

INTERIM PAYMENTS

Introduction

This talk will examine the law and its development in relation to interim payments (IP) culminating in the Court of Appeal decision of Cobham Hire Services Limited v Benjamin Eeles [2009] EWCA 6204, and the practical implications of that decision for both claimants and defendants.

Purpose of IP

IP are payments on account of damages which a party may be held liable to pay to another if a final judgment is given in their favour. It enables a court to award to a claimant at an earlier point in time part of what will become due to him at the conclusion of the litigation. Their purpose is to relieve the claimant of undue hardship while awaiting the final outcome of his action. In that way they are intended to redress the balance during the interval before trial between the strength of one party, such as an insurer with resources, and the weakness of the other party, such as a claimant without an income.

In so doing it is said that they will dispose parties towards a fair and reasonable compromise and induce them to accelerate and not delay the conduct of the litigation. However, experience demonstrates otherwise, allowing claimants in large value claims to drag out the litigation process and inflate costs. That has prompted defendants to resist IP applications to gain a tactical advantage in the litigation process.

Statutory Basis

The power to make IP is contained in section 32 of the Supreme Court Act 1981 which simply enables rules to be made to govern the basis upon which IP are awarded.

The Civil Procedure Rules at part 25 deal with interim payments:-

- (i) CPR 25.6 – deals with the general procedure.

- (ii) CPR 25.7 – deals with the conditions to be satisfied and matters to be taken into account. Most importantly:
 - (a) The court can only make an order if the Defendant against whom payment is sought has admitted liability to pay damages **or** judgment has been obtained **or** the court is satisfied that if the Claimant went to trial he would obtain judgement for a substantial amount of money against the Defendant.
 - (b) The Court must not order an interim payment for more than a reasonable proportion of the likely amount of the final judgment.
- (iii) CPR 25.8 – deals with the court's powers where it has ordered an interim payment to be made

The rules are supplemented by a practice direction.

Tactical Importance

Although the fundamental purpose of IP is to relieve a claimant of hardship and pay him at the earliest opportunity what is rightly his, IP are capable of being used by litigants as a tool to further their interests in the litigation process. By way of example:-

- (i) Insurers will presently prefer to retain funds until trial. With the special account interest rate at only 0.5%, an insurer can earn more on those funds in the marketplace.
- (ii) Withholding interim payments provides significant pressure on a claimant, which increases as trial approaches, making a timely and low Part 36 offer more acceptable.

- (iii) Defendants experience is that once a claimant spends his interim payment they still want damages at trial as if the IP had never been made.
- (iv) In large claims it provides a tool for claimant's solicitors to relieve any pressure on them from the claimant to further the litigation process. The claimant is satisfied with part of the damages and being able to spend it on whatever he chooses and the claimant's solicitor in turn either becomes dilatory or worse simply uses the process to increase costs (MFOR).

Developments in the Law

Although requests for IP are always prompted by need, the CPR contain no restrictions to suggest that as a pre-condition to receipt of an interim payment the claimant has to show need.

Although some earlier decisions suggest that the claimant's need is a factor to be taken into account when exercising what is a judicial discretion (See: Neill LJ in Schott Kem Limited v Bentley 1991 AER 850 at 858C.), the case of Stringman v McArdle (1994) 1 WLR 1653 spelled out that what the money is for is nothing to do with the defendant at all. Stewart Smith LJ:

“The error into which the judge fell in this case was, in my opinion, when he concerned himself with what was to be done with the damages in the hands of the plaintiff and those responsible for her care... It should be noted that the claimant does not have to demonstrate any particular need over and above the general need that a plaintiff has to be paid his or her damages as soon as reasonably may be done. It will generally be appropriate and just to make an order where there will be some delay until the final disposal of the case... In the case of an adult

of sound mind the court making an order... is not concerned in any way with what the plaintiff does with his damages.”

However, having said that it should be noted that Sir Tasker Watkins concluded that the facts of that case that very much proved a need and Butler-Sloss LJ was happy to allow the appeal on the basis that the Court of Protection would control the use to which the money was put in any event.

The practical effect of that decision was that defendants lost a great deal of control of the litigation process and shaping the basis of the claim prior to trial. For instance if a claimant needed funds for a care regime or accommodation, defendants could no longer seek to restrict that ‘need’ to a cheaper care regime or cheaper property. Instead there followed a robust Claimant’s approach demanding IP on the basis that its the Claimant’s money and he wants it now. On applications there was a practice of filing cursory evidence from a claimant as to the value of the claim to justify even the most substantial IP. That left defendants in large claim not only losing control but having less idea at an early stage of how the claimant was valuing his damages.

Defendant’s needed to fight back, and they did but with very limited success:

In Campbell v Mylchreest [1999] PIQR Q17 is the ‘level playing field’s’ case. The claimant had suffered catastrophic head injuries and was arguably in a persistent vegetative state and cared for at an NHS unit. The significant issue was whether the claimant would be cared for in his parent’s home with a very expensive care regime or cared for as the defendant contended in a National Health hospital. The objection to the interim payment was that funding the setting up of a home care regime before trial would prejudice the decision on whether the claimant should be cared for at home or at hospital as few courts would wish to disturb a care regime in place, particularly if working. The Court of Appeal accepted that the ‘level playing field’ argument was a valid factor for the court to consider, but no more. Sir John Balcombe noted:-

“There is also the question of the effect that this payment may have on the level playing field. Mr Davies has very fairly submitted that judges are human and that considerations of this kind are therefore likely to affect them even if they try to apply the strict logic which flows from the evidence before them; and that if a judge were to know that a permanent home regime had been introduced before the hearing of the assessment of damages, it could not but affect his or her mind, even though, as a matter of strict application of the evidence the logical result would be the other way.

There must I accept be some force in that argument, but judge’s are trained to act as dispassionately as possible and if the evidence were to be that it would not be to the plaintiff’s benefit that he should have the regime at home but that he should stay in the Frank Jones unit with just occasional visits home, I do not believe that the judge would be so affected by the introduction of a permanent home regime, so far as that may have gone, as to be seriously affected by it.”

I suppose one interesting observation is that the Court of Appeal suggested that judges were only ‘human’ but trained to act ‘dispassionately’ whereas, if anything, it seems to me they tend to be ‘dispassionate’ and ought to be trained in how to appear human.

The bottom line is that the court did not accept that the playing field was affected in that case and that there was a positive benefit in seeing if the new regime worked and that there would be no difficulty in switching back to the National Health provision if that were appropriate. In summary, it is hard to think of examples that would affect the level playing field and indeed the Court of Appeal did not seem to regard that as a very likely scenario.

One example can be found in the case of *Tinsley v Sarkar* 2004 EWCA Civ 1098 where an interim payment specifically to set up an experimental independent care regime outside an institution before trial. (*Pankhurst*).

As indicated since *Stringman* claimants developed a practice of producing “not less than” schedules in which the claimant simply demonstrated that it was highly unlikely that less would be awarded than set out in such a schedule. These were particularly challenged by the NHSLA in a series of cases before the Masters where it was argued that if you can’t set out what the likely award was to be you shouldn’t be able to get an interim payment, even though you could say that it won’t be less than £x (See cases such as *Jones v Heatherwood and Wrexham Park Hospitals NHS Trust* May 2005.) Not surprisingly the argument wholly failed.

The next argument adopted by defendants was to consider whether the future damages would be reduced or reflected in free local authority care following the decision in *Sowden v Lodge* [2003] EWHC 588. Unfortunately, as seen in *Crofton v NHSLA* [2007] EWCA 671, that argument simply didn’t get off the ground. Firstly, the defendant wasn’t able to establish that the local authority would in fact be making the payments in the future and, secondly, the claimant argued that it was simply for him to choose, a decision which we know has been subsequently borne out by *Peters v East Midlands Strategic HA* 2009 EWCA Civ 145.

So, in broad terms, the ingenious arguments presented by defendants had been wholly unsuccessful in removing the tactical advantage claimants had gained in *Stringman*, until now that is.

The Periodical Payments Argument

The Damages Act 1996 as amended by the Courts Act 2003 provided the defendant with a new argument that a large interim payment would hinder the court when deciding whether to make a periodical payment order.

The force of the argument was significantly increased by the impact of the decision in *Thompson v Tameside and Glossop Acute Services NHS Trust* [2008] EWCA Civ 5 in deciding that indexation for care and case management costs would be linked to ASHE 6115. It inevitably followed from that case that more awards in high value cases

would be subject to periodical payments. There could be little argument in the generality of cases that it would not be sensible for such damages to be paid in such a form.

Accordingly, the simple argument pursued with more vigour was that large interim payments would fetter the discretion of the judge to award periodical payment orders in circumstances where it was manifestly in the best interest of the claimant that he should receive a periodical payment award.

The argument was accepted in the case of *Mealing v Chelsea and Westminster NHS Trust* [2007] EWHC 3254 where Swift J said:-

“The trial judge will have to consider whether part of the award should be by way of periodical payments and, if so, how much. It is very important in the particular circumstances of this case that no decision that I make at this stage should have the effect of unduly fettering the judge’s freedom to allocate as large a proportion of the award to periodical payments as he or she considers appropriate. In any event, it is highly likely that the trial judge would want to make a lump sum order sufficient to cover capital expenditure, including the provision of accommodation and to cover contingencies for the future. That lump sum will be derived, at least in part, from the capitalisation of future annual recurring costs not included within the periodical payments order. An interim payments order that resulted in a significant proportion of those costs being spent in advance of the hearing would have the indirect effect of reducing the amount of the award that is available to be paid by way of periodical payment.”

Interestingly he felt that a significant proportion of the potential future losses should be capitalised.

In the case of *Braithwaite v Homerton University Hospitals NHS Foundation Trust* 2008 EWHC 353, Stanley Burnton J considered there were two particular issues. Firstly, whether the court had jurisdiction to make an interim payment that contained the capitalised element of what otherwise would have been a periodical payment. In particular, he looked at CPR 25.7(4) and noted that *“the court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment”* and said that he found *“it difficult to construe it as including periodical payments”*. This was particularly so because periodical payments by their very nature will be uncertain in duration and therefore it is impossible to say precisely what their capitalised value is. He also felt that *“at this stage the court should not make a decision which is liable to close the door on decisions which may be made by the trial judge.”* He therefore concluded that the appropriate question was this: *“Is the court at this stage, therefore, able to say that it is likely that there will be at trial an award of a capital sum of the kind of figure which is necessary for this interim payment to be made? If the court cannot say what is likely to occur then there is no jurisdiction under part 25.7(4). If on the other hand the court is in a position to make a reliable prediction as to what the judge at trial will do then the position is different.”*

In effect he considered that the court should not be fettering a future judge’s decision but, on the evidence before him he was confident that the court would capitalise future payments to satisfy the clear need for accommodation, and so he could do so at the interim stage.

Again that case was a step in the right direction for the Defendants, but left room for a judge to simply guess what it was likely the trial judge would do in terms of capitalising future losses. Accordingly, it was not surprising that the matter would soon come before the Court of Appeal as it did in the case of *Cobham*.

COBHAM V EELES

In this case a defendant appealed against an interim payment order of £1.2m where the claimant, aged 11, had suffered serious head injuries 10 years earlier. There had already been interim payments of £450K which had been used to adapt the family home. They now wished to purchase the 9 bedroom Brightlingsea Hall with a separate bungalow in the grounds. The judge rejected the defendant's argument that it would tie the hands of the trial judge in respect of periodical payment orders having made a conservative valuation of £3.5m as the overall capital value of the claim, inclusive of future losses.

In the CoA the defendant was successful and the leading judgment of Smith LJ established the following:-

- (i) The court does not have an unfettered discretion to make an IP. It is limited at its upper end by CPR 25.7(4) to '*a reasonable proportion of the likely amount of the final judgment*'.
- (ii) In a case in which a PPO is made the amount of the '*final judgment*' is the actual capital sum awarded. It does not include the notional capitalised value of the PPO, which sum is irrelevant for the purposes of determining an interim payment.
- (ii) The importance of not fettering the trial judge's freedom to allocate the heads of future loss must not be underestimated. That a proper decision as to what part of an award will constitute PPOs cannot properly be resolved until trial. It is only at that stage that it will be known what sums are awarded under each head of damage and financial advice will be available.
- (iv) Accordingly, the court must first assess what is likely to be awarded for the heads of damage which are bound to be ordered as lump sums, namely, general damages and past losses within interest on both. However, it was common

ground and accepted by the court that accommodation costs will be awarded as lump sums (even those elements relating to future running costs).

- (v) All other heads of damages, including earnings, care, case management, therapies, equipment, holiday costs, and Court of Protection costs are potentially subject to PPOs. For the purpose of an interim payment application the judge would not normally begin to speculate about how the trial judge will allocate damages. He should stop at the figure which is likely to be awarded as a capital sum and he may then award a reasonable proportion of that figure. It may be reasonable to award a high proportion of that figure provided that the estimate has been a conservative one. At this first stage the court is wholly unconcerned with what the claimant intends to do with his money.

Therefore at the first and usually final stage of the new process, the position is significantly changed in that save in respect of accommodation all future losses are excluded from the definition of the '*final judgment*' seen in CPR 25.7

- (vi) However, in exceptional cases, it was recognised that:-

*"... there will be cases (Braithwaite was one such) in which the judge at the interim payments stage will be able confidently to predict that the trial judge will capitalise additional elements of the future loss so as to produce a greater lump sum award. In such a case, a larger interim payment can be justified. Those will be cases in which the claimant can **clearly demonstrate a need for an immediate capital sum**, probably to fund the purchase of accommodation. In our view, before a judge at the interim payments stage encroaches on the trial judge's freedom to allocate, he should have a **high degree of confidence** that such a course is appropriate and that the trial judge would endorse the capitalisation undertaken."*

Accordingly, in an exceptional case, before taking such a course a judge must be satisfied by evidence that there is a “*real need for the interim payment requested*”. Further he has to have ‘*high degree of confidence*’ that the trial judge would endorse his view, not merely establish what is *per CPR25.7*.

The Court gave an example in the concluding paragraph of the judgment:

At para 45:

*We turn to the circumstances in which the judge will be entitled to include in his assessment of the likely amount of the final judgment additional elements of future loss. That can be done when the judge can confidently predict that the trial judge will wish to award a larger capital sum than that covered by general and special damages, interest and accommodation costs alone. We endorse the approach of Stanley Burnton J in Braithwaite. Before taking such a course, the judge must be satisfied by evidence that there is **a real need for the interim payment requested**. For example, where the request is for money to buy a house, he must be satisfied that there is a real need for accommodation now (as opposed to after the trial) and that the amount of money requested is reasonable. He does not need to decide whether the particular house proposed is suitable; that is a matter for the Court of Protection. But the judge must not make an interim payment order without first deciding **whether expenditure of approximately the amount he proposes to award is reasonably necessary**. If the judge is satisfied of that, **to a high degree of confidence**, then he will be justified in predicting that the trial judge would take that course and he will be justified in assessing the likely amount of the final award at such a level as will permit the making of the necessary interim award.*

That alone suggests the burden on the Claimant is to produce fairly convincing evidence to support an application and indeed very possibly unilaterally disclose his expert evidence.

Subsequent Decisions

In *Kirby v Ashwood and St Peters* 2008 EWHC 132, Swift J dealt with an application on behalf of a 3 year old CP child for a third interim payment for £350K that would bring the total IP to £1.2 m. The main problems with the application were that the claimant's expert evidence did not wholly support the proposed purchase; It only emerged during the hearing that the claimant was in fact in temporary bungalow accommodation that rendered the move less pressing; and thirdly, the trial was likely to be in 2½ years time and not some long distant future date. There Swift J calculated the basic award conservatively at c.£900K. It was submitted for the claimant that the judge could be confident that at trial the claimant would be awarded at least £1.2 million because the claimant's needs could not be satisfied without such an award. Swift J concluded that there was in fact no real need for accommodation not least because of the recent acquisition of the rented bungalow. Moreover, the trial judge might well say that the proposed purchase was unreasonably expensive. She made a small award for ongoing care and the like.

In *Johnson v Chesterfield and Derbyshire Royal Hospitals NHS Trust* 22 May 2009, HHJ Bullimore dealt with an application for a top-up interim payment where a house had been purchased but funds had dried up before adaptations had been made. He decided that the whole objective of the purchase would be frustrated if the application were refused. Accordingly, this was an “*exceptional case*” in which he could be satisfied that a trial judge would order a significant lump sum when it came before him.

In *FP v Taunton and Somerset NHS Trust* [2009] EWHC 1965 Blair J considered an application in a severe wrongful birth case. The claimant was clearly tied to the premise that a PPO was possible. The IP in fact awarded was based upon the claimant's ‘fall back’ case, thereby restricting funds for the Claimant to do what she truly wanted in terms of a care regime and accommodation. The Judge had to deal with incredibly lengthy submissions as to likely eventual awards, in detailed and reasoned judgment.

Practical Effects

There is no doubt that overall the decision in Cobham is a “*defendant’s*” case in that it shifts the tactical balance towards them. Indeed it has the following practical implications:

- (i) There is likely to be more satellite litigation in respect of interim payment applications in high value claims which will be more lengthy and expensive to pursue. (see *FP*)
- (ii) It could force a claimant to make a formal application at an early stage and thereby disclose detailed evidence of the claimant’s claim in terms of not only a detailed schedule and valuation of the claimant’s case but also supportive expert evidence before mutual disclosure in the litigation. This is an enormous tactical tool for defendants in cases against certain claimant solicitors who are least co-operative in a consensual approach to high value claims. Even if the application is consented to prior to the hearing.
- (iii) In catastrophic injury cases there is always likely to be an IP made for equipment needs and providing the family with appropriate living expenses, that will eat in to past losses, particularly with a child with no loss of earnings claim. There is very often going to be cases where the Claimant needs to establish the exception in Cobham applies.
- (iv) There is unlikely to be difficulty in obtaining an IP for a care regime that is already in place albeit that it is expensive unless challenged by the defendant on substantive grounds (Again the defendant’s evidence may need to be disclosed). (there remains the Mychreest argument that was approved in Cobham). Even then there is unlikely to be any difficulty in obtaining money for the care regime that D admits (perhaps an early offer for the IP on that basis will become the norm).

- (iv) Of most significance is if a large sum is sought for accommodation it will be necessary to persuade the court that the trial judge is highly likely to capitalise other heads of the claim because until Roberts v Johnson is successfully challenged the accommodation claim will often prove insufficient to provide the costs of buying and adapting a house.

As an example will demonstrate, if the cost of accommodation is £500,000.00, adaptations £250,000.00 and relocation costs £50,000.00 an additional IP of £800,000.00 will be necessary. But even assuming the defendant admits those sums, the accommodation claim with a Roberts v Johnson calculation and multiplier of 15 is max £487,500.00. If PSLA is £200K and past losses £100K, then the IP award arrived at would be a reasonable proportion of £787,500.00 (say £600K (75%)). Therefore the court will have to be provided with evidence that permits it to conclude with a high degree of confidence that the trial judge will capitalise a further £200,000.00 plus. Of course, if there is a low life expectancy then it is unlikely that other heads of claim would provide an additional sum and a property simply could not be bought however much it might be necessary to do so for the remaining years of the claimant's life. This inequality is a product not of the judgment that the Court of Appeal needs but the inequity of the Roberts v Johnson calculation.

Accordingly, in respect of property claims this judgment will have most effect as there will be a heavy burden on the claimant to prove to the court that it could have a high degree of confidence that the trial judge would capitalise other heads of claim at the expense of PPOs. That would require them to consider and disclose evidence:-

- (a) Proving the current accommodation is wholly unsuitable and that a need is essential.

- (b) That there is no realistic prospect of renting suitable property either because adaptations could not be made or a property is not available or the D refuses to pay for the same.
- (c) Prove that heads of claim other than care and case management can be capitalised without there being an equally and opposite disadvantage to the claimant in terms of inability to purchase equipment, etc necessary for short-term needs. Again this evidence itself would tend to make the claims weaker.
- (d) Evidence from an independent financial advisor upon capitalisation of losses the need and advantage of doing so.
- (v) Accordingly , the choice of house on an interim payment will be severely limited by the constraints of the likely eventual lump sum award. If a trial is close Claimants will probably more likely consider postponing such an application.

Conclusions

In summary, Eeles makes it much more difficult for claimants to obtain a large IP. Generally it should have no impact on small IPs or lower value claims. Indeed it may have limited impact on the cost of care and case management regimes that can be put into effect into existing properties, although that is likely to be affected by the Mylchreest argument.

To overcome Eeles claimants will require a methodical and planned approach exposing their claim at an early stage. This will enable defendants in large injury cases to earlier assess the full value of the claim and make tempting Part 36 offers, particularly where a claimant is in difficulty in raising sufficient interim payments to meet the desired

purchase of a property. It surprising how often the claimant's preference is to purchase something grander than needed.

What next? I think in practice Cobham will demonstrate the need for the Roberts v Johnson calculation in assessing damages for accommodation needs to be re-visited. Ultimately Cobham v Eeles may prove less beneficial to defendants than has proven to be the case to date.

Andrew Lewis QC

Byrom Street Chambers

7th October 2009