

# **OBTAINING AN INTERIM PAYMENT FOR ACCOMMODATION**

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# The single most important part of a SCI case?

- Having the right accommodation makes a huge difference to the client with a SCI
- True care needs usually only emerge once the accommodation is right (difficult for families to accept substantial levels of care in cramped accommodation)
- Getting accommodation sorted early takes pressure off and allows the rest of the claim to develop at an appropriate pace
- The way in which an I.P. for accommodation is dealt with will often set the tone for the whole litigation

# Eeles v Cobham Hire Services [2009] EWCA Civ 204



# Life before Eeles

*"There was a general perception that, if the pot could be measured in millions, quite frankly a claimant could have out of it almost anything."*

**Mollie Johnson v Chesterfield & Derbyshire NHS Trust**

HHJ Bullimore (22.5.09, reported on Lawtel)



# The impact of Eeles

- The Court of Appeal's decision was a game-changer
- Greeted by insurers as a great victory and by claimant lawyers with dismay
- General perception that it represented a real change in the law and made it much more difficult to get large interims
- In fact, it provides a clear analysis of how the legal principles are to be applied and effectively sets out a route map to success
- Requires a strategic approach from the beginning
- Provides an opportunity to get on top of cases early & avoid mistakes

# Brightlingsea Hall



# FP v Taunton & Somerset NHS Trust [2011] EWHC 3380 (QB)

*"Eeles requires a disciplined and structured approach to interim payments that ensures awards are made in a principled way, avoiding the twin risks of over-compensating a claimant and keeping him out of damages at a time when he is likely particularly to require the money to enable him to cope with the injuries caused by the Defendant."*

Hickinbottom J

# The strategic approach

- Anticipating the need for interim payments
- Building the case for an interim
- Seeking consensual solutions
- Careful consideration of the evidence required
- Managing the application within the legal framework
- Analytical presentation

# The Legal Framework

# Procedure – CPR 25.6

- C may not apply for an IP before the end of the period for filing acknowledgment of service 25.6(1)
- Application notice must be served at least 14 days before hearing and supported by evidence 25.6(3)
- Respondent must serve evidence 7 days before hearing 25.6(4)
- Applicant must serve any further evidence at least 3 days before hearing 25.6(5)
- **Note the opportunity to get an application issued, secure a hearing date and then gather further evidence**

# Qualifying Conditions

CPR 25.7(1) Court may only make an order for an interim payment where:

- D has admitted liability;
- C has obtained judgment; or
- Court is satisfied C would obtain judgment for a substantial sum against D from whom interim payment is sought or where more than one insured D against at least one

**So liability has to be addressed before seeking an interim payment**

# CPR 25.7(1)(e)

- Applies where there is more than one D
- If court is satisfied C will succeed against at least one D and all D's are insured / covered by the MIB / public body an IP can be made even though court cannot then determine which D is liable
- See **Berry v Ashtead Plant Hire Co Ltd & others** [2011] EWCA Civ 1304 – where application was made against 2 D's who were both insured on basis one or other was liable as his employer, it did not matter that there was also another D who was uninsured (although CA overturned an order for an IP on the basis that the case was not so strong as would justify summary judgment against D1 or D2 once the identity of the employer was resolved)

# CPR 25.7

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



# The impact of PPO's

- IP cannot be ordered if it will fetter trial judge's discretion as to form of award
- In most serious cases a PPO will be considered (even if not a full liability case)
- But not in every case (**Preston v City Electrical Factors**[2009] EWHC 2907 (QB))

# Eeles – The Guidance

- Applies where damages likely to include PPO
- 2 stage test
- Conservative assessment of lump sum element
- Larger sum may be allowed only if can “confidently predict” trial judge will wish to capitalise other elements

# Eeles – Stage 1

- Assess:
  - PSLA
  - Special Damages (to trial?)
  - Accommodation
- Conservative basis
- Reasonable (may be high) proportion
- No regard to what C intends to do with it

# What is a reasonable proportion?

- A number of cases suggest it may be as high as 90% - see **AC v St George's Healthcare NHS Trust** [2015] EWHC 3644 (QB) (Whipple J) at paragraph 37
- But see **Griffin v Ponsonby** [2013] EWHC 3410 (QB) (Andrews J) – every case must turn on its own facts – “trying very hard to work out a figure that is fair to both parties ... adopt a more conservative approach” - 80%
- Much depends on the evidence – good evidence will give the judge the confidence to allow a high proportion

# Eeles – Stage 2

- If stage 1 does not provide enough, can judge confidently predict trial judge will allow larger capital sum?
- Must be satisfied **by the evidence** that there is a **real need** for the IP



# Managing claims for accommodation

- In some cases, it is possible to secure a sufficient sum at Stage 1 but more usually Stage 2 comes into play
- Have to show real need for the money now (can't wait for trial)
- Amount requested is reasonable
- Involves scrutiny of the claimant's choice of property
- But not required to decide particular house is reasonable
- Evidence – evidence – evidence!

# Which comes first?



Finding the house



Obtaining the interim payment

# Do you look for the house before you have the I.P.?

- This can be a Catch-22
- C finds the “perfect” house but purchase falls through because funds can’t be secured in time
- Or the I.P. is secured but no available property can be bought and adapted with the money in the pot
- It is not essential to have a particular property in mind – award will be based on a reasonable sum – but do consider the evidential presentation based on a hypothetical
- One option is to make use of the rules about service of evidence to allow the application to evolve and then present a finalised position shortly before the hearing

# The basis of the award

- The hypothetical reasonable house – **Kirby v Ashford & St Peter's Hospital** [2008] EWHC 1320 (QB) where Swift J accepted that there was a reasonable need for a property to be purchased before trial but was not satisfied that there was a real need to purchase the property identified by C
- The actual reasonable cost of an available property – **Farrell v Salford Royal Foundation NHS Trust** (2014) where Parker J rejected hypothetical evidence from an “armchair expert” and looked at the actual cost based on what was available
- The fall-back? – it can be useful to have a fall back position – but that can't come too late – **Crispin v Webster** [2011] EWHC 3871 (QB)

# Rental v Purchase in the interim phase

- Defendants may present as an option (**Mabiriizi v HSBC Insurance** [2011] EWHC 1280) – often without evidence of available rental accommodation
- Judge may decide it is an option
- May be able to show it is not (**Oxborrow v West Suffolk Hospitals NHS Trust** [2012] EWHC 1010 (QB))
- See **AC v St George's** – Whipple J at para 25 (no reported case where C has been required to rent rather than buy)
- Claimants may want to rent as a “trial run” (**Sedge v Prime** 25th April 2012) or as a stop-gap to get out of hospital

# Evidence for I.P. For a House

- Expert evidence
  - Need for new accommodation
  - Home v residential
  - Cost of accommodation
  - Life expectancy?
- Lay (family) evidence
  - Difficulties in current accommodation
  - How accommodation search was approached
  - Why new property is reasonable

# The lay evidence

Statement from C's solicitor	Statement from C
<p>“The Claimant’s existing home is not suitable and he and his family are living in cramped conditions. I submit it is not reasonable for him to be expected to wait until after trial to buy a new property.”</p>	<p>“Since my injury I feel I have lost my dignity. To give an example, I cannot access any toilet facilities and my bowel care is managed in the family dining room. My sister once walked in while this was happening and I felt humiliated. I am absolutely desperate to move and feel my life will be on hold until I am living somewhere more suitable.”</p>

Which is more likely to persuade a judge?!

# Encouraging signs from the recent cases

- **Moore v Plymouth NHS Trust** [2013] EWHC 3193 (QB) – Stuart-Smith J unimpressed by D’s late attempt to introduce causation & life expectancy arguments – D’s figures to be treated as an “irreducible minimum”
- **Smith v Bailey** [2014] EWHC 2569 (QB) Popplewell J holding evidential burden in relation to contributory negligence at the interim payments stage rests on D
- **Sellar-Elliott v Howling** [2016] EWHC 443 (QB) – D advancing case of causation but had served no evidence – Sweeney J accepted entitled to keep powder dry but Master right to determine application on available evidence

# Developing a Strategy

- Start thinking about an I.P. from day one
- Will you get one? How?
- How does this impact on the case strategy?
- What work will be needed?
- Remember the qualifying requirements & think about timing
- Address the issues with good evidence
- Think about proportionality
- Route-map the case alongside the I.P. Application
- Encourage cooperation but do not fear a contest

# A sensible approach

- Engage with D – consider a meeting – what evidence do they need to allay concerns?
- Invite early involvement of D's expert & display willingness to consider all options
- Document attempts to cooperate – if collaborative approach does not work this can evidence the reasonableness of C's position at a contested hearing
- Do not draw back from making the application even if negotiations are ongoing – don't lose sight of the urgency & think about the time needed for listing

# The end result



# Thank You!

If you would like a copy of my paper “**Interim Payments: Dealing with applications in the post-Eeles era**” please leave your email address or email me

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