E)(1) The preliminary questions raised in relation to the HSS

31. My understanding is that whilst the HSS (which is not open to any former participants in the Group Litigation) has been set up by the Post Office as a voluntary remediation scheme, one of the conditions of participation is that any payment made pursuant to the scheme will be in full and final settlement of any claims which the SPM may have against the Post Office. This would seem to me to mean that, in some cases, SPMs who have been made bankrupt will be in a position equivalent to that of the bankrupt in *Re a Bankrupt (No 145 of 1995)* [1996] BPIR 238, the possible receipt of any award being made pursuant to the HSS being similar to that bankrupt's hope (with no corresponding right) to an award from the Criminal Injuries Compensation Board, whereas other SPMs who have been made bankrupt will be in an equivalent position to Mr Ward in relation to the compensation which he received in respect of PPI mis-selling. Which side of the line any SPM will fall will depend upon a number of factors:

    (i) Whether or not the SPM would otherwise have any valid legal claims arising from the historic conduct of the Post Office (leaving aside the question of whether such claims may have vested in an officeholder). If the answer to that question is "no", then arguably any award is purely ex gratia and a mere spes.

    (ii) If the SPM would otherwise have any valid legal claims arising from the historic conduct of the Post Office (leaving aside the question of whether such claims have vested in the officeholder) then any such award will be regarded as being attributable to such claims (it being paid in full and final settlement of those claims).

    (iii) Whether any or all of such claims will have vested in the officeholder where a bankruptcy order has been made (and never rescinded or annulled), will depend upon the specific factual chronology in the individual case:

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a. If such valid cause(s) of action came into existence *prior* to the making of the bankruptcy order and include any damages for pecuniary loss (including in respect of future earnings), they will have vested in the officeholder albeit that the officeholder will hold the right to recover and in due course receive such part of the award as is attributable to the injury or affront to the bankrupt's person on trust for the bankrupt. (In this regard, whether or not the bankrupt has been discharged will be immaterial.)

b. If such valid cause(s) of action only came into existence *after* the making of the bankruptcy order and they are not subject to any effective notice pursuant to section 307 of the Act, they will not have vested in the officeholder. However, if the award is received prior to the bankrupt having been discharged, it is possible that the officeholder may seek to serve a section 307 notice in respect of such cash whereas it would not be possible for the officeholder to do that if the bankrupt had already been discharged.

(iv) If a bankruptcy order has been annulled or rescinded, subject to the terms of any order which the court may have made upon such annulment or rescission, any award may in the future be received and retained by the SPM. The position in relation to any award (or any part of an award) that has already been received by an officeholder prior to such annulment or rescission would need to be considered in the individual factual circumstances. It may have already been distributed to creditors or otherwise utilised or required for the purposes of the bankruptcy .

(v) Where the SPM has entered into an IVA, whether the award would be regarded as an asset caught by the arrangement will depend upon its particular terms.

32. My understanding is that a number of potential causes of action have been floated by or on behalf of SPMs, all stemming from the Horizon Shortfalls. For example, depending upon the individual factual circumstances, there may be a variety of claims for breach of contract, negligence, deceit, malicious prosecution (whether in respect of criminal proceedings, insolvency proceedings or other civil proceedings), trespass and potentially others. Individual SPMs may therefore have more than one cause of action and such distinct causes of action may have arisen at different times (with potentially

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overlapping heads of damages) and some but not all such causes of action may be subject to expired limitation periods. I therefore agree with the comment made by the Insolvency Service published on 24 February 2023 that bankruptcy and its impact on the Horizon IT compensation schemes is, to say the least, "*complex*".[22] Each individual case would need to be considered by reference to the specific factual chronology.

33. I have effectively addressed the specific questions numbered 1 to 4 with the more fulsome analysis which I have set out above and which I hope is of greater assistance. However, I set out each of the questions in bold below and identify in summary my answers to the same:

Q1. Does Leading Counsel agree with the analysis set out in paragraphs 3 to 8 of the written submissions of Post Office Limited?
Q2. If the answer is not unequivocally Yes, please explain why?

34. For the reasons which I have identified above and without detracting from such fuller analysis, broadly speaking, "*yes*". However, I would make the following differing points.

35. In the analysis which I have set out above, I have tried to provide a greater degree of clarity in relation to when any cause of action will vest in the officeholder and the effect of a person being an undischarged or a discharged bankrupt. For the reasons I have identified, I do not agree that there is any automatic vesting (properly so called) of a cause of action which "*comes into existence before the bankrupt is discharged (generally, 12 months after the bankruptcy order is made"* (as is stated in paragraph 4, albeit qualified with the words "*in certain cases"*). In my opinion, the position is more nuanced than that. For the reasons I have explained above, the likely time period before discharge will have depended upon when the bankruptcy order was made and a cause of action which comes into existence *after* the making of a bankruptcy order but before discharge would need to be the subject of an effective section 307 notice (or, potentially and it would be a matter for novel argument, an income payment order under section 310), before it would vest in the officeholder.

[22] https://www.gov.uk/government/news/progress-update-on-compensation-for-postmasters-subject-to-bankruptcy-orders

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36. In paragraph 5, the Post Office state that *"[t]he cause of action in respect of such shortfalls is for breach of contract and arises at the time Post Office demanded repayment of a shortfall and/or this was paid to Post Office (depending on the facts of the particular case) from the postmaster in question (in breach of the implied terms set out in the Common Issues Judgment)."* Accordingly, the Post Office reasons that if the bankruptcy or an IVA commenced after such demand or payment the cause of action necessarily vests in the officeholder or the supervisor and it is for them to pursue the compensation under the HSS. In my view, as I hope will be apparent from the analysis which I have set out above, this statement oversimplifies matters and should be qualified. In particular –

(i) The position in respect of any IVA (and therefore whether any cause of action will have vested in the corresponding supervisor) will depend entirely upon its individual terms. Even if the cause of action arose before the IVA it could have been excluded from the arrangement by its individual terms.

(ii) Whilst it is not for me either to identify all the possible causes of action which might have come into existence or to opine on their potential merits, it does seem to me that there is plainly at least the potential for more than the one cause of action identified by the Post Office to exist; although whether and to what extent they are intended to be covered by the HSS is perhaps another matter. I note that in *Judgment (No. 3) "Common Issues"* Mr Justice Fraser found that the contracts between the SPMs and the Post Office were all relational ones and that they included the various implied terms which I have set out in Appendix A to this Opinion[23]. Having regard to those terms and to the fact that steps were taken by the Post Office based upon the Horizon Shortfalls which went beyond simply making demands for and receiving such payments[24] and which themselves might be actionable separately whether as breaches of contract or in tort, it seems to me that individual cases *may* result

[23] Whilst I appreciate that the Inquiry will be familiar with the findings of Fraser J in the *Judgment (No. 3) "Common Issues"*, I found it helpful to produce such document for the purposes of considering the questions that have been asked of me and accordingly I have appended it to this Opinion for ease of reference.
[24] Such as pursuing criminal, civil and/or insolvency proceedings, searching and excluding SPMs from premises, termination of contacts.

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in there being different and possibly multiple causes of action, which may have arisen on different dates. Accordingly, depending on the individual SPM's factual chronology, it is possible that some cause(s) of action may have vested in the officeholder whereas others may be vested in the individual SPM.

(iii) Whilst the Post Office's obligation is to account to the person in whom the material cause of action vests, it is incumbent upon the Post Office to identify correctly who that person is rather than simply relying upon any officeholder's determination in that respect (since payment to an officeholder would not discharge any separate liability to an SPM). In addition, in circumstances where the Post Office knows that an officeholder holds a right to recover damages that are personal to the bankrupt as a trustee it ought to seek to ensure that it does not do anything which might be considered to assist in any breach of that trust.

3(a). What is the significance of a bankruptcy having been annulled prior to the making of a claim under HSS?

37. As explained in more detail above, if a bankruptcy order against the relevant SPM has been annulled or rescinded prior to the making of any claim under HSS, subject to any relevant terms of the court's order annulling or rescinding the bankruptcy order, any cause(s) of action will now be vested in the SPM. The only qualification to that would be if the officeholder had previously assigned the material cause(s) of action to a third party, which would remain valid pursuant to section 282(4)(a); but I am not aware of any suggestion of that being a live consideration in any particular case.

3(b). What is the significance of a bankruptcy having been annulled following receipt of an award under HSS?

38. As explained in more detail above, where a bankruptcy is annulled *following* receipt of an award under HSS, the effect of the annulment on such award will depend upon what has happened to it in the meantime and/or upon the terms of the particular annulment order: see section 282(4). This will require individual consideration of the specific factual circumstances of the case.

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4. What is the position of an applicant who has been or still is the subject of an IVA?

39. Unfortunately, as I have identified above, this question can only be answered in each individual case by reference to the particular terms of the SPM's IVA.

Q5 (a). Can Leading Counsel explain the principles upon which compensation would ordinarily be assessed when there is a causal link between the alleged breach of contract (or tortious conduct) and bankruptcy?
Q5 (b). Does Leading Counsel have any practical advice about the assessment of compensation where there is a proven link between bankruptcy and the alleged wrongful conduct?
Q6. Are any issues raised in the submissions of Hudgells Solicitors ,Howe+Co, and Paul Marshall upon which Leading Counsel wishes to comment?

40. Assessing *whether* compensation would be payable where there is a proven factual link (on a mere 'but for' basis) between the relevant wrong and the subsequent bankruptcy, would necessarily depend upon first identifying the particular 'wrong' for which compensation is being given and/or the scope of the duty which has been breached for which redress is claimed and secondly an assessment of whether such damage would be considered too remote. However, that is no doubt to state the obvious and I do not understand the Inquiry to be asking me to consider and comment on the issue of *recoverability* of any such damages, particularly in circumstances where the Horizon Group Litigation was settled prior to any consideration by Mr Justice Fraser of issues of breach and causation and did not extend, in any event, to any consideration of tortious claims. Moreover, it would be difficult to escape the conclusion that each case would need to be considered on its own individual facts in any event.

41. Instead, I assume that the questions raised are directed at how the court might *quantify* or measure damages intended to compensate someone for the fact of being made bankrupt, on the premise that they would not have been made bankrupt (whether at their own or another's behest) if the contractual breach or tortious wrong had not been committed and in circumstances where such damages are regarded as recoverable under the relevant cause of action. In this regard, one must obviously start from the premise that the actionable wrong pre-dated the making of the bankruptcy order and,

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in such circumstances, as I have explained above, any claim for damages for pecuniary loss attributable the breach or wrong will have vested in the officeholder. The question is therefore what might be awarded to compensate the SPM for the consequential *personal* damage – in other words for the damage to their credit and reputation caused by the stigma of bankruptcy.

42. I regret to say that at the time of writing I have been unable to find any direct modern authority on the point. On reflection, this is perhaps unsurprising, since, in almost all cases where a wronged individual has been compelled into bankruptcy as a result of consequential financial difficulty, the cause(s) of action in respect of the underlying wrong will have vested in the officeholder who will then have been concerned to pursue the relevant pecuniary losses arising with a view to distributing such economic benefit to the creditors proving in the estate in bankruptcy. Put simply, in contrast to the exceptional circumstances of the Horizon Scandal (and those of the case of *Wilson v United Counties Bank Ltd* referred to in paragraph 12(v)(a) above and further below), there are unlikely to have been many cases where damages referable to the mere fact or consequences of bankruptcy would even have been within anyone's contemplation.

43. Indeed, the only relevant reported case that I have thus far been able to find in which such damages have been awarded is *Wilson v United Counties Bank Ltd* [1920] AC 102 (HL). In that case, the questions put to the jury and the answers given were as follows[25]:

" (1.) Did Mr. Roper on behalf of the defendants on November 2, 1914, agree with the plaintiff amongst other things, (a) That Mr. Cremonini would generally supervise the plaintiff's business and see it carried on; and in particular the financial side thereof? (Answer)-Yes. (b) That the defendants would take all reasonable steps to maintain the plaintiff's credit and reputation and that the plaintiff could rely on the defendants to look after his financial affairs? (Answer)-Yes. (2.) Did the defendants undertake and commence to supervise the carrying on of the plaintiff's business and the maintenance of his credit and financial affairs? (Answer)-Yes. (3.) Were the defendants guilty of negligence, in the performance of their duties under the said agreement? (Answer)-Yes. (4.) Was such negligence the cause (a) of the proceedings taken by the creditors against the plaintiff? (Answer)-Yes. (b) Of the loss of the plaintiff's credit? (Answer)-Yes. (c) Of the creditors requiring that a deed of assignment should be executed by the

[25] Recited by Lord Birkenhead at pp106-107.

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plaintiff? (Answer)- Yes. (d) Of the plaintiff's subsequent bankruptcy? (Answer) -Yes. (5.) What was the damage in money to the plaintiff's business and estate caused by such negligence? (Answer)- 45,182l. 5s. 8d. In arriving at the same, at what amounts do you put the Ackleton Estate? (Answer)-27,600l. And Chesterton? (Answer)-10,150l. (6.) What was the additional damage (if any) sustained by the plaintiff personally by reason of any loss to his credit and reputation caused by such negligence? (Answer)- 7500l."

44. On appeal, the House of Lords therefore approached the question of damages on the basis of the jury's conclusions that the bank had agreed to take all reasonable steps to maintain the plaintiff's credit and reputation and that their negligence had ultimately caused his bankruptcy. In that notably exceptional context, the House of Lords held that substantial damages were recoverable without proof of special damage and that the jury's award had not been excessive.

45. In particular, at p120, Viscount Finlay relevantly stated:

"It is clear that the fact of bankruptcy must injure the credit of the person made bankrupt apart from damage to the estate. In an action for negligence against a solicitor leading to the bankruptcy of his client, even if owing to fortuitous circumstances, the estate had not been damaged, it seems on principle that the jury might give substantial damages for injury to the credit of the person made bankrupt. For a libel falsely imputing bankruptcy to the plaintiff, damages might be recovered in respect of injury to his credit. It is difficult to see on what principle such damages might not be given if there has been an actual bankruptcy as the result of breach of contract on the part of the defendant to take steps to prevent it. If the imputation of bankruptcy would give a right to such damages in an action for libel, why should not the fact of the bankruptcy owing to the defendants' breach of duty confer a similar right upon the plaintiff? It was urged that proof must be given of special damage in order to sustain the verdict on this head for more than nominal damages. I cannot see on what principle this contention rests. The mere fact of bankruptcy imports damage to the credit of the bankrupt. It is a natural consequence, and it is for the jury to assess the damages for such a slur. There was nothing excessive in the sum given on this head, 7500l., and I do not think that any case has been made for disturbing the verdict on the point."

46. Similarly, at p140, Lord Parmoor stated:

"My Lords, I have had some difficulty on the item of 7500l. The jury have found that the respondent bank agreed to take all reasonable steps to maintain the appellant Wilson's credit and reputation, and that the appellant Wilson could rely on the respondent bank to look after his financial affairs, but that the respondent bank was guilty of negligence in the performance of this duty, and that thereby the appellant

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Wilson's credit was lost. No evidence, however, was given of any actual damage, and the question arises whether in such a case general damages can be considered. On the whole, this case appears to me to come within the same category as when a banker having funds to meet a customer's cheque dishonours his draft, and where the amount ascertained of actual damages could not be, as estimated in money, a full satisfaction for the wrong which the appellant Wilson has suffered consequent on the breach of duty by the respondent bank. In the case of Prehn v. Royal Bank of Liverpool (1) Martin B. defined general damages to be such damages as the jury may give when the judge cannot point out any measure of damages by which they are to be assessed except the opinion and judgment of a reasonable man. I think that on those lines the verdict for 7500l. should not be disturbed.

47. Similarly, even though the tort of malicious prosecution of insolvency proceedings undoubtedly subsists[26], unsurprisingly such cases are extremely rare and, as yet, I have not been able to find any modern authority where compensation has been awarded in that context for damage to credit and reputation from which any useful comparison might be drawn. Nevertheless, it is of note that in *The Quartz Hill Consolidated Gold Mining Company v Eyre* (1883) 11 QBD 674 (where the tort of malicious prosecution was held to encompass winding up proceedings brought against a company), a similar approach to that adopted in *Wilson v United Counties Bank* was taken as to whether proof of special damage was required. As the then Master of the Rolls stated at p684:

"... there are three heads of damage which will support an action for malicious prosecution. There is damage to a man's person, as when he is taken into custody, whether that be, as in former times, upon mesne process or upon final process, or whether it be upon a criminal charge. To take away a man's liberty is damage, of which the law will take notice. Secondly, to cause a man to be put to expense is damage, of which the law will take notice. But Holt, C.J., adds a third head of damage, and that is where a man's fair fame and credit are injured. This is also a head of damage of which the law will take notice. Under the old law as to bankruptcy it was held that where a man was falsely and maliciously and without reasonable or probable cause made a bankrupt, two kinds of legal injury were inflicted upon him: first, in order to get rid of the bankruptcy, he was obliged to incur expense, and that was an injury; secondly, it was held that to allege of a trader that he was insolvent and liable to be made a bankrupt, was injury to his fair fame and credit, of which the law would take notice. Therefore under the old system of bankruptcy a trader had a good cause of action, if he was made a bankrupt falsely and maliciously and without reasonable or probable cause."

[26] Whether as a specific tort or as a species of a more general tort of malicious prosecution; see fn 18 above.

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48. It is therefore, regrettably, not possible for me to opine on "*the principles upon which compensation would ordinarily be assessed when there is a causal link between the alleged breach of contract (or tortious conduct) and bankruptcy*" because there is nothing '*ordinary*' about such circumstances. So far as I have been able to ascertain, in contrast to the position concerning compensation for wrongful detention in respect of which I understand the Court has (in a number of cases) given clear judicial guidance as to the relevant approach[27], there is no equivalent case law concerning compensation for bankruptcy.

49. Nevertheless, the following can be stated:

    (i) It would seem likely that, assuming recoverability as a head of damage under the material cause of action, general damages for the injury to credit and reputation occasioned by bankruptcy could be awarded.

    (ii) According to the Bank of England's inflation calculator[28], in today's money the equivalent of the *7500l* awarded by the jury to Major Wilson (which the House of Lords did not consider to be excessive as at the date of their Judgment in June 1919) would be £306,493.06.

    (iii) Although the stigma of bankruptcy has lessened considerably over time, as Lady Justice Arden said in *Oraki v Dean & Dean (a firm)* [2013] EWCA Civ 1629 at [58], "*Bankruptcy still carries with it stigma*" and it does of course adversely affect a person's credit rating.

    (iv) It might also fairly be said that there is a distinction to be drawn between the stigma of bankruptcy orders made prior to the reforms introduced by the EA 2002 and those made subsequently, the ordinary period of discharge having been reduced from 3 years to a year with effect from April 2004.[29]

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[27] For example, in *Rees and others v Commissioner of Police of the Metropolis* [2021] EWCA Civ 49 at [15].
[28] https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator
[29] As succinctly described in the Explanatory Memorandum to the EA 2002, the main provisions in relation to the insolvency of individuals were -
"- *Providing for the automatic discharge of nearly all bankrupts after a maximum of 12 months.*
- *Reducing the number of restrictions that are automatically imposed on undischarged bankrupts.*
- *Providing for a court-based regime – Bankruptcy Restrictions Orders – to be attached to those bankrupts whose conduct, before and during bankruptcy, the court has found to be culpable."*

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(v) In addition, where the bankruptcy order has subsequently been annulled or rescinded (particularly, but not only, if it has been annulled or rescinded on the grounds that it should not have been made at the outset), although the past injury to credit and reputation cannot be undone, it will obviously mitigate damage going forwards.

(vi) In determining the appropriate amount to award in modern day, it might be considered useful to take account of any established principles applied by the courts when determining the appropriate level of general damages to be awarded in defamation cases, particularly in any cases where the injury to one's fame concerns financial standing.

50. On a practical level, but appreciating that it may be difficult if not impossible for some SPMs to obtain access to the necessary legal advice or representation in order for them to seek to do so, it would be sensible for there to be active consideration given to whether individual SPMs could successfully obtain either an annulment or a rescission of their bankruptcy orders (irrespective of whether they have already been discharged). As any order for annulment or rescission would obviously go some way to mitigating ongoing stigma and adverse credit ratings. However, such an application might not necessarily be in the individual SPM's best interests depending on the level of overall debt (excluding any previously claimed by the Post Office) and again, each case would need to be considered by reference to its own factual circumstances. Accordingly, whilst it perhaps strays beyond the remit of a legal opinion and raising it only because I have been asked whether I have any *practical* advice about the assessment of compensation *where there is a proven factual link between bankruptcy and the alleged wrongful conduct*, it may be that consideration could be given to funding such legal advice for those SPMs, on the premise that *if* such costs had already been incurred and annulment or rescission had been procured, they might be recoverable against the Post Office either pursuant to the bankruptcy court's costs jurisdiction (if they were a material party to the bankruptcy proceedings) or (provided the judicial determination of such annulment or rescission did not preclude such a claim) as consequential losses/costs of mitigation.

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51. I also note that in the context of overturned historical convictions claims there appears to have an Early Neutral Evaluation carried out by Lord Dyson. I do not know whether its terms are available to be seen by the Inquiry. However, if they are, it may be that some useful comparisons could be drawn from that analysis.

(E)(2) The preliminary questions raised in relation to the OHCS

52. As it has been explained to me –

(i) The OHCS is a scheme pursuant to which payments are to be made to persons who have had their criminal convictions overturned or persons who were the subject of unsuccessful criminal proceedings brought by the Post Office provided (in the latter case) that such persons were not claimants in the Group Litigation.

(ii) Whilst the Claimants in the Group Litigation may have made claims for malicious prosecution and other related torts, the terms of the Group Litigation Settlement Deed preserved the rights of any then convicted Claimants to bring proceedings for malicious prosecution in the event of their convictions subsequently being quashed.

(iii) The reason for distinguishing persons who were the subject of unsuccessful criminal proceedings brought by the Post Office between those who were Claimants in the Group Litigation and those who were not, is because it is considered that any such malicious prosecution claims vested in the Claimants in the Group Litigation were settled by the Group Litigation Settlement Deed.

Q7. When did the cause of action for malicious prosecution in relation to convicted persons crystallise?

53. In *John Dunlop v Her Majesty's Customs & Excise* (1998) WL 1042585, the Court of Appeal considered the question of when the cause of action for the tort of malicious prosecution accrues for the purposes of section 2 of the Limitation Act 1980, which provides -

"*An action founded on tort shall not be brought after the expiration of 6 years from the date on which the cause of action accrued.*"

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54. In that case, the relevant chronology was as follows:

(i) The appellant had been charged (on a date or dates unknown) with offences contrary to sections 170(2) and 170(1)(b) of being knowingly concerned in a fraudulent evasion of a prohibition on the importation of goods and being knowingly concerned in the harbouring, keeping or concealing of goods with intent to evade a prohibition on the importation thereof.

(ii) He was committed for trial by magistrates on 11 January 1989.

(iii) He appeared before the Crown Court on 26 and 27 April 1989, pleading not guilty.

(iv) On 27 April 1989, the Recorder directed that verdicts of not guilty should be entered under section 17 of the Criminal Justice Act 1967.

(v) On 24 April 1995, the appellant issued a writ claiming damages for malicious prosecution which the Commissioners for Customs and Excise then sought to have struck out on the ground that it was barred by section 2 of the Limitation Act.

The Master struck out the claim on the basis that the cause of action accrued at the time the criminal proceedings were instituted and therefore some time before 11 January 1989 and that decision was upheld by Collins J on appeal.

55. However, the Court of Appeal allowed the further appeal. Lord Justice Roch, with whom Lord Justices Aldous and Brooke agreed, held (in answer to a submission that the need for the relevant proceedings to have been first terminated favourably to the plaintiff was merely a matter which could operate to bar a right of action and not an essential element of the tort or cause of action):

"The answer to this submission, in my judgment, is that "cause of action" means that which makes action possible, c.f. Viscount Dunedin in Board of Trade v Cayser Irvine and Co Ltd [1927] AC 610 at 617. Definitions of the tort of malicious prosecution all set out a favourable determination of the earlier proceedings as one element that the plaintiff suing on this cause of action must prove."

Having then referred to various authorities to that effect and noting that the same position had been adopted by the Canadian Court of Common Pleas in *Crandall v Crandall* [1880] 30 Upper Canada Common Pleas 497, Lord Justice Roch concluded –

"[T]he favourable determination of the proceedings forming the basis of the action for malicious prosecution is a necessary element of the cause of action which does not

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accrue until all the essential elements of the tort are present. Consequently in this case the limitation period did not start to run until the 27th April 1989, and this appeal must be allowed."

Lord Justice Brooke, agreeing and adding a few words of his own, referring to additional authorities likewise concluded:

"For no doubt good pragmatic reasons the common law judges seem to have decided that in actions for malicious prosecution … no cause of action (the language used in the Limitation Act) enures to the plaintiff until the earlier proceedings have been determined in his favour. This may not be entirely logical, but the common law was not always founded on logic, and the more modern cases cited by Roch LJ are all one way. Indeed, the modern rule, which is clear and easy to understand, has recently received authoritative imprimatur of the House of Lords in Martin v Watson [1996] 1 AC 74."

56. Subsequently and consistent with such analysis, Lord Steyn stated in *Gregory v Portsmouth City Council* [2000] 1 AC 419 at 426:

"To ground a claim for malicious prosecution a plaintiff must prove (1) that the law was set in motion against him on a criminal charge; (2) that the prosecution was determined in his favour; (3) that it was without reasonable and proper cause, and (4) that it was malicious: Martin v Watson [1996] AC 74, 80. Damage is a necessary ingredient of the tort."

Whilst the House of Lords' decision in *Gregory v Portsmouth City Council* was departed from in the more recent decision of the Supreme Court in *Willers v Joyce* in so far as the latter held that the tort extends to malicious prosecution of *civil* proceedings, the Supreme Court's decision did not otherwise cast any doubt upon Lord Steyn's statement of what is required to ground such a claim.

57. Accordingly, in my opinion, *John Dunlop v Her Majesty's Customs & Excise* remains binding authority: any cause of action for malicious prosecution will not accrue until the relevant proceedings have been determined in the SPM's favour.

58. Lord Justice Clarke's statement in *Tibbs v Islington Borough Council* [2002] EWCA Civ 1682 at [17], in the context of malicious prosecution of bankruptcy proceedings, was also to the same effect: *"it is well settled that to found a claim for malicious prosecution*

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a claimant must prove, amongst other things, that the prosecution was determined in his or her favour."

Q8. If the cause of action arose when the prosecution was commenced in what circumstances would the cause of action vest in a trustee in bankruptcy or supervisor under an IVA?
Q9. How if at all, are the answers to Questions 1 to 5 above different in respect of the applicants to OHCS?
Q10. Are there any issues raised in the submissions made by Post Office Limited, the Department (BEIS), Hudgell Solicitors, Howe+Co and Paul Marshall upon which Leading Counsel wishes to comment?

59. As I have explained, the cause of action will have accrued only when the criminal proceedings were determined in the SPM's favour and the reasoning which I have set out above applies to determine whether such cause of action would vest in the officeholder (as part of the estate in bankruptcy or as after acquired property). Whilst the retrospective way in which the cause of action accrues is unusual (perhaps even unique), that does not alter my view that it would not (unless and until it accrues) constitute property for the purposes of sections 283 and 306 of the Act: until such time as it accrues it does not exist. Accordingly, the relevant factual chronology would need to be considered in each case. If the bankruptcy order pre-dated the accrual of the cause of action, in my opinion it will not have vested automatically in the officeholder. If however, the bankruptcy order postdated the accrual of the cause of action, it will have vested in the officeholder albeit they will hold the right to recover personal damages (and any such damages received) on trust for the SPM. The effect of any annulment or discharge from bankruptcy is the same as I have explained above.

(E)(3) The preliminary questions raised in relation to the GLS

60. This scheme, which is yet to be published in its final form, is intended to be created for the purposes of providing further redress to the Group Litigation Claimants in circumstances where it has been acknowledged by government that the full and final settlement which was effected by the Group Litigation Settlement Deed was unsatisfactory. As I understand it, there is no suggestion that the Group Litigation

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Settlement Deed is not binding or is somehow ineffective. Instead, political will has resulted in a scheme being created under which *ex gratia* payments will be made by the now Department of Business and Trade[30] to former Claimants in the Group Litigation in order to provide them with further compensation for their experiences.

61. In a letter to the Inquiry dated 13 January 2023, the Treasury Solicitor has stated –

> *"Broadly, the department's position in relation to the GLO Scheme is that a payment made under an ex-gratia scheme, announced by the Government in 2022 does not constitute an asset, right or claim in existence falling within the bankruptcy estate given:*
> *(1) the postmasters compromised their claims upon entering the full and final settlement with the Post Office in December 2019 bringing to an end the GLO litigation;*
> *(2) such a payment was not in contemplation when postmasters entered into deeds of assignment with their respective trustees in bankruptcy when seeking their permission to participate in the GLO litigation; and*
> *(3) it also does not constitute a future interest "arising out of or incidental to the claims" against the Post Office.*

Such correspondence further notes that, in contrast, one insolvency practitioner (who it is said acts as trustee for a number of bankrupt SPMs) has taken the position that it does constitute an asset within the SPMs' bankruptcy estates.

Q11. Does Leading Counsel agree with the view of the law expressed by BEIS[31] in the first page of its letter of 13 January 2023?
Q12. If the answer to Question 11 is not unequivocally Yes, please explain why?
Q13. Does Leading Counsel have any advice as to how the dispute between BEIS and the Insolvency Practitioner can be resolved (other than by court proceedings or negotiation)?
Q14. How, if at all, would questions 3 to 5 above be answered differently in relation to applicants to the GLS compared with applicants to HSS or OHCS?
Q15. Are there any issues raised in the written submissions of Hudgell Solicitors, Howe+Co and Paul Marshall upon which Leading Counsel wishes to comment in relation to the applicants to the GLS?

62. Whilst I have not seen the asserted basis of the individual insolvency practitioner's stance, in my opinion, an *ex gratia* payment which may be made by the Department and to which the SPM had no legal right or entitlement pursuant to a scheme which will

[30] Formerly the Department of Business, Energy and Industrial Strategy (**BEIS**)
[31] Now the Department for Business and Trade.

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have come into operation only after the bankruptcy order was made (that necessarily being the case in the context of this question, as the scheme has not yet been established), would not constitute property which would automatically form part of the estate in bankruptcy. The SPMs who might in the future receive an award under the GLS are in the same position as Mrs Campbell was in relation to her mere hope of receiving an award from the Criminal Injuries Compensation Board (see *Re a Bankrupt (No 145 of 1995)* referred to above). I therefore agree with the conclusion expressed on behalf of BEIS subject to the following 2 caveats:

(i) I note that if the SPM has not been discharged from bankruptcy by the time they receive any such award, an officeholder might serve notice pursuant to section 307 laying claim to the payment as after acquired property. (Whereas if they have already been discharged, as I have identified above such step would not be open to the officeholder to take.)

(ii) It is not inconceivable that, when entering into a deed of assignment with their officeholder in order to obtain permission to participate in the GLO litigation, an SPM *might* as part of the consideration given by them for such assignment have conferred on the officeholder some interest in respect of any such future payment. I note that the GLS was not in contemplation at the time such deeds were entered into but the individual terms would need to be considered in order to discount the possibility of any such construction and effect.

63. In relation to the contrary stance which has been adopted by the individual insolvency practitioner, without the asserted basis of their position being identified it is difficult to comment. It *may* be the case that they are seeking to advance an argument based on section 436 of the Act (which, as explained above, provides that, "*"property" includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property*"), contending that the right to receive an award from the GLS will comprise an interest which arises out of or is incidental to the original chose(s) in action previously vested in the officeholder. Leaving aside the complexities which I have identified above in relation to what chose(s) in action may (or may not) have vested in the officeholder, in my view such an argument

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should fail in circumstances where, by reason of the Group Litigation Settlement Deed, such original property has been fully realised and extinguished. Further, as the payment will be *ex gratia*, there will be no right to receive it which might qualify as a sufficient 'interest'.

64. If the officeholder continues to maintain their stance and no grounds are advanced which might merit reconsideration of the position, the Department may wish to consider whether an application for directions pursuant to section 303 of the Act within one of the bankruptcies might be the most appropriate way of resolving the issue.

(E)(4) The preliminary questions raised in relation to Clause 11 of the Group Litigation Settlement Deed

Q16. Would Leading Counsel please explain the significance of this clause in relation to applications under GLS and/or generally?

65. Clause 11 of the Group Litigation Settlement Deed reads as follows:

"11. INSOLVENCY, SECURITY AND CHARGES

11. 1 In the case of those Claimants who provide documentary evidence that they are subject to an ongoing bankruptcy or insolvency process, the Defendant agrees, without making any admissions as to the validity of the original claim or proof, and subject to confirmation from the relevant trustee or insolvency officeholder {the "Officeholder") that (a) the Officeholder agrees with the proposed course of action and (b) the Defendant shall incur no liability in respect of any fees or costs to either the Officeholder or the Claimant's estate by so doing, that it shall:

11.1.1 as soon as practicable following the provision of the name and contact details of the Officeholder, confirm to the Officeholder that it withdraws any claim or proof of debt in respect of unpaid shortfalls arising between 2000 and the Effective Date of this Deed or, alternatively, (but only if it would be permissible and practical to do so) agree to assign the claim or proof of debt to the Claimant in question; and agree, at the Claimant's election:

(A) to withdraw any claim or proof of debt in respect of unpaid shortfalls arising between 2000 and the Effective Date of this Deed; or

(B) to sign an appropriate deed of assignment prepared by the Claimant in question, to assign and so assign the claim or proof of debt to the Claimant in question and confirm to the Officeholder that ft has so assigned the claim and give such notice of assignment required to give such assignment legal effect;

11.1.2 as soon as practicable following the provision of a copy of any charge or other security held by the Defendant and the appropriate paperwork, agree to assign

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to the Claimant in question (or at his or her election, release) any security it holds in respect of the aforesaid claim or proof.

11.2 The provisions of Clause 11.1.1 (B) or 11.1.2 shall not oblige the Defendant to take any step unless the relevant Officeholder so agrees. Nor does it make any representation or give any warranty as to the legal effect thereof.

11.3 In the case of those Claimants who have been or are the subject of civil proceedings by the Defendant relating to the subject matter of the Action, and / or have charging orders made against them in favour of the Defendant and / or any other cash or security taken by the Defendant in connection with those proceedings:

11 .3.1 the Defendant shall take all necessary steps and cooperate in good faith with the Claimants (or any solicitors instructed by them) to expedite the resolution of any such proceedings on a basis consistent with the provisions of this Deed;

11.3.2 in the event that a Claimant notifies the Defendant of any steps he or she requests that the Defendant take to bring about the discontinuance, variation, set aside, discharge or release of any such proceedings, judgment, order or related security, the Defendant shall respond within 14 days or as soon as is reasonably practicable, confirming whether it consents to the request made by the Claimant, such consent not to be unreasonably withheld.

11.3.3 In the event of a dispute following a withholding of consent by the Defendant, the Claimant may elect to resolve that dispute using the dispute resolution procedure set out in Clause 16.2 below.

11.4 Any disputes arising out of the Parties' compliance with Clause 11.1 and I or Clause 11.2 shall be subject to the dispute resolution procedure set out at Clause 16.2 below."

66. It seems to me that the purposes of Clause 11 were to endeavour to unravel, to the extent that it was possible to do so consensually between the Post Office and those SPMs who were claimants in the Group Litigation, any previous civil action which had been taken as result of Horizon Shortfalls.

67. As bankruptcy is a class remedy, even if the Post Office had been the Petitioner in the particular bankruptcy proceedings and/or the only creditor of the SPM, it would not have been possible for the Post Office and the SPM to revoke or unravel the bankruptcy order by acting consensually. As I have explained in Section C above, only the Court may annul or rescind a bankruptcy order and it must exercise its jurisdiction in accordance with statutory and other established principles. The most that could be achieved in terms of 'unwinding' by bilateral consent (absent the Post Office committing to fully fund applications for annulment pursuant to section 282(2(b) which presumably

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it would have been very unwilling to do on any blanket basis[32]), would be for the Post Office to withdraw or alternatively to assign to the SPM its claim to be a creditor in the bankruptcy (its 'proof of debt' being the formal process by which such claim is submitted to the officeholder in accordance with the Insolvency Rules) and to any related security.

68. The effect of the Post Office withdrawing its proof of debt pursuant to Clause 11.1.1 would however enhance the individual SPM's prospects of being able successfully to apply for an annulment of their bankruptcy order pursuant to section 282(2)(b) as it would reduce the overall amount of the debts required to be satisfied for that purpose. However, there could be (and it would seem are) cases in which, even with the withdrawal of the Post Office's proof of debt, that is still not possible. Giving the SPM an ability to elect (subject to the approval of the officeholder) between the Post Office withdrawing its proof of debt or assigning it to the SPM, would (assuming the officeholder does not reject the validity of the underlying debt) enable the SPM to stand in the shoes of the Post Office for the purposes of receiving any dividend that might be distributed to creditors within the bankruptcy. Which election to make would therefore be a commercial consideration for the SPM. Taking an assignment of the claim would also enable the SPM to withdraw the proof themselves at a later date if desirable..

69. Clause 11.1.2, makes equivalent provision for any related security. Releasing the security held by the Post Office over an asset in the estate in bankruptcy would result in such value being available to the officeholder to be used to meet expenses of the bankruptcy and/or to make distributions to unsecured creditors. (If the security was held over the asset of a third party it would simply be no longer encumbered.) An assignment of the security to the SPM (which would presumably only be selected where the SPM has taken an assignment of the claim which is the subject of the proof of debt rather than the Post Office withdrawing such proof) would mean that that security could be claimed by the SPM for the purposes of being applied towards the assigned

[32] Since that would have entailed writing a blank cheque for the purposes of meeting all of the bankruptcy debts irrespective of their value and composition together with statutory interest thereon, the officeholder's costs of the bankruptcy and the legal costs of the necessary application.

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debt. Which course would be more beneficial for the SPM would again depend upon the individual circumstances of the case.

70. The Post Office was presumably concerned to avoid representing that such outcomes could be achieved lest the officeholder or other creditors did not agree for some reason, and Clause 11.2 provided that the Post Office was making no warranty or representation in relation to the legal effect of such steps.

71. Clause 11.3 was not directly concerned with bankruptcy, but it appears to have been intended to bring about the termination or unwinding of any civil proceedings brought against the SPM Claimant by the Post Office, including the unravelling of any security or cash which might have been obtained from the Claimant in the course of those proceedings. The procedure provides for the Claimant SPM to notify the Post Office of the steps which they consider are required to be taken to achieve that, for the Post Office not to unreasonably withhold consent to such requests as may be appropriate and, in the absence of agreement being reached as to the steps to be taken, for the matter to be addressed by the prescribed dispute resolution procedure.

72. Since Clause 11 only applies to "*Claimants*", defined as being those described in the Group Litigation Register, it only applies to such persons and not to all SPMs. It may be desirable (if it is possible) for the same to be offered to SPMs under the HSS, especially in any circumstances where the Post Office withdrawing its proof might enable the SPM successfully to apply for annulment pursuant to section 282(1)(b) by thus reducing the level of debts required to paid.

73. It does not seem to me that the existence of this clause in the Group Litigation Settlement Deed would have any particular significance for claims under the intended GLS (which are perhaps better described as 'applications' given the ex gratia nature of the scheme), save to the extent that any former SPM Claimants *might* have been able to mitigate any relevant damage by having been able successfully to pursue an application for annulment as a result, which might in turn affect issues of quantum.

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Conclusion

74. I hope that I have sufficiently addressed all the preliminary questions that have been raised by my Instructions. Whilst I have been asked in relation to each of the schemes whether there are any issues raised in the written submissions of the Post Office, Hudgell Soliciors, Howe & Co and/or Paul Marshall on which I wish to comment, I have not sought to specifically address (whether by agreement or demurral) all of the various legal points that have been argued or raised by them. Instead, I have endeavoured (particularly in Sections A to D above) to provide a more holistic analysis with a view to providing the Inquiry with a more comprehensive response to the issues that have been raised and which I hope will be of assistance. Nevertheless, I am mindful of the complexities involved given the exceptional nature of the matter and the multitude of different individual factual circumstances and I would be happy to provide such further assistance to the Inquiry as may be desired. In particular, if there are any specific points that have been raised in any of the various submissions that are not addressed by the analysis which I have set out above and in respect of which the Chair considers it would be useful for me to consider and advise further, then I would be happy to do so.

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APPENDIX A – material findings of Mr Justice Fraser in relation to contract terms

1. In *Judgment (No. 3) "Common Issues"* Mr Justice Fraser found at [711]:

   "I consider that there is a specie of contracts, which are most usefully termed "relational contracts", in which there is an implied obligation of good faith (which is also termed "fair dealing" in some of the cases). This means that the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptably by reasonable and honest people. An implied duty of good faith does not mean solely that the parties must be honest."

   Further holding, at [725] – [728], that the contracts between the SPMs and the Post Office were such relational contracts.

2. For the purposes of considering whether particular damage fell within the scope of the Post Office's relevant duties and/or any issues of remoteness of damage, it is notable that the Judge reached the conclusion that the contracts were relational ones taking into account the following (amongst other) factors:
   a. That the contracts were long-term ones, "*with the mutual intention of the parties being that there will be a long-term relationship"* ([725.2]);
   b. That the parties "*intend[ed] that their respective roles be performed with integrity, and with fidelity to their bargain"* ([725.3]);
   c. That the parties were "*committed to collaborating with one another in the performance of the contract*" ([725.4]);
   d. That the "*spirits and objective of their venture may not be capable of being expressed exhaustively in a written contract*" ([725.5]);
   e. That they reposed trust and confidence in each other, but of a different kind to that involved in fiduciary relationships ([725.6]);
   f. That the contract involved "*a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty"* ([725.7]);
   g. That there might be "*a degree of significant investment by one party (or both) in the venture*" which in some cases might be "*more accurately described as substantial financial commitment"* ([725.8]);
   h. "*In a great many cases, the investment of the SPMs in buying or leasing premises for the branch represented a major and significant financial personal commitment to running that branch, which operates for the joint benefit of the SPM and the Post Office. This is more than merely "a significant degree of investment". For many (if not all) SPMs, this investment would represent the most significant investment they would make*." ([728.1])
   i. "*The Post Office knew not only of the size of this investment, but the source of an incoming SPM's funds, as these were included in the business plans submitted by the SPMs. If the source of funds was not identified, this information would be sought by the Post Office*." ([728.2])
   j. "*The role of a SPM providing personal service entitled that SPM to benefits that had similar characteristics to that of an employment contract, such as entitlement to holiday substitution allowance*." ([728.3])
   k. "*The Post Office was careful, when considering potential SPMs for appointment, to assess the financial viability of the applicant for appointment. An element of approval, or "vetting", was therefore involved in the Post Office deciding that an SPM's business plan was viable.*" ([728.4]).

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l. It was essential that the Post Office and the SPM could repose trust in each other ([728.7]).
m. *"[I]n a great many instances, that the branch premises included residential accommodation in which the SPM themselves (and potentially other family members) would live*." ([729])

3. In this regard, he further found (at [732]) that, "*the notice provisions do not undermine the correctly ascertained objective intention of the parties when contracting, namely that the post of SPM at a particular branch was intended by both parties to be a long term one*".

4. Accordingly, he held (at [738]) that:
"the contracts included an implied obligation of good faith. This means that both the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. Transparency, co-operation, and trust and confidence are, in my judgment, implicit within the implied obligation of good faith."

5. Consequently, the Judge concluded at [888] – [908] that in relation to termination, the Post Office was required to act in compliance with its duty of good faith. Therefore, any decision by the Post Office to terminate on notice could only take into account relevant factors and not irrelevant ones and any decision by the Post Office to terminate without notice or summarily could only be taken if an SPM was in repudiatory breach of the contract.

6. The Judge also found (as summarised in Section R of the Judgment) that the following were implied terms of such contracts between the Post Office and SPMs (adopting the lettering used in the list of Common Issues set out in [45]):
   (a) To provide adequate training and support (particularly if and when the Defendant imposed new working practices or systems or required the provision of new services).
   (b) To provide a system which was reasonably fit for purpose, including any or adequate error repellency.
   (c) Properly and accurately to effect, record, maintain and keep records of all transactions effected using Horizon.
   (d) Properly and accurately to produce all relevant records and/or to explain all relevant transactions and/or any alleged or apparent shortfalls attributed to Claimants.
   (e) To co-operate in seeking to identify the possible or likely causes of any apparent or alleged shortfalls and/or whether or not there was indeed any shortfall at all.
   (f) To seek to identify such causes itself, in any event.
   (g) To disclose possible causes of apparent or alleged shortfalls (and the cause thereof) to Claimants candidly, fully and frankly.
   (h) To make reasonable enquiry, undertake reasonable analysis and even-handed investigation, and give fair consideration to the facts and information available as to the possible causes of the appearance of alleged or apparent shortfalls (and the cause thereof).
   (i) To communicate, alternatively, not to conceal known problems, bugs or errors in or generated by Horizon that might have financial (and other resulting) implications for Claimants.
   (j) To communicate, alternatively, not to conceal the extent to which other Subpostmasters were experiencing relating to Horizon and the generation of discrepancies and alleged shortfalls

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(k) *Not to conceal from Claimants the Defendant's ability to alter remotely data or transactions upon which the calculation of the branch accounts (and any discrepancy, or alleged shortfalls) depended.*

(l) *Properly, fully and fairly to investigate any alleged or apparent shortfalls.*

(m) *Not to seek recovery from Claimants unless and until: (i) the Defendant had complied with its duties above (or some of them); (ii) the Defendant has established that the alleged shortfall represented a genuine loss to the Defendant; and (iii) the Defendant had carried out a reasonable and fair investigation as to the cause and reason for the alleged shortfall and whether it was properly attributed to the Claimant under the terms of the Subpostmaster contract (construed as aforesaid).*

(n) *Not to suspend Claimants: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and proper cause; and/or (iii) in circumstances where the Defendant was itself in material breach of duty in respect of the matters which the Defendant considered gave it the right to suspend.*[33]

(o) *Not to terminate Claimants' contracts: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and proper cause; and/or (iii) in circumstances where the Defendant was itself in material breach of duty in respect of the matters which the Defendant considered gave it the right to terminate.*[34]

(p) *Not to take steps which would undermine the relationship of trust and confidence between Claimants and the Defendant.*

(q) *To exercise any contractual, or other power, honestly and in good faith for the purpose for which it was conferred.*

(r) *Not to exercise any discretion arbitrarily, capriciously or unreasonably.*

(s) *To exercise any such discretion in accordance with the obligations of good faith, fair dealing, transparency, co-operation, and trust and confidence.*

(t) *To take reasonable care in performing its functions and/or exercising its functions within the relationship, particularly those which could affect the accounts (and therefore liability to alleged shortfalls).*

The Judgment also records in the list of Common Issues at [45] that *Stirling v Maitland*[35] and Necessary Cooperation implied terms were admitted by the Post Office.

7. Notably, contrary to the contentions of the Claimants, the Judge held (at [752]) that implied term (t) did not extend to include the "*business, health and/or reputation of Claimants*". However, the Judge made clear that "*[w]hether any of the other tortious causes of action brought by the Claimants against the Post Office extend to or include remedies in respect of such matters is not within the scope of the Common Issues trial"*.

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[33] See [748].
[34] See [748].
[35] i.e. the duty not to prevent performance.