INTERIM PAYMENTS IN CATASTROPHOC INJURY CASES: GOOD PRACTICE IN CASES WHERE PPO's ARE LIKELY

Cobham Hire Services Limited v Benjamin Eeles
(by his mother and litigation friend Julie Eeles)
[2009] EWHC Civ 204

Julian Benson, Guildhall Chambers

Introduction

Few fierce battles have been fought recently over interim payments in catastrophic injury cases. For years, following *Stringman v McCardle*,[1] slapdash Claimant representatives routinely obtained substantial interim payments on the basis that:

(a) the total claim was patently worth substantially more than all the interim payments sought, and/or

(b) the Defendant's had offered a lump sum much greater than the total of the interims claimed.

In "Eeles", a powerful judgment of the Court, the Court of Appeal explained the law of interim payments in the context of Periodical Payment Orders (PPO's).

The Judgment (which was pointedly critical of Fosket J) has significantly narrowed the scope of interim payments – and vindicated the attitude that insurers and their representative have long held. In the ordinary case, these are only to be awarded as against damages which are likely to be awarded as lump sums at trial (typically PSLA, past earnings, care, and interest). The scope of interim payments is only likely to be broadened, for example to permit the purchase/adaptation of property, in the exceptional case.

Factual background

The Claimant, who was 11 at the time of the application, had been injured in a liability-admitted RTA in 1998 when he was 9 months old. He made a good physical recovery and can walk independently. However, he suffered significant cognitive and intellectual difficulties, such that he attends a school for children with special needs. His life expectancy is normal but he will always require physiotherapy, occupational and speech therapy, and case management.

Shortly after the Claimant's birth, his family moved into a five-bedroom house which they hoped would be sufficient for many years to come. Judgment was entered for damages to be assessed in April 2004. The Defendant had paid £450,000 in agreed interim payments, by the time the claim had been issued, which the parents used to build an extension to the home providing a therapy room for the Claimant.

In 2007 Mr and Mrs Eeles had a second child and at some point they decided that the existing family home would not provide sufficient room for their family. The Claimant's legal representatives did not believe it was possible to quantify the claim until about 2010 but in 2008 the parents saw that what they regarded as a perfect – and locally rare – property had come on to the market. This was Brightlingsea Hall, a nine-bedroom house (with separate bungalow - useful for carers) costing £840,000, with approximate refurbishment cost of £200,000. They made an interim payment application for £1.2m to include the purchase, refurbishment and associated costs.

[1] [1993] 1 WLR 1653

The application before Foskett J

At no point prior to the application before Foskett J had the Claimant provided a Schedule of Loss, either in draft or preliminary form. The application was supported by a witness statement which gave some suggested figures as follows:

(a)	PSLA	£150,000
(b)	Past losses	£158,000
(c)	Future loss of earnings	£800,000+

The Claimant's solicitor also referred to an offer made by the Defendant to settle the claim for £3.25m, made in 2007, either as a lump sum of that amount or a lump sum of £750,000 with a PPO of £75,000 per year.

The Defendant did provide a schedule of estimated loss for the hearing, suggesting the following figures:

(a)	PSLA	£100,000
(b)	Past loss	£260,000
(c)	Future loss of earnings	£440,000

In other words, the Defendant's case was that if future lost earnings were included in a capital lump sum award, that lump sum would be about £1.1m. If future loss of earnings were excluded from the lump sum (and included in the PPO calculation) the lump sum would be closer to £700,000.

In his judgment, Foskett J referred to the familiar jurisdiction to award an interim payment, particularly CPR 25.7(4):

> "The Court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment."

He then made a broad-brush conservative valuation of the overall capital value of the claim at £3.5m. He noted that a further award of £1.2m would bring the total of interim payments to just less than half of the value of the claim – something he decided did not exceed a reasonable proportion of the likely award. He concluded by making the point that there were concerns about tying up too much capital at the interim stage, and the risk that doing so

> "might inhibit the Court at trial from making as large an immediate order for periodical payments as might otherwise have been the case".

However, Foskett J considered that such capital as might have been available to the trial judge to make a periodical payments order would nonetheless remain available to the Claimant, having been invested in the property that was to be purchased for him. Lastly, Foskett J decided that "he should not stand in the way of the family's wish to proceed but emphasised that it would be for the Court of Protection to decide whether the specific project was in Ben's best interest" (paragraph 24).

Judgment in the Court of Appeal

The Court of Appeal criticised Foskett J for failing to consider properly the "amount of the final judgment" in the context of PPOs. He was wrong to have estimated the total capital value of the claim (having capitalised the PPOs):

> "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 in a case of this kind"
> (paragraph 35).

The Court then went on to criticise the Judge for "misunderstanding and underestimating" the importance of not fettering the trial judge's discretion to allocate the heads of future loss. The fact that the capital sum ordered by way of interim might be invested wisely and highly beneficially for the

Claimant "misses the point about the importance of the trial judge's freedom to make an appropriate PPO" (paragraph 32). The Court went on:

- "a PPO has the potential to provide real security for a Claimant for the whole of his life;
- 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."
  (paragraph 32)

Exercising the discretion afresh

The Court exercised its discretion afresh. It relied substantially on the Defendant's estimated figures – because "the Claimant's figures are not supported by evidence" (paragraph 35), and made these general points:

- a conservative estimate ought generally to be made at this stage of the (correctly understood) 'final judgment';
- that was particularly the case where there was a wide difference between the parties;
- the actual determination made by the Court would of course depend on the strength of the evidence in each case.

In this case, once the Defendant's figures had been adopted, the decision made itself. Given the original interim payments of £450,000, and excluding all the heads of loss which were likely to be the subject of PPOs (including future loss of earnings), the Court decided that the capital award was likely to be "at least" £590,000 (meaning 'in that ball park', rather than suggesting it might be very much higher). Given the important of a conservative estimate at this stage, there was precious little room to make another interim payment (in addition to the £450,000 already made).

The special case

The Court did provide for the possibility that a Judge, even at this stage, might 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" (paragraph 38). By such a case was only where the Claimant "can clearly demonstrate a need for an immediate capital sum, probably to fund the purchase of accommodation". Furthermore

> "before a judge at the interim payment 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 will endorse the capitalisation undertaken" (paragraph 38).

The Court endorsed the decision (Stanley Burnton J) in *Braithwaite v Homerton University Hospitals NHS Foundation Trust*[2] as just such a case, and explained the differences in Eeles:

[2] [2008] EWHC 353 (QB)

"The Claimant has not clearly demonstrated a present need to buy Brightlingsea Hall or indeed any other substantial property. He is well housed at present and has a therapy room provided by past interim payments. It may well be that, in the medium or longer term, a larger house may be justified. But there is no need for that move to be made before the trial judge has had the opportunity to consider the accommodation issue in 2010… We do not consider that the scarcity of larger properties in Brightlingsea should be regarded as the determining factor … it is not at all clear to us that they will need a house as large as the Hall. There is a real danger that, if the Hall is purchased, a 'status quo' will have been established before the trial and the playing field will have been rendered uneven"

For present purposes, we are not prepared to assume that the trial judge would hold that that purchase [of Brightlingsea Hall] was reasonably necessary to meet the Claimant's needs…. " (paragraph 39)

(I have underlined the key points)

Practice Points

- This case marks the end of the sloppily prepared interim payment application.
- It demonstrates the seismic change brought about by PPOs.
- Neither party even referred to any claims for future care, therapies, holidays, case management or Court of Protection costs - impliedly agreeing that these were/are now invariably dealt with by way of PPOs.
- This tacit agreement of the parties (fostered and even extended by the Court of Appeal) suggests that contested interim orders will be fewer and further between.
- Where applications are contested, the Claimant will have to provide a heavy weight of persuasive evidence to bring itself within the 'special case'.
- Defendants will be well advised to prepare a draft Counter-Schedule for use at the interim stage, limited to the likely lump sum awards, and explaining the reasons for their figures. This will give the Court a benchmark for a conservative assessment.
- Given the number of times costs orders in these applications are 'fudged' so that the losing Claimant does not have to pay the successful Defendant's costs 'in any event', it is worth laying the ground for a powerful costs application in correspondence if the Claimant's representatives will not provide evidence of the type which is clearly necessary to come within the 'special case.'

Summary of the procedure

The ordinary case

1. Assess the likely amount of the final judgment, excluding all heads of loss "the trial judge might wish to deal with by PPO":

   (a) Strictly this is only PSLA, past special damages, interest

   (b) It may include future accommodation and running costs

2. The assessment of the interim payment related to the final judgment ought to be conservative.

3. The interim payment (required by the rules to be no more than a reasonable proportion) may then be a high proportion providing the assessment was conservative.

4. The Court need have no regard to what the Claimant intends to do with the interim payment (if he has capacity, he can decide. If not, the Court of Protection will control the destination of funds).

The special case

5. There are two substantial hurdles. The Judge at the interim application must

   (a) be able to "confidently predict" that the trial judge will wish to award a larger capital sum;

   (b) be persuaded by evidence that "there is a real need for the interim requested - now.

   (c) Be satisfied that the amount sought is reasonably necessary.

6. Even in the special case, the judge need not need to decide whether the particular house requested is suitable.

Julian Benson
Guildhall Chambers
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