

## **Briefing Note:**

### **Court of Appeal Judgment in the *Thompstone et al* indexation cases**

Ian Gunn, 18<sup>th</sup> January 2008

Back in April 2005, the Courts were given a radical new power: the ability to award damages in the form of periodical payments without the consent of the parties.

That marked the beginning of a new and separate form of damages, with different and distinct characteristics to the conventional lump sum.

However, because there were doubts about how far the Courts' power extended, and in particular whether periodical payments could be linked to earnings rather than prices, there was doubt as to whether the new regime would make any material difference or end up floundering in a similar manner to the previous Structured Settlement regime.

Clear guidance was needed as to whether periodical payments could only be linked to the RPI, particularly for the future care and case management elements of a claim, and how and when this new power should be wielded.

This guidance has now been given by the Court of Appeal in the *Thompstone et al* cases.

The unequivocal conclusion with regard to indexation is that ASHE 6115, a measure of carers' earnings, is the appropriate link to apply to periodical payments for future care and case management costs (and some other related elements). Indeed, the issue is not to be re-opened in any future proceedings unless fresh and more persuasive evidence can be adduced by the defendant.

Periodical payments, at least for future care and case management, are therefore likely to take up position as the "gold standard" for the Courts and many claimants, especially in cases where the annual costs are significant and the need is stable.

It is not without some irony that, so shortly after the commencement of the Mental Capacity Act, which is phrased in terms of empowering individuals to make decisions, however unwise, that the Courts should have also been given the power to limit a claimant's ability to receive and squander a conventional lump sum, even where the claimant has the capacity to manage his own affairs.

However, the Court of Appeal has also taken the opportunity in this judgment, as requested by Mackay J, to give directions as to when the Courts should yield this new power, how and who the Court should listen to in the event of a dispute.

## The Court's Role

The overall aim for the Court, in deciding whether to make a periodical payments order under Section 2(1) of the Damages Act (a "PPO"), must be to make whatever order best meets the claimant's needs.

So what are the needs that the Court should consider?

It is accepted that the "needs" are not limited to those which the claimant has been required to prove as recoverable heads of damage. For example:

- The need for somewhere to live, which will require more capital than can be recovered as damages;
- The wish to spend capital on things for which no damages have been recovered, not being necessities but forming part of a claimant's reasonable needs;
- The need to spend capital on things for which damages have only been partially recovered.

In terms of meeting the claimant's reasonable needs, there is a balancing act to be undertaken, as between capital and income, in which the Court will need evidence in the form of independent financial advice.

The two forms of award each have their own particular advantages and disadvantages, which need to be blended to best meet each claimant's particular and peculiar needs.

It is anticipated that, in the vast majority of cases, as long as the claimant has a suitable plan, the Court will go along with it. It is envisaged therefore that imposition will be rare.

However, there is a clear warning that those advising the claimant who turn up for approval, or trial, without the necessary evidence do so at their peril.

If the Court is not satisfied with the proposals of the parties and/or the information provided by them, it can appoint an assessor and call for a report. In other words, the Court can take an inquisitorial role. However, there is also the risk that if the claimant has not put forward a suitable plan, the Court may consider that the defendant's form of award to be acceptable and impose that regime on the claimant.

In the circumstance of an approval, the Court will of course have the benefit of privileged information which the defendant cannot see (although a censored version may be made available). In the event that it is part approval and part decision, it is acknowledged and accepted that the privileged information seen by the Court for the approval part may well influence the decision that has to be made.

### **The Claimant's Advisers' Role**

In a substantial case, it is anticipated that the claimant will instruct and call an independent financial adviser to report on the form of award which will best meet the claimant's needs.

This will assist the Court in approving the proposed balance between the two forms of award.

This may mean that advice will need to be taken during negotiations and/or when making an offer of settlement as to whether such terms can be supported by independent financial advice.

If there is a trial, then the independent financial advice will assist the Court in reaching a decision as to whether periodical payments are suitable and for which elements of the claim (in whole or in part).

As will be seen below, save in exceptional circumstances, little weight will be given to the defendant's preference in either the approval or decision process.

### **The Defendant's Role**

There may well be competing views between the parties about what form of award is best; whether this is because one form of award better suits the defendant's, or his insurer's, financial arrangements; or because the defendant thinks he knows better than the claimant himself what best meets the needs of the claimant.

Whilst it is open to a defendant to challenge the claimant's proposals for either reason, it will only carry any weight if the defendant's evidence seeks to advance a better means of meeting the claimant's needs.

However, it is difficult to conceive the circumstances in which such a proposal would be proven to be superior to the plan put forward by the claimant himself, having had the opportunity for a free and frank discussion about his future needs with his advisers. Furthermore, it is even more unlikely that such a proposal would prove to be a more economic settlement for the defendant.

It will therefore be rare for a defendant to be given leave to call evidence from a financial adviser.

### **What does this mean for the future?**

Firstly, we will need to see whether the defendants petition the House of Lords in these cases, as the Court of Appeal has not given permission.

If these cases do proceed to the House of Lords, then we are likely to remain in an uncertain environment.

However, if this decision remains good law, earnings-linked periodical payments for future care and case management will be financially attractive in catastrophic personal injury cases.

The evidence given by Dr Wass indicated that carers' earnings had increased at a rate between 1.5% and 2% per annum above the RPI.

If this was to continue into the future, a conventional lump sum would have to achieve a real net return of between 4% and 4.5% per annum to keep up (assuming a real and net discount rate of 2.5% per annum). Assuming the RPI to be, say, 4% per annum, this would require a return of between 8% and 8.5% per annum after taxation.

This is unlikely to be a realistic aim in the present economic environment, without exposure to very unattractive levels of investment risks.

Furthermore, as general mortality continues to improve, the mortality risks associated with a conventional lump sum are also likely to increase over time.

In the case of *Ure v Ure*, AXA Insurance consented to periodical payments linked to ASHE 6115. If more insurers take a similar view then this form of award may become the norm. If not, defendants will have to come up with other ways to try and tempt claimants to forgo the ability of obtaining a guaranteed, earnings-linked, tax-free income for life.