



Neutral Citation Number: 2008 EWHC 2948 (QB)

Case No: HQ07X00737/HQ06X02046

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2008

Before :

SIR CHRISTOPHER HOLLAND

Between :

**Lee Carl Thompstone (a minor, by his mother and
litigation friend, Heather Brindley) Claimant**

- and -

Tameside Hospital NHS Foundation Trust Defendant

Robin Oppenheim QC (instructed by Linder Myers) for the Claimant
Paul Rees QC (instructed by Bevan Brittan) for the Defendant

**John Paul Corbett (a minor, by his mother and
litigation friend, Catherine Elizabeth Corbett) Claimant**

- and -

**Yorkshire and the Humber Strategic Health
Authority Defendant**

Robin Oppenheim QC (instructed by Irwin Mitchell) for the Claimant
Paul Rees QC (instructed by Kennedys) for the Defendant

**RH (a minor by his mother and litigation friend,
LW) Claimant**

- and -

**University Hospitals Bristol Healthcare NHS
Foundation Trust Defendant**

Robin Oppenheim QC (instructed by Barcan Woodward) for the Claimant
Paul Rees QC (instructed by Kennedys) for the Defendant

BB (by his mother and litigation friend, KB) **Claimant**
- and -
National Health Service Litigation Authority **Defendant**

Robin Oppenheim QC. (instructed by Leigh Day) for the Claimant
Paul Rees QC. (instructed by Capsticks) for the Defendant

Adnan Ahmed Adam (a minor, by his father and **Claimant**
litigation friend, Ahmed Haji Adam)
- and -
Royal Free Hampstead NHS Trust **Defendant**

James Watson QC (instructed by Parlett Kent) for the Claimant
Paul Rees QC (instructed by Bevan Brittan) for the Defendant

Hearing date: 2nd December 2008

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON SIR CHRISTOPHER HOLLAND

Sir Christopher Holland

1. The history of the instant problems stems from the Damages Act 1996 (as substituted by the Courts Act 2003). By s. 2(1) the Court was empowered to order that damages awarded in respect of personal injury could be wholly or partly in the form of periodical payments. Subsections (8) and (9) merit citation in full.

“2(8) An order for periodical payments shall be treated as providing for the amount of payments to vary by reference to the retail prices index (within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988) at such times, and in such a manner, as may be determined by or in accordance with Civil Procedure Rules.

(9) But an order for periodical payments may include provision

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(a) disapplying subsection (8), or

(b) modifying the effect of subsection (8).”
2. In due course Claimants’ advisers became concerned about the efficacy of the Retail Price Index (“RPI”) as a point of reference for the indexation of periodical payments in respect of, inter alia costs of future care and inspired by expert advice, fixed upon the Annual Survey of Hours and Earnings for the occupational groups of care assistants and home carers [“ASHE 6115”) as a preferable alternative. There being no agreement as to that contention, the resultant issue was litigated at first instance and on appeal, the overall result being a finding in favour of the Claimants’ contentions by way of a Court of Appeal decision of the 17th January (“[2008] EWCA Civ 5”). Intended subsequent appeals to the House of Lords were eventually withdrawn.
3. For the purposes of their decision, the Court of Appeal had considered appeals in four cases. Subsequently three of these cases came before Mackay J in July 2008 for approval of orders giving effect to the judgment, the respective claimants being under a disability. For such purpose he was particularly concerned with so much of the respective orders as dealt with “ the mechanics and methods of indexation “ and he delivered a judgment supportive of that which was put before him, see [2008] EWHC 2424 (QB). The three cases were *Thompstone v Thameside Hospital NHS Foundation Trust*, *RH v University Hospitals Bristol NHS Foundation Trust* and *Corbett v Yorkshire and the Humber Strategic Health Authority*.
4. The same three cases have now come before me (Sitting as a Deputy High Court Judge) in the following circumstances. There is an urgent requirement for a ‘model’ Order to serve as a foundation for the final orders necessary to give effect to the many cases held in partial abeyance pending the conclusion of the appellate process – and to serve as a like foundation for similar orders to be made in future cases. It was presumably hoped that that which Mackay J approved would meet this requirement. In the event however subsequent comment has been expressed as to one part of the then draft and continuing consideration by involved practitioners has raised a desire for fine ‘tuning’ other parts. In the result, the cases have returned for consideration and hopeful approval of the respective draft orders, each in turn based upon a hopefully to be approved ‘model’ such as can underpin other like orders. Two further cases have been listed before me to the same ends: *BB v National Health Service*

Litigation Authority and Adam v Royal Free Hampstead NHS Trust. The overall concerns are for me two-fold: approval with respect to the cases now before me and prospective approval with respect to the many cases now waiting for such and with respect to the cases that will, alas, inevitably arise in the years to come.

5. To assist me in these tasks I have had the benefit of admirable representation: Robin Oppenheim Q.C. and James Watson Q.C. for respective Claimants and Paul Rees Q.C. for all the Defendants. As observed by other judges, these leading counsel have evinced exceptional mastery (fuelled by substantial input from experts) of “the mechanics and methods of indexation” and the court and their clients could not have been better served. That said, I have to remind myself that the orders put before me in draft will, if approved, be in place for potentially long periods of time, to be read and understood by those lacking the expertise that was deployed before me. My concern has been to ensure that often quite sophisticated concepts are expressed with a clarity that can command uniform compliance as guided by those advisers that come belatedly and afresh to this area of law and practice.
6. Parameters bearing upon drafting for long term efficacy are afforded by the following:
 - a) In each of the cases before me and in all such live cases the periodic payments as ordered will be made by the National Health Service Litigation Authority (“NHSLA”) annually on the 15th December. I interpose: the fixing of this one payment date reflects practicality and has already been the subject of judicial approval.
 - b) Periodical payments as ordered are immediate (that is, so as to commence forthwith) or deferred (that is, so as to commence at some subsequent, specified date). In each instance the order will specify a multiplicand. With respect to immediate payments such are indexed from inception and thereafter annually. With respect to deferred payments, upon taking effect the multiplicand will reflect indexation as applicable as from the making of the Order and once ‘in play’ it is subject to the same annual indexation. With respect to both such payments, the Order may provide for future enlargement or contraction of the multiplicand on a specified date, ‘that is a step up’ or a ‘step down.’
 - c) Indexation may be by reference to the Retail Price Index (“RPI”) or by reference to ASHE 6115. The current use of these indices poses no significant administrative problem and thus no significant drafting problems. However the parties - and particularly the NHSLA – are understandably concerned to obviate so far as is, presently practicable the expense and difficulties inherent in future litigation and thus have sought by way of drafting to anticipate and surmount possible alternatives in the form or functioning of the indices. It is to be remembered that the use of the RPI and ASHE 6115 as indices is entirely incidental to their respective preparation and functions so that alterations in such can come about without any regard to the impact upon the use made of them by the parties to this litigation.
 - d) With reference to prospective alterations in the form or functioning of the RPI the nature of any such is so speculative that the impact upon periodical payment indexation cannot be anticipated and the drafting understandably does no more than refer resultant problems to the parties for agreement as to solution – and failing such, to the courts.

- e) With respect to prospective alterations to the form or functioning of the ASHE 6115, the parties have sought by way of drafting to anticipate and meet such, thereby to avoid, so far as is practicable future litigation. That which is anticipated falls into two categories: reclassification and revision, each impacting upon drafting. By way of introduction to the topic, it is helpful to refer to a table appended to this judgment as 'A'. This table contains the data extrapolated from successive publications of ASHE 6115. Each figure reflects a gross hourly rate, the whole being graded in terms of centile, supplemented by median and mean average figures. For present purposes, it is important to note that by way of the current practice, data obtained in about April of each year produces in about October that year's figures, expressed as 'first release.' A month later, the final figures are published, usually but not necessarily identifying a modest variation on the provisional. In the event, this year there has been delay: the first release figures were not published until the 14th November and the revised figures were published on the 28th November. Understandably it is the final formulation that is crucial for the indexation exercise and the drafting seeks to provide for this. In the result 'revision' is an annually recurring concept but, as table A demonstrates, further more drastic revision can be superimposed: in 2006 there was just such when there was a change in methodology. It is important to note that revision does not impact upon the structure and use of ASHE 6115. The Claimant's position in terms of centile has been the subject of prior ruling or agreement – revision whether annual or extraordinary simply impacts upon the precise hourly rate with variations that are modest in the short term but which may contribute to significant long term indexation adjustments. I turn to reclassification. The parties perceive a risk that in the future those who compile ASHE 6115 may alter its present structure, say, by identifying and providing rates for a more pertinently relevant sub-set of employees. Adverting to table A, it will be seen that there has been no such prior event albeit that it records the inception of ASHE 6115 as a consequence of reclassification of that which was earlier embraced by ASHE 644. I return to the issue of drafting. For my part,
- f) understand and applaud drafting that seeks to anticipate and surmount the result of revision. I have personal difficulty in envisaging drafting that can anticipate and surmount reclassification given the uncertainties as to occurrence and nature. All that said, the parties wish to seek to deal with both problems by way of current drafting and I see no reason to negate their efforts which with respect to a reclassification may be more successful than I expect, alternatively which may help promote agreement between the parties as to a resolution of the resultant problem.
- (f) I revert to the date of payment, 15th December each year, and to the significance for the quantum of payment of the ASHE 6115 revised figures, such being on an unfixed date in about November. It is apparent that notwithstanding the best effort of the NHSLA the impact of indexation may not be established in time to fix the quantum of payments as made on the 15th December. The parties sensibly wish to anticipate and provide for this problem so as to identify what payments should be made in the interim and to provide for the payment of interest on so much as may have to be paid late. As it happens, it was the draft to deal with this situation as placed before Mackay J that subsequently excited adverse comment such as helped promote the

hearing before me. This is the paragraph 8 point, happily now fully resolved by agreement.

7. I turn to my task. With the aid of sustained contributions from leading counsel my primary focus has been upon the drafting of 'Model Schedules'. Once in play these have two functions: first, potential incorporation in the orders for approval in each of the five cases now before me; and second, potential incorporation in the orders that await approval in current and prospective cases.
8. The Model Schedules in question are those which define and provide for periodical payments, whether as currently fixed or as prospectively reflecting re classification or revision of the respective indices. The Schedules are in three parts: Part 1 establishes the life time obligation and the mechanics of payment; Part 2 makes provision for such periodical payments as may in the circumstances of the case be indexed by reference to the RPI; and Part 3 focuses upon those that are to be indexed by reference to ASHE 6115. It goes without saying that these Schedules do no more than offer practitioners a precedent for adaptation to meet the particular nature of an award of damages – that said, the terms represent the best current expertise and departure from such in case of any future draft Order will have to be justified in order to secure approval from the Court.
9. In the event, the terms of the Model Schedules in great measure reflect input and agreement supplied by the respective leading counsel. Two relatively minor rulings were required from me – these I communicated earlier to the parties so that I am now able to append to the judgment the final draft as 'B': the approved model. Justification for my rulings has yet to be given. It is as follows.
10. Part 2, Paragraph 1. The Defendant tendered as an opening "The following present value annual sums shall be paid in advance." Mr Watson pointed out that 'present value annual sums' were in fact never going to be paid, there was always input by way of recalculation. In my view he is right and I prefer "The following present value annual sums as recalculated in accordance with paragraph 3 shall be paid in advance"
11. Part 3, paragraph 1. The same point arises and my ruling is as above, varied only so as to read "in accordance with paragraphs 3 – 10."
12. Para 3, paragraph 11. There was debate before me as to the circumstances in which a dispute between the parties could justify a return to the court. Understandably the Defendants are concerned to curtail future litigation, hence the effort applied to devising formulae aimed at meeting all presently envisaged future eventualities. Whilst I respect their concerns there is no doubt in my mind that Court approval of the resultant inevitably sophisticated terms can only be justified with the aid of a simply expressed 'Liberty to apply' in the event of a dispute as to the application of part 3.
13. In the light of the foregoing approval of the 'Model Schedules' there is no need for me to say more by way of this judgment about the Orders that I am asked to approve in respect of each of the five cases. In each case as soon as a final draft is before me I look forward to approving such.
14. This judgment with its appendices, seeks to supply an introduction to the expeditious disposal of the formidable outstanding concern: approval of the many still embryo orders. Circulation among the parties must follow, leading to subsequent listings. As to those latter steps I refer to the letter that Messrs Kennedys are circulating amongst

the parties which includes a timetable which has my support. As from the 12th January, 2009 I will be engaged in systematic approval – if the material put before me with respect to any one case meets my requirements as specified in this letter I will seek to approve by way of a paper exercise; if I perceive a problem, or if there is a request for such, there will be a listing for a hearing.

