

Case No. TLQ/07/0135

Neutral Citation Number: [2008] EWHC 2424 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice,
STRAND,
London, WC2A 2LL.

31st July, 2008

B e f o r e :

THE HONOURABLE MR JUSTICE MACKAY

RH (by his mother and litigation friend LW)

And Others

Claimant

- and -

UNITED BRISTOL HEALTHCARE NHS TRUST

And Others

Defendants

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Mr. R. Oppenheim Q.C. (instructed by **Barcan Woodward**) for the **Claimant**
Mr. P. Rees QC and Mr. D. Manknell (instructed by **Kennedys**) for the **Defendant**

J U D G M E N T

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Re: Form of schedule

MR JUSTICE MACKAY:

1. I have just delivered a separate judgment dealing with my approval of the particular orders in three of the four cases which went to the Court of Appeal, Neutral Citation No. 2008/EWCA Civ. 5. In particular, I was concerned to approve the form of the Schedule to the orders which deals with the mechanics and methods of indexation. Mr Robin Oppenheim, Q.C. for the three claimants and Mr Paul Rees, Q.C. for the three defendant authorities, in the course of their negotiations, which I understand were not short, produced a proposed model Schedule appropriate for orders in high value claims where periodical payments orders have been made, and made subject to indexation.

2. In respect of some such claims, items of future loss and expenditure have been indexed to the retail prices index (RPI) and care costs to the Annual Survey of Hours and Earnings (ASHE) (SOC 6115) at various centiles. This is a complex exercise designed to achieve accuracy in protecting these damages against inflation over time. However, as the Court of Appeal agreed, such orders must also be workable, which means they must be capable of being understood and applied by practitioners in this field without overdue and unnecessary recourse to expensive expert advice on each occasion and without, to put it more simply, redesigning the wheel each time. They also have to be accessible to the judges who have to approve these orders in due course.

3. The scale of this problem is very considerable. The NHSLA alone, which stands behind these three defendants, has an accumulated backlog over the last two to three years of 104 such cases, all stayed pending the outcome of this litigation. This second judgment relates principally to cases in which the NHSLA is involved as indemnifying a defendant. It does, however, have implications for other repeat litigants in the world of liability insurance.

4. The agreed NHS model is attached to this judgment as the Appendix below. It is, as I say, the result of very considerable negotiations between counsel, both of whom have acquired, I would suggest, unparalleled experience and skill in this field. It is also based on advice given to the claimant from an equally experienced independent financial adviser, Mr Cropper, from Dr Victoria Wass, a labour economist who gave evidence for the claimants in all three cases, and Professor G.H. Makepeace, a statistician. It addresses the principal problems posed by the use of ASHE 6115. First, there is an initial release of data in October/November of each year, in which the data has been collected in the previous April, and the final figures are not released until about a year later. Secondly, there may be changes in the methodology of collection of data from the SOC leading to a discontinuity in such data. Thirdly, there is the future possibility that reclassification of the SOC may take place, resulting in the relocation of the target group of care workers in a different SOC.

5. I have been taken through the model in detail and seen how it has been applied to the three orders I have been asked to approve in the instant cases. I am satisfied that this model copes admirably with the problems I have identified and is

workable in the sense I have defined above. I believe it should be followed in all cases where the NHSLA is the paying party, unless there are specific features of a particular case which make it inappropriate. The order is specific to the NHSLA in this particular respect: for understandable and, in my judgment, legitimate reasons of orderly administration and economy, given the number of claims of this nature with which it has to deal, the NHSLA wishes to make all its adjustments in PPOs, of which there will soon be very many, at the same time of year. This is fixed in the model as 15th December, which gives time for assimilation of the initial ASHE figures in October/November. So important is that feature of the model to them that it has conceded terms which are positively advantageous to claimants relating to the timing of payments. It will almost always be the case their birthdays do not coincide with the payment date and, thus, the steps in their multiplicands do not either and they will therefore enjoy accelerated receipt of the increased figure.

6. The use of the model in all NHSLA cases involving indexation will therefore, in my judgment, bring these three benefits. First, the claimants will not need to incur high levels of costs in devising their own indexation schemes to meet the problems in ASHE that I have identified. Secondly, judges with the duty of approving settlements will not need to spend the time that I have spent, that is to say two to three hours pre-reading the material and not much less in court having the schedule explained to them, as Mr Oppenheim did, and necessarily did, with me. I add that I was not unfamiliar with the problems in this case having tried one of them over several days. Many judges called on to express approval will not be. Thirdly, the model is in a form which can be freely circulated and publicised in such practitioner works as Facts and Figures or Kemp and Kemp and will therefore be known to all who work in this field.

7. I cannot and do not attempt to dictate future decisions by my brother and sister judges on settlement of such cases, but I can, I think, make this statement, designed to ensure that litigation involving the NHSLA is conducted in a just and economical way. If in future cases claimants' advisers wish to ignore the model and devise their own forms of order, they will necessarily incur expense in so doing, both in re-writing the order and, probably, having available at court the advisor who assisted them to explain it to the court and to justify preferring it to the model. While all matters of costs are entirely for the judges who hear applications, it seems to me that they are likely, if they do that, to do so at their client's risk as to costs should the court conclude that the expense was unnecessarily incurred.

8. As to the wider picture, there are, of course, other insurers and indemnifiers, including such as the Motor Insurance Bureau, for whom the model will not provide an immediate or exact fit, but it would surely make sense for them to combine, and to devise a single model suitable for their use in which connection there are large parts of this schedule that could usefully be adopted. Should that exercise result in agreement, consideration should then, in my view, be given to an approach to the Rules Committee to add a new Practice Direction prescribing a model to be used in such cases similar to, for example, CPR Part 25, Practice Direction 13 in relation to interim injunctions, to achieve the aims I have set out above.

APPENDIX TO JUDGMENT

SCHEDULE TO THE ORDER

Part 1 of the Schedule to the order

Each sum payable under part(s) 2 and 3 of this schedule is a "periodical payment" subject to the conditions set out in paragraphs 1-8 of this part

1. Unless specifically stated, all the periodical payments under part(s) 2 and 3 of this schedule will continue during the lifetime of the Claimant
2. No minimum number of periodical payments under part(s) 2 and 3 of this schedule shall be made
3. Payment of the periodical payments under part(s) 2 and 3 of this schedule will cease on the death of the Claimant
4. The final periodical payment under part(s) 2 and 3 of this schedule will be pro-rated for so much of the final year that the Claimant had survived and any balance owing to the NHSLA or its successor will be repayable to it out of the Claimant's estate, subject only to deduction by the Claimant's estate of such sums as the Claimant's estate may be liable for in respect of the termination of the employment of any persons employed to care for the Claimant
5. The NHSLA shall be entitled to require the Claimant to produce evidence in a form reasonably satisfactory to the NHSLA that the Claimant remains alive before making any periodical payment
6. The periodical payments under part(s) 2 and 3 of this schedule are to be made by BACS to the Court of Protection (or its successor) for the benefit of the Claimant under reference [] (where applicable)
7. At the time of each periodical payment under part(s) 2 and 3 of this schedule the NHSLA shall provide to the Claimant and/or the Deputy details in writing explaining how the periodical payment has been calculated
8. In the event that a payment has not been paid within 28 days of the publication of the relevant data by the Office for National Statistics ['ONS'] or by the 15th of December in any year (whichever date is the later) the NHSLA shall pay interest at the then applicable special investment account rate on any outstanding periodical payment or part of a periodical payment until full payment is made
9. For the period from the [the date when the future loss period accrues assuming periodical payments relate only to future loss] to [14 December of the relevant year when the periodical payments will commence] to represent the periodical payment under part(s) 2 and 3 of this schedule for that period the Defendant do pay the sum of [£] () due as the balance of the periodical payment for the above period and that sum shall be paid 4.00 pm on the []

Part 2: The RPI-Linked Periodical Payments

1. The following present value annual sums shall be paid in advance:
 - 1.1 The annual sum of [£] () payable on the 15th of December in each year from 15th December [] until 15th December [] inclusive, with the first such payment to be

made on 15th December []

- 1.2 The annual sum of [£] () payable on the 15th of December in each year from 15th December [] until 15th December [] inclusive
- 1.3 The annual sum of [£] () payable on 15th of December in each year from 15th December []
2. The index to be applied is the United Kingdom General Index of Retail Prices for all items published by the ONS (January 1987 = 100) or any equivalent or comparable measure which in the parties' reasonable opinion replaces such index from time to time. In the event of a dispute between the parties, the appropriate alternative measure shall be determined by the court
3. Each periodical payment referred to in paragraph 1 [1.1 to 1.3] above shall be recalculated annually in November in each year prior to payment on 15th December of the same year from November [] in accordance with the following formula

$$PP = C \times \frac{NF}{A}$$

3.1 Where

- 3.1.1 'PP' = the amount payable by way of periodical payment in each year, the first PP being the payment made on 15th December []
- 3.1.2 C = the relevant annual sum set out in paragraph 1 [1.1 to 1.3] above respectively
- 3.1.3 'NF' = the index applicable to September in the year in which the calculation is being carried out, the first NF being in respect of September []
- 3.1.4 'A' = the index applicable to [the index applicable to three months prior to the date of settlement or judgment]

Part 3: The ASHE 6115-Linked Periodical Payments

1. The following present value annual sums shall be paid in advance
 - 1.1 The annual sum of [£] () payable on 15th December in each year from [] until 15th December [] inclusive, with the first such payment to be made on 15th December []
 - 1.2 The annual sum of [£] () payable on 15th December in each year from [] until 15th December [] inclusive
 - 1.3 The annual sum of [£] () payable on 15th December in each year from []
2. The relevant earnings data are the gross hourly pay for "all" employees given by the present Standard Occupational Category ['SOC'] for (Care assistants and home carers) ['6115'] at the relevant percentile shown below (currently in table 14.5a at

the tab for "All" Employees) of the Annual Survey of Hours and Earnings in the United Kingdom [ASHE] published by the ONS. Both the initial "first release" and the final "revised" data are used below. The original relevant percentiles are:

2.1 [] percentile shall be applied to paragraphs [] above

2.2 [] percentile shall be applied to paragraphs [] above

3. The annual periodical payments referred to in paragraph 1 [1.1 to 1.3] above shall be recalculated in November prior to payment on the 15th December of the same year until reclassification from November [] in accordance with the following formula

$$PP = C \times \frac{NP}{A}$$

3.1 Where

3.1.1 'PP' = the amount payable by way of periodical payment in each year being calculated in November and paid on the 15th of December the first 'PP' being the payment on the 15th of December []

3.1.2 'C' = the relevant annual sum set out in paragraph 1 [1.1 to 1.3] above respectively

3.1.3 'NP' = the first release hourly gross wage rate published by the ONS for the relevant percentile of ASHE SOC 6115 for "all" employees for the year in which the calculation is being carried out, the first NP being the figure applicable to the year [] published in or around October []

3.1.4 'A' = the revised hourly gross wage rate for the relevant percentile of ASHE SOC 6115 for all employees applicable to [] and published by the ONS in or around October []. In the event of a revision by the ONS it will be the replacement final figure issued by the ONS retrospectively

4. The annual periodical payment referred to in paragraph 1 [1.1 to 1.3] above shall be recalculated annually in subsequent years in November in each year prior to payment on the 15th December of the same year until reclassification from November [] in accordance with the following formula

$$PP = C \times \frac{NP + (NF - OP)}{A}$$

4.1 Where in addition to the definitions previously set out

4.1.1 'NF' = the revised hourly gross wage rate published by the ONS for the relevant percentile of ASHE SOC 6115 for "all" employees for the year prior to the year in which the calculation is being carried out, the first NF being that applicable to the year [] and published in or around October []

4.1.2 'OP' = the first release hourly gross wage rate published by the ONS for the relevant percentile of ASHE SOC 6115 for "all" employees for the year prior to the

year in which the calculation is being carried out, the first *OP* being the figure applicable to the year [] published in or around October []

5. If, in any year, the ONS reclassify ASHE SOC 6115 and collect data for both the current SOC and the reclassified SOC in or about April of that year the new SOC shall be the reclassified SOC which includes home carers

6. The relevant annual sum referable to the sums at paragraph 1 [1.1 to 1.3] above following reclassification shall be known as '*CR*' and shall be calculated in the year of reclassification only as follows

$$CR = C \times \frac{AF}{A}$$

6.1 Where in addition to the definitions previously set out

6.1.1 '*AF*' — the final published revised hourly gross wage rate for the relevant percentile of the previously applied SOC for "all" employees

7. The first payment only following the publication of the reclassified revised data shall be

$$PPR = \left[CR \times \frac{NPR}{AR} \right] + \left[C \times \frac{AF - OPF}{A} \right]$$

7.1 Where in addition to the definitions previously set out

7.1.1 '*PPR*' = the amount payable by way of periodical payment in each year following reclassification

7.1.2 '*NPR*' = the first release hourly gross wage rate published for the new relevant percentile of the new SOC following reclassification for the year in which the calculation is being carried out

7.1.3 '*OFF*' = the final first release hourly gross wage rate published for the relevant percentile of the previously applied SOC for "all" employees

7.1.4 '*AR*' = the revised hourly gross wage rate for the percentile of the new SOC, when first published, which is closest to *AF*, and the relevant new percentile shall be the percentile to which *AR* corresponds

8. Until further reclassification the formula for calculating subsequent values of *PPR* shall be

$$PPR = CR \times \frac{NPR + (NFR - OPR)}{AR}$$

8.1 Where in addition to the definitions previously set out

8.1.1 '*NFR*' = the revised hourly gross wage rate published for the new relevant

percentile of the new SOC following reclassification for the year prior to the year in which the calculation is being carried out

- 8.1.2 'OPR'= the first release hourly gross wage rate published for the new percentile in the new SOC following reclassification for the year prior to the year in which the calculation is being carried out
9. Further reclassifications shall be dealt with in the same way by the application of paragraphs 5-8 above
10. In the event that a change or methodology creates a discontinuity in the data in the applied SOC resulting in the ONS publishing two sets of data for that applied SOC. then the same process as set out in paragraphs 5-8 above shall be undertaken. However, in these circumstances all references to a '*new SOC*' shall be treated as being a reference to the '*new methodology for the existing SOC*', *AR* shall represent the data under the new methodology and *AF* shall represent the data under the old methodology
11. In the event of a dispute between the parties arising from the application of paragraphs 5-9 above the appropriate series and/or percentile shall be determined by the Court