



JUDICIARY OF
ENGLAND AND WALES

THE HONOURABLE MRS JUSTICE SWIFT DBE

Summary of Judgment

- 1 The case of *RH* was one of the original ‘test’ cases on the issue of the indexation of periodical payments. The periodical payments order in *RH* was made by Mackay J in July 2007 and was subsequently modified slightly at a hearing before Sir Christopher Holland in December 2008. Since then, the “model order” based on Sir Christopher’s modified order in *RH* has been used in every case involving the National Health Service Litigation Authority (NHS LA) in which a periodical payments order for care and case management has been made. To date 643 such orders have been made.
- 2 Periodical payments for care and case management in cases involving the NHS LA are index-linked by reference to the Annual Survey of Hours and Earnings (ASHE) 6115 published by the Office for National Statistics (ONS). The model order contains formulae based on the ASHE 6115 data to be used when calculating the annual increase in the periodical payments to be made to a claimant.
- 3 In 2010, the ONS changed its methodology, as a result of which certain data which were required to calculate the increases in the periodical payments payable to claimants in December 2012 were not available to the NHS LA. Periodical payments were made on the basis of the data that were available and claimants/Deputies were informed that balancing payments would be made, if appropriate, once the problem caused by the missing data had been solved.

- 4 With the assistance of the three experts who had been instructed for the claimant and the defendant in *RH* and other “test” cases and who had both been involved in the development of the model order, the defendant/NHS LA succeeded in identifying a solution to the problem of the missing data. That solution and the proposed amendments to the order in *RH* (which amendments are to be replicated in the model order) have been carefully considered by the experts, together with solicitors and leading counsel, and are agreed by the parties in *RH*.
- 5 I am entirely satisfied that the proposed solution is fair and reasonable and will achieve justice as between the parties. I am satisfied also that the proposed amendments are both necessary and appropriate to meet the problem which has arisen in giving effect to the existing order.
- 6 It is the NHS LA’s intention to use the amended model order in all future cases where periodical payments orders for care and case management are made. It is also necessary that the amended provisions should be applied to all cases involving the NHS LA in which there are existing periodical payments orders for care and case management so as to enable the periodical payments made in December 2012 to be recalculated and any balance owing to claimants to be paid, and also so as to ensure that there is a process in place to deal with any similar problems that might arise in the future.
- 7 I would strongly encourage all claimants and Deputies in cases with existing periodical payments for care and case management to accept the NHS LA’s proposal that the amended provisions of the model order should be applied to their case. Whilst

it is open to an individual claimant or Deputy to object to that course and to contend that the problem that has arisen should be solved in some other way, he/she should be aware of the implications of doing so. If an objection is raised, the claimant or Deputy will have to be prepared to demonstrate, to the satisfaction of a Court and on the basis of sound expert evidence, circumstances such as:

- a) the existence of some technical or other flaw in the solution that has been adopted in the case of *RH* which has gone undetected and will affect the future operation of the model order; and/or
- b) an alternative proposed solution to the problem of the missing data which has very significant advantages over the solution adopted in *RH* such that a further amendment to the model order would be just and proportionate; and/or
- c) some specific feature of the claimant's case that makes the solution adopted in *RH* unworkable.

In the event that the objection is dismissed, the claimant will be at risk of paying the costs of what may have been a very expensive exercise.

9. The NHS LA proposes to write to the claimant or Deputy in every case in which the NHS LA is involved and where there is an existing periodical payments order for care and case management:

- a) identifying the problem that has arisen and explaining the way in which it intends to solve it;
- b) enclosing and explaining the revised calculation and the financial consequences for the claimant ;
- c) enclosing a copy of the amended model order, with track changes so that the amendments can be clearly seen; and
- d) informing him/her that the NHS LA intends to apply the provisions of the amended model order to the claimant's case in the future unless, within 28 days of receipt of the letter, the claimant or Deputy gives notice in writing to the NHS LA's solicitors that he/she disagrees with the proposed solution and/or the amendments to the order, setting out his/her proposed alternative solution, together with any relevant calculation(s) and/or proposed technical adjustments.

- 10 The proposals set out above do not of course apply to cases in which periodical payments orders for care and case management have been made and the NHS LA is not involved. I am told that there are many such cases currently in existence. The compensators in those cases include government and public bodies, insurers, the Motor Insurers' Bureau and Lloyd's syndicates. I am told that the form of periodical payments orders used in non-NHS LA claims varies, some being based on the NHS LA's model order and others not.
- 11 I would urge compensators in all cases where a periodical payments order for care and case management has been made and the NHS LA is not involved to review the terms of their existing order(s) and, in the event that the terms of the orders require it and the same problem of calculation arises, to seek acceptance by claimants and Deputies to amendments similar to those which have been made to the NHS LA model order.