



## **Briefing Note: Interim Payment Applications and Periodical Payments**

On 4<sup>th</sup> March 2009, the Court of Appeal heard the case of *Benjamin Eeles*<sup>1</sup>, in which the lower court had made interim payments of £450,000 and £1,200,000. The latter was the subject of the Defendant's appeal. The Court upheld the appeal and refused the application for £1,200,000.

It ought to be emphasised that, in this particular case, the Court of Appeal was not persuaded that the Claimant had demonstrated a present need to purchase a substantial property. Indeed, the Court expressed the view that he is well housed. No other conclusion could, therefore, have been reached.

The Court of Appeal recognised that, at an interim payment application, the judge faces a dilemma, and said:

*"A PPO has the potential to provide real security for a claimant for the whole of his life. Of course, there will be a tension between the claimant's need for an immediate capital sum and the desirability of the security of a substantial PPO. That tension cannot usually be properly resolved until the trial judge knows what sums are actually to be awarded under each head of damage and has financial advice available to him. At the interim payment stage, the judge does not have those materials. If the judge makes too large an interim payment, that sum is lost for all time for the purposes of founding a PPO. It cannot be put back into the pot from which the trial judge will allocate the damages."*

In this particular case, prior to the Court of Appeal hearing, I was instructed on behalf of the Respondent to prepare a report. The Court of Appeal read my expert evidence, but held it to be inadmissible because it could have been obtained prior to the interim payment application, but went on to say:

*"..... although, of course, the evidence was capable of belief, having read it, we do not consider that its admission would be capable of having a significant effect on the outcome of the appeal. We would add that, as Mr Braithwaite conceded, it will only be in an exceptional case that it is appropriate for reports of this kind to be placed before the court on an application for an interim payment."*

The Court took the view that, for the purposes of an interim payment application, the judge should not normally begin to speculate about which future losses the trial judge will deal with by a PPO. Financial advice at that stage, such as it is possible, will not therefore assist the Court.

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<sup>1</sup> Cobham Hire Services Limited (Appellant) -v- Benjamin Eeles (Respondent), [2009 EWCA Civ 204].

The Court made the best assessment it could of the likely award of general damages, past losses and interest on both, which it has no power to deal with by a PPO.

The purchase of a property is the usual trigger for a substantial interim payment application, as it was in this case. The Judgment confirms that accommodation costs, including future running costs, as well as the *Roberts v Johnstone* claim and costs thrown away, would not be expected to be dealt with by a PPO, and can therefore be capitalised.

Adding together the sums for general and special damages, interest and accommodation, the Court assessed a likely capital award of at least £590,000. There had already been an interim payment of £420,000, leaving little scope for any further interim payment.

However, the award for accommodation is not designed to provide sufficient capital to purchase a property, since the objective of the *Roberts v Johnstone* calculation is simply to compensate a claimant for the loss of use of his capital. This problem is accentuated in cases where life expectancy is short and/or uncertain: the very cases where a PPO is likely to be most attractive.

This inevitably means that claimants have to dip into other parts of their award. General damages and interest are an obvious source of available capital, but may not be sufficient, especially if there are any issues on causation or liability. Claimants are often forced to raid other future losses. If there is a claim for loss of earnings, this will be the first resort.

There is some logic in capitalising at least part of a claim for future loss of earnings, since claimants must give credit for the property they would have owned, but for their injury, and that would have been paid for out of their earnings.

Thus far, there is only one instance<sup>2</sup> of the Court imposing a PPO for earnings (and pension), and there are practical difficulties in this form of award. These include the application of discounts for contingencies other than mortality when there is only a multiplicand to adjust and selection of appropriate index. The absence of a lifetime payment guarantee (because earnings cease at normal retirement age) and the probability that a seriously injured claimant will have a totally different spending pattern to the one he would have had, uninjured, are also significant factors. There is also an overriding need to preserve an appropriate balance between capital and income and, more often than not, it simply makes sense to capitalise earnings.

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<sup>2</sup> *Sarwar v Ali and The Motor Insurers' Bureau* [2007] EWHC 1255 (Admin).

In the case of a child with short life expectancy, there may be no loss of earnings claim in any event.

However, the Court of Appeal Judgment is clear that, at an interim payment application, the judge should not take these factors into account, unless persuaded he can confidently predict that a trial judge will capitalise some of the future losses.

The Judgment includes the following guidance, which also clarifies the role of the Court of Protection in relation to a property purchase:

43. *“The judge's first task is to assess the likely amount of the final judgment, leaving out of account the heads of future loss which the trial judge might wish to deal with by PPO. Strictly speaking, the assessment should comprise only special damages to date and damages for pain, suffering and loss of amenity, with interest on both. However, we consider that the practice of awarding accommodation costs (including future running costs) as a lump sum is sufficiently well established that it will usually be appropriate to include accommodation costs in the expected capital award. The assessment should be carried out on a conservative basis. Save in the circumstances discussed below, the interim payment will be a reasonable proportion of that assessment. A reasonable proportion may well be a high proportion, provided that the assessment has been conservative. The objective is not to keep the claimant out of his money but to avoid any risk of over-payment.*
44. *For this part of the process, the judge need have no regard as to what the claimant intends to do with the money. If he is of full age and capacity, he may spend it as he will; if not, expenditure will be controlled by the Court of Protection.*
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.”*

So where does all this leave claimants who can demonstrate a need for a substantial interim payment to purchase a property? On the face of it, at greater risk of failing to secure a payment, and therefore potentially:



- unable to move into suitable accommodation;
- unable to implement a care regime;
- facing adverse costs consequences.

However, the Court of Appeal clearly endorsed the approach taken in *Braithwaite v Homerton University Hospitals NHS Trust*, i.e. where there is little or no dispute that the claimant has a pressing need for accommodation, or the evidence proves the point, it could confidently be predicted that the trial judge would eventually allocate sufficient capital to enable the claimant to buy a suitable property.

Such claimants will therefore need to marshal their evidence very carefully. It would seem that expert financial advice may only be justified in exceptional cases.

*Ian Gunn*  
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