

**ADDITIONAL WRITTEN SUBMISISON ON BEHALF OF THE CORE PARTICIPANT CLIENTS**  
**REPRESENTED BY THOMPSONS SCOTLAND**

**Background**

1. Counsel to the Inquiry have distributed a written Note entitled “Addendum Note on Scottish Office and SHHD decision-making” dated January 2023.<sup>1</sup> The contents of this Note were not able to be considered by the legal representatives of the CP clients of Thompsons Scotland (“the Thompsons clients”), either by the time that their written submission was presented to the Inquiry on 15 December 2022 or by the time of the closing statement made on their behalf on 2 February 2023.
2. The Note contains a commentary on the subject of the HIV litigation, in particular insofar as it was conducted and concluded in Scotland and the nature of the waiver which required to be signed to receive a payment from the Macfarlane Special Payments (No. 2 Trust). This is a subject which was addressed in the main written submission made on behalf of the Thompsons clients. The Inquiry has agreed that it would be helpful for a further written submission to be made on behalf of the Thompsons clients in connection with the Note.

**Submission on the evidence relating to the HIV litigation in Scotland and the waiver**

3. The Note produced by Counsel to the Inquiry focusses on the development of the terms of settlement of the HIV litigations in Scotland, in particular considering the assertion (made elsewhere in the evidence before this Inquiry and asserted within the Scottish Government and its advisory structures post-devolution) that the terms of the settlements of litigations in Scotland arising out of infection with HIV from haemophilia treatment differed from the terms of settlement of the HIV group litigation in England and Wales, in particular that the Scottish litigants did not require a waiver of the litigants’ rights to pursue the State in respect of losses suffered as a result of hepatitis infection, as well as HIV infection. The procedural position in

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<sup>1</sup> INQY0000442

Scotland as regards the litigations differed in Scotland and England and Wales, given that in Scotland there was not at the time any procedural mechanism whereby litigants could raise a class action. The result was that the HIV litigants had separate actions which required to be settled separately. Those litigations were co-ordinated to an extent. Our main submission contains reference to correspondence by Mr Tyler of Balfour and Manson, Solicitors who undertook this co-ordinating function on behalf of the group, whose individual members had their own separate actions and their own separately instructed solicitors.

4. The general thrust of the detailed assessment undertaken by Counsel to the Inquiry is to the effect that original trust deed which contained *inter alia* the terms upon which payments would be made to those infected with HIV from haemophilia treatment, reflecting the terms of settlement of the HIV litigations was executed on 3 May 1991.<sup>2</sup> That trust deed contained a requirement that a waiver be signed covering both losses suffered as a result of contracting HIV and hepatitis by such Scottish patients. However, as the note details, it appears that the litigations had not, in fact, settled by that point. An alteration to the trust deed, insofar as it related to Scotland, was executed in September 1991. Amongst other changes, this altered version of the trust deed did not require a waiver to be given in respect of future litigation in relation to hepatitis infection, but only infection with HIV with which the underlying litigations had been concerned.
5. In our main written submission, we assert that the HIV litigation settlement was indicative of an attempt on the part of the government to take advantage of the sick litigants by seeking to restrict their ability to take future action in respect of HCV infection, which had not been the subject matter of the HIV litigations. This is, in our submission, was a significant episode in understanding the intransigent attitude of government to the infected and affected community in the decades after the settlements in the early 1990s. The way in which the actions had been settled created a misplaced understanding on the part of government that the disaster had been dealt with finally. We submitted that the HCV waiver had been illegitimate and forced upon the infected and affected community. Such a requirement had been inserted after the

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<sup>2</sup> Schedule 4 of MACF0000083\_004 from page \_0027

main terms of settlement had been reached and in order to allow the government to draw a line under the threat of future litigation, though losses flowing from HCV infection had not been the subject of the actions. The very nature of HCV meant that the matter could not be deemed to be concluded. The payments agreed upon in the High Court action had been calculated in relation to infection with HIV only. Loss would be likely to arise as a result of HCV infection in the future which could not have been appreciated in 1990/ 1991 in most cases. These matters are covered in detail in our main submission.<sup>3</sup>

6. The Note by Counsel to the Inquiry suggests that as the HIV litigations in Scotland were not settled at the time of the May 1991 trust deed and that there was a change to the terms of the trust deed executed in September 1991 that it should be concluded that the HIV litigations (and other payments) were made to Scottish beneficiaries of the HIV payments on the basis of them having given a waiver in respect of future HIV litigation only (as per the September trust deed), not including future HCV litigation (as per the May 1991 trust deed). It also notes that the various versions of the trust deed and the waiver applicable to Scotland underwent a significant change on 24 April 1991 when, for the first time, the proposed waiver included in the draft trust deed relating insofar as it related to Scotland covered both HIV and hepatitis.<sup>4</sup> The amended Scottish undertaking (which eventually became schedule 4 to the May 1991 trust deed) addressed both hepatitis and HIV, discharging government and NHS bodies (including those in Scotland) from liability in respect of both infections.<sup>5</sup> From paragraph 40 of the Note, Counsel to the Inquiry analyse materials indicating that the negotiations of the settlement terms in Scotland continued after the execution of the trust deed on 3 May 1991. We would urge the Inquiry to bear in mind that at no point in this helpful analysis is it suggested that there was any indication that the substantive terms of the waiver were subject of any active negotiation. It would, therefore, be wrong to conclude that this was a negotiation in any substantive sense, focussing on what the discussions had been from the outset, namely an attempt to alter the terms of the

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<sup>3</sup> From SUBS0000064\_ 1032, from SUBS0000064\_ 1107 and from SUBS0000064\_ 1116 on the subject of the waiver which required to be signed as a condition of settlement of the HIV litigations

<sup>4</sup> INQ0000442 at para 34; SCGV0000503\_067 and SCGV0000503\_068

<sup>5</sup> SCGV0000503\_063 @ pages 27-28 which became part of the final registered deed on 3 May 1991 (MACF0000083\_004]

trust deed insofar as it applied to England and Wales not in any substantive way but insofar as Scots law required for the terms of the deed to have legal effect north of the border. The changes to the schedule which were proposed were based on the fact that the schedule applicable to Scotland in the 3 May 1991 trust deed was inaccurate and did not achieve that aim. Thus, a new schedule would require to be substituted with wording which would be “necessary for Scotland”.<sup>6</sup> These words indicate that the changes were required for the schedule to have legal effect, not that they were the result of any further substantive negotiation. By this point (June 1991) the changes which were proposed did include the removal from the waiver of reference to hepatitis (SCGV0000234\_102).<sup>7</sup> No explanation for why is apparent.

7. It is important, in our submission, that the Inquiry takes account of the evidence of Alice Mackie to this Inquiry about the settlement which was received by her husband from the Macfarlane Special Payments (No. 2 Trust), in effect the payment made in settlement of his HIV litigation which had been raised in the Court of Session at that time. In her first statement to the inquiry, she stated that her husband had signed to accept the settlement offer made to him in the litigation in July 1991, even though her legal advisor had not been given access to the discovery and other paperwork (to which the Inquiry has access) in the HIV litigation being conducted at the High Court in London.<sup>8</sup> In her third statement to the Inquiry, she explained that the payment was made to her husband in August 1991.<sup>9</sup> She exhibited a letter which was proof of that payment being made to the solicitors who acted for the steering group of HIV litigant clients which was for the settlement of her husband’s litigation.<sup>10</sup> As signature was a pre-condition of receiving the payment, we submit that the waiver must have been signed before the payment was made.<sup>11</sup> Her evidence about the waiver was to the effect that she thought it likely that the payment had been made on condition that a waiver be signed covering both future actions relating to her husband’s HIV infection

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<sup>6</sup> Para 44 of Counsel’s note

<sup>7</sup> SCGV0000234\_105 – correspondence between the Scottish Office and the DoH gives no indication that any of the proposed changes are substantive

<sup>8</sup> WITN2189001\_0025 @ para 42 (first written statement of Alice Mackie)

<sup>9</sup> WITN2189066 @ para 47 (third written statement of Alice Mackie)

<sup>10</sup> WITN2189068 (22 August 1991)

<sup>11</sup> See SCGV0000503\_058 and para 41 of Counsel’s Note

**and** infection with hepatitis C.<sup>12</sup> She made reference to a copy of a document which had come to her attention which was schedule 4 to the settlement agreement and which included a requirement that a waiver in respect of both infections be signed by Scottish litigants.<sup>13</sup> Mrs Mackie is the only witness of whom we are aware who has given evidence to the Inquiry about the circumstances of the settlement of one of the Scottish HIV litigations. We submit that this is primarily because so few of those infected with HIV in the haemophilia community are still alive and the passage of time. It should be noted that Mrs Mackie also indicated in her first statement that the paperwork relating to the claim (which one assumes would have included a copy of the waiver actually signed) was later destroyed by her solicitors.<sup>14</sup> When in 2005 the Mackies sought a copy of the waiver which had actually been signed, they were told by the Scottish Executive that it had been destroyed.<sup>15</sup> Her current solicitors (Thompsons Scotland) have undertaken searches with Russell-Cooke, Solicitors (who hold paperwork formerly in the possession of the MFT) to see if a copy of the waiver which was signed by Mr Mackie is available and have been told that one is not.

8. It is this submitted on behalf of the Thompsons clients that it is likely, on the balance of the evidence available to the Inquiry that most, or at least some of those who received payments from the Macfarlane trust in settlement of their HIV litigations in Scotland did so on materially the same basis as those who received such settlements in connection with the HIV litigation in England and Wales. The only individual of whom we are aware who were party to such a litigation who has given evidence to the Inquiry (Mrs Mackie) about the terms of the settlement has stated that the settlement which her husband received was conditional upon signing a waiver of the right to litigate further, both in connection with HIV infection and HCV infection, as was the case in England and Wales. The Inquiry's through investigation of this matter has not managed to find out why there was a change to the terms upon which payments were made from the Macfarlane trust to those who were infected in Scotland. The solicitor who acted on behalf of the pursuers in the Scottish litigations

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<sup>12</sup> WITN2189005 @ para 17.17 (second written statement of Alice Mackie)

<sup>13</sup> WITN2189005 @ para 17.17 (second written statement of Alice Mackie); MACK0000015\_007

<sup>14</sup> WITN2189001 @ para 42 (first written statement of Alice Mackie)

<sup>15</sup> WITN2189005 @ para 17.18 (second written statement of Alice Mackie); MACK0002228\_002

(at least as co-ordinator and Chairman of that group) has provided a statement to the Inquiry.<sup>16</sup> He has not been able to provide the Inquiry with any such explanation either as to why the Scottish waiver was ultimately different or as to the prominence of the waiver in the settlement discussions.<sup>17</sup> The evidence, in our submission, makes it hard to understand why any change to the terms of the waiver to be granted as per the September 1991 amendment to the trust deed was made as the need for the Scottish litigations to be settled on the same terms as the negotiated settlement in the English HIV litigation is apparent from the paperwork, into which the Scottish litigants had had no input.<sup>18</sup> In any event, we submit that, in particular in the absence of any explanation whatsoever as to why the Scottish waiver changed in its form, that it is likely that settlements continued to be on the basis of the terms of the extant trust deed before its terms were changed. This is consistent with the evidence of Mrs Mackie.

9. The negotiation which took place was, on the evidence, about ensuring that the terms of the English settlement was replicated in accordance with the requirements of Scots law, not about any material change in the settlement terms.<sup>19</sup> Formal settlement offers were made in Scotland on 24 June 1991.<sup>20</sup> As Mr Tyler sets out in his statement, the Scottish Office had no autonomy in the negotiation. The evidence reveals no substantive reason as to why the Scottish cases should be settled on terms more favourable than those agreed in the English litigation.<sup>21</sup> The most likely explanation, in our submission, is that the difference in the waivers occurred inadvertently. Changes were required to the schedule applicable to Scotland which necessitated an alteration to the May trust deed which was eventually executed in September 1991. Either the waiver was limited by mistake or the alterations included in the September had used as its basis not schedule 4 to the May 1991 deed but an earlier version of the schedule which had not include the hepatitis waiver. The Note by Counsel indicates that on investigation within the Scottish office in 1993, there was no recorded reason

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<sup>16</sup> WITN7665001 (written statement of Alfred Tyler)

<sup>17</sup> WITN7665001 @ paras 70 to 74 (written statement of Alfred Tyler)

<sup>18</sup> WITN7665001 @ paras 45 and 63 (written statement of Alfred Tyler)

<sup>19</sup> WITN7665001 @ para 67 (written statement of Alfred Tyler)

<sup>20</sup> WITN7665001 @ para 66 (written statement of Alfred Tyler)

<sup>21</sup> WITN7665001 @ paras 92 and 03 (written statement of Alfred Tyler)

as to why the changes to the waiver had been made within the Scottish Office files.<sup>22</sup> It is stated there that *"It would appear that the insertion of the clause [containing the hepatitis waiver] may have been overlooked and should have been included in the Scottish scheme."*<sup>23</sup> It is clear from this, we submit, that the omission was a mistake and was not the government's intention. What is overlooked here is that the mistake was not simply a matter of failing to insert a clause. The clause with the hepatitis waiver was not merely omitted as a result of the English draft having failed to draw attention to the change in its April wording. The altered wording was incorporated in the Scottish schedule 4 in the May deed. It was actively removed and replaced,, apparently for no reason, in September. Before September 1991, if anyone had wished to ascertain the terms upon which a waiver was required, one would have found the apparently required waiver in schedule 4 to the 3 May 1991 trust deed. It seems consistent with all of the evidence available to the inquiry that those who signed at the same time as the Mackies are likely to have been given the May 1991 waiver to sign. As no reason is apparent for why the change was made, it seems likely that little attention would have been given to this part of the waiver and nobody is likely to have noticed that it was not as per the agreement reflected in the Scottish settlement negotiations, that change having been made inadvertently.

10. We also assert that the search in 1993 for the reason why the waiver changed indicates that subsequent statements of what waiver had actually been signed and why would have been based on an assessment of the Scottish Office/ Scottish Executive files which are limited in the information which they are able to provide on these matters. Therefore, in subsequent years when civil servants stated that no waivers were signed covering hepatitis in Scotland and so accounts to this effect given by patients must be inaccurate, we submit that such statements are likely to have been based on the limited information contained in the files and an assumption that the terms of the waiver actually signed were as per the post September 1991 amended trust deed.<sup>24</sup> In our submission, this assumption was inaccurate. Thus, later advice

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<sup>22</sup> Note by Counsel at para 50 *et seq*; SCGV0000236\_090 and SCGV0000236\_089

<sup>23</sup> SCGV0000236\_089

<sup>24</sup> See for example SCGV0000262\_166 (7 April 2003)

provided to ministers in this regard was based on limited information and was misleading.

11. It is certainly the case, we submit, that the change could not have resulted from any material consideration of the merits of the Scottish cases which, on the evidence, simply did not and could not have happened given the limited stage which the litigations had reached at the time of settlement and the mandate that the Scottish office could not materially alter the settlement terms. By June 1991, the terms of the settlement had already been presented to the High Court in London.<sup>25</sup> In light of the fact that there was no reason for the change, we submit that it is likely that pre-September 1991 settlements in Scotland were achieved on the basis of the extant registered May 1991, which included the hepatitis waiver.

## **Conclusion**

12. In light of this analysis, we submit that the evidence heard from Alice Mackie to the effect that her husband did require to sign a waiver in connection with both future litigation relating to both HIV and hepatitis is likely to be accurate. Her evidence is consistent with the terms of the extant trust deed governing entitlement to payment (ie pre September 1991), the overriding evidence which can be gleaned from the government documentation that consistency of settlement terms was paramount in the government's approach to settlement across the UK and the lack of any evidence at all as to why the terms of the trust deed in September 1991 were changed, such that a waiver relating to hepatitis in Scotland was ultimately not required. If the Inquiry was aware of why the terms of the trust deed and hence the settlement changed in Scotland from September 1991, it might cast more light on the likelihood of the accuracy of the proposition made by Mrs Mackie that her husband signed a waiver which also covered hepatitis. In the absence of such evidence, we would suggest that the Inquiry should be slow to find that this evidence ought not to be accepted.

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<sup>25</sup> DHSC0003663\_042

13. Furthermore, given the fact that evidence is available to the Inquiry to the effect that the Scottish litigations were managed together and that, though they were separate litigations under the Scottish system, settlement appears to have been undertaken on a group basis, it is likely that others who were part of the group are likely to have settled at the same time as the Mackies and that they, too, are likely to have had to sign the waiver as it appeared in the May 1991 deed, ie including the hepatitis waiver. This inference is also supported by the evidence of Alice Mackie who states in one of her statements to the Inquiry that it was a condition of her husband's settlement that all members of the group required to accept the offers for any of them to receive the payments.<sup>26</sup> This tends to suggest that all of the cases settled together and that waivers would have been signed (by the litigant group at least) around the same time before payment was made to Mr Mackie in August 1991.
14. The alternative interpretation is that the waiver which was signed was as per schedule 4 of the September trust deed, despite the extant terms of the trust deed pre-September 1991, when we know that the Mackies' settlement was finalised before then and we submit that others are likely to have been also. Such a conclusion would involve concluding that Mrs Mackie's recollection of the terms of the waiver her husband signed is inaccurate. Even if the Inquiry concludes that this is the case, we submit that the substantive submissions we have made about the significance of the HIV litigation settlement insofar as they relate to Scotland remain valid. There is no evidence to suggest that there was any reasoned basis upon which a different approach to the waiver in Scotland (which was the outcome in the period post-September 1991) was rooted in any substantive consideration of the merits of the Scottish claims. Such a conclusion is consistent with the government's clear position that consistency in settlement was paramount and indeed a *fait accompli*. The narrative given in the latter part of Inquiry Counsel's note suggests that the impression within the Scottish Office was that the settlement had in fact been achieved on terms which included the need for a hepatitis waiver when the matter was revisited in the context of payments being made to those who had contracted HIV via blood

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<sup>26</sup> WITN2189005 @ para 17.16 (second written statement of Alice Mackie)

transfusion or tissue transfer.<sup>27</sup> Thus, our submission to the effect that settlements were forced upon the Scottish infected by the government without any proper consideration of the merits of their claims, remains valid, in our submission, either way.

15. We maintain the position (as set out in our main submissions) that the Scottish litigants are likely to have required to sign a waiver covering hepatitis as well as HIV, that in any event the attitude towards the settlement both south and north of the border indicated an intransigence on the part of the government and that the HIV litigation represented an important moment in fixing the civil service mentality for years to come that the blood contamination disaster was a done deal and was not to be re-opened.<sup>28</sup>

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Heather Arlidge

May 2023

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<sup>27</sup> See Counsel's Note at paras 57 to 60 which indicates that the Scottish government did propose that the undertaking for this group did require that hepatitis be included in the waiver despite the lesser statistical chance of a transfusion HIV infected claimant having both viruses than haemophilia infected one, where coinfection based on concentrate exposure was, in fact, near inevitable in HIV infected patients. The hepatitis reference was again removed on no reasoned basis, other than a representation made on the basis of the claimants for consistency with the equally unexplained haemophiliac limitation as per the September 1991 trust deed.

<sup>28</sup> SUBS0000064\_ 1025, para 1.3