INTERIM PAYMENTS

Dealing with applications in the post-Eeles era

by

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Introduction

1. Benjamin Eeles sustained serious brain injury in an accident in 1997 when he was just 9 months old. As time passed, the resulting difficulties became apparent and his family decided that they would have to move to meet Ben's increasing needs. In 2008, a substantial property in the village in which they lived came onto the market. "Brightlingsea Hall" was a former hotel with nine bedrooms and a bungalow in the grounds. Ben's mother saw this as a unique opportunity and decided to press for an interim payment of £1.2 million to fund its purchase and adaptation. In doing so, she probably did not imagine how well known Ben's name would become within the field of catastrophic injury litigation. Since the Court of Appeal handed down their judgment in **Cobham Hire Services Limited v Eeles** [2009] EWCA Civ 204, personal injury practitioners have become very familiar with Ben's case. The judgment certainly shook up practice in relation to interim payments. To quote His Honour Judge Bullimore in the case of **Mollie Johnson v Chesterfield & Derbyshire Royal Hospital NHS Trust** (Lawtel), 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"*. That is no longer the case. Obtaining a substantial interim payment post-Eeles requires careful preparation and detailed forensic analysis. However, this is no bad thing. Careful attention to interim payments lessens the risk of wasted expenditure and encourages well-directed preparation at an early stage. Large interim payments are still available and can be obtained by grasping the issues and gathering the appropriate evidence.

2. Interim payment applications can have wider importance in the litigation. They can allow for some testing of the evidence, giving both sides greater confidence about any settlement. Sometimes, the way an interim payment application is handled can set the scene for the rest of the litigation. I have experience of a case where final settlement was achieved remarkably easily after something of a battle over interim payments. Careful

preparation of the application on both sides narrowed the issues and led to greater cooperation between the parties so that the remainder of the litigation ran smoothly. Successful management of any large claim involves early strategic consideration of interim payments. Post-Jackson, it has become all the more important to front-load preparation and to have a "route map" for the case. Attention to an early interim payment can assist in this.

3. The need for a pro-active approach to interim payments can be demonstrated by two post-Eeles cases. **Megumi Wilson v Dummett & MIB**, a decision of HHJ Seys-Llewellyn QC, 27.5.2011 (Lawtel) shows just how important an interim payment can be for a catastrophically injured person. In that case, the grievously injured claimant (a young woman left tetraplegic and "locked in" but retaining full capacity) was desperate to be discharged from hospital but could not achieve that without an interim payment. The judge observed that *"she has been in hospital, other than the sum of four days, for five years of her 25-year life"*.

4. There can be a tendency to delay making an application (perhaps while attempting to secure a voluntary payment) until funds have run out. This is a dangerous tactic as the judgment in **Kirby v Ashford & St Peters Hospital NHS Trust (No. 2)** [2011] EWHC 624 warns. This was a second application following an earlier contested application in the same case which was heard by Swift J in 2009 (although the citation is [2008] EWHC 1320). On this occasion, His Honour Judge Robinson reluctantly ordered a further interim payment where money had already been committed to expenditure which could only be met by capitalising future loss. The judge had this to say:

"In the event, this court has found itself in a position of being held hostage. On this occasion the court has bailed out the claimant. Future applicants should take heed that the court may not look so benevolently on what are in effect retrospective applications for approval of decisions to spend money which has not yet been awarded."

Interim payment applications need to be anticipated and worked towards. I am very much in favour of a consensual approach but pro-active management requires disciplined preparation and it is this which often unlocks cooperation from the other side.

The framework for interim payments

5. CPR Part 25.6 makes general provision for applications for interim payments and CPR Part 25.7 sets out the conditions to be satisfied and matters to be taken into account when the court is considering whether to order an interim payment.

Procedure – CPR 25.6

6. 25.6(1) – the claimant may not apply for an order for an interim payment before the end of the period for filing an acknowledgment of service.

   25.6(3) – the application notice must be served at least 14 days before the hearing and be supported by evidence.

   25.6(4) – the respondent must serve written evidence on which he wishes to rely at least 7 days before the hearing.

   25.6(5) – if the applicant wishes to rely on further evidence in reply, he must serve it at least 3 days before the hearing.

7. Interim payment applications may involve a judge predicting what the trial judge is likely to do. For this reason, a contested hearing for a substantial sum such as that needed to buy a property should be listed before a High Court Judge. My advice is to make the application as soon as the need for an interim payment is identified. It can be supported by a very brief statement within the application notice. The necessary evidence can then be prepared while waiting for the hearing date and served not less than 14 days before the hearing.

Conditions to be satisfied and matters to be taken into account – CPR 25.7

8. 25.7(1) – The court may only make an order for an interim payment where
   (a) the defendant has admitted liability
   (b) the claimant has obtained judgment for damages to be assessed
   (c) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money against the defendant against whom an interim payment is sought.
   (e) in a claim against which there are two or more defendants and an order is sought against one or more of those defendants, the court is satisfied that if the claim went to

trial, the claimant would obtain judgment for a substantial amount of money against at least one defendant (even though it cannot determine which) and all the defendants are insured, covered by compulsory motor insurance or a public body.

It is important to note that these are qualifying conditions and that if the claimant cannot bring himself within them, the court has no power to order an interim payment. Part of the strategy on the claimant's side must therefore involve securing an admission, seeking summary judgment or proceeding to an early split trial to open up the court's discretion to award of interim payments.

9. The Court of Appeal considered the provisions of CPR 25.7(1)(e) in **Berry v Ashtead Plant Hire Co & others** [2011] EWCA Civ 1304. The reference to all the defendants being insured applies to the defendants against whom an order for an interim payment was sought. It did not matter that there was also another defendant who was not insured provided at least one of the defendants joined in the application would be liable and all those defendants were insured. However, the application failed on its merits as the case was not so strong as to justify summary judgment against one or other defendant.

10. CPR 25.7(5) - "The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment."

The law before Eeles

11. Before the amendment of the Damages Act 2003 and the advent of Periodical Payments Orders, the position was fairly straightforward. The court would look at the valuation of the claim from both sides in a broad and general way, assess the merits of the application and, even if erring on the side of caution, grant applications for sizeable interim payments in many, if not most, cases. There were two widely cited cases. **Stringman v McArdle** [1993] 1 WLR 1653 was authority for the basic rule that a claimant should be paid his or her damages as soon as may reasonably be done and that the Court was not concerned with what would be done with the money. Accordingly, where the threshold conditions were satisfied and the sum sought was no more than a reasonable proportion of the claim, an interim payment would generally be ordered.

12. The Stringman principle was modified to some extent by **Campbell v Mylchreest** [1998] P.I.Q.R. P20, which established the "level playing field argument", allowing defendants to argue that an interim payment should not be made because it was contended that the use which a claimant intended to make of an interim payment might prejudice the fair conduct of the trial in some way. This argument may still be advanced post-Eeles (see **Brown v Emery** [2010] EWHC 388 (QB)). For an interesting view on the level playing field argument, see **Megumi Wilson v Dummett & MIB**, a decision of HHJ Seys-Llewellyn QC, 27.5.2011 (Lawtel) in which the judge concluded that if the interim payment was ordered and was tailored in such a way as to achieve an effectively empty pot at trial the trial judge would face a clean sheet so that the level playing field would not be affected.

The impact of PPO's

13. With the advent of PPO's, defendants began arguing that a large interim payment could not be made where this might impact upon a PPO and potentially fetter the trial judge's discretion as to the form of the award. Mrs Justice Swift accepted such an argument in **Mealing v Chelsea & Westminster NHS Trust** [2007] EWHC 3254 (QB). Another decision on this point was that of Mr Justice Stanley Burnton (as he then was) in **Braithwaite v Homerton University Hospitals NHS Foundation Trust** [2008] EWHC 353 (QB). The Court of Appeal in Eeles specifically approved Stanley Burnton J's approach.

Cobham v Eeles – the guidance in detail

14. First, it is important to note that Eeles will not apply to every application for an interim payment. It is worth noting the words of Lady Justice Smith in the first paragraph of her judgment:

"This appeal raises the question of what is the correct approach to the making of an interim payment in a heavy personal injury claim where the damages, when finally assessed, are likely to include one or more periodical payments orders pursuant to section 2 of the Damages Act 1996 as amended by the Courts Act 2003."

In **Preston v City Electrical Factors** [2009] EWHC 2907 (QB), Walker J accepted my argument on behalf of the Claimant that the final award of damages was unlikely to include a PPO. Eeles therefore did not apply. However, it should be assumed that in most serious injury cases, a PPO will be up for consideration. It is not sufficient merely to point to a deduction for contributory negligence for example as a ground for saying that a PPO will not be made (see **Harry Brown v Guy's & St Thomas' NHS Foundation Trust** (2011) Med LR 387 for an example of the argument failing on that basis).

15. Smith LJ concluded her judgment by summarising the approach to be taken "in a case in which the trial judge may wish to make a PPO" and I quote paragraphs 43 to 45 in full:

"43. The judge's first task is to assess the likely amount of the final judgment, leaving out of account the heads of future loss which the trial judge might wish to deal with by PPO. Strictly speaking, the assessment should comprise only special damages to date and damages for pain, suffering and loss of amenity, with interest on both. However, we consider that the practice of awarding accommodation costs (including future running costs) as a lump sum is sufficiently well established that it will be usually be appropriate to include accommodation costs in the expected capital award. The assessment should be carried out a conservative basis. Save in the circumstances discussed below, the interim payment will be a reasonable proportion of that assessment. A reasonable proportion may well be a high proportion, provided that the assessment has been conservative. The objective is not to keep the Claimant out of his money but to avoid any risk of over-payment.

44. For this part of the process, the judge need have no regard to what the claimant intends to do with the money. If he is of full age and capacity, he may spend it as he will; if not, expenditure will be controlled by the Court of Protection.

45. We turn to the circumstances in which the judge will be entitled to include in his assessment of the likely final amount of the final judgment additional elements of future loss. That can be done when the judge can confidently predict that the trial judge will wish to award a larger capital sum than that covered by general and special damages, interest and accommodation costs alone. We endorse the approach of Stanley Burnton J

*in **Braithwaite**. Before taking such a course, the judge must be satisfied by evidence that there is a real need for the interim payment requested. For example, where the request is for money to buy a house, he must be satisfied that there is a real need for accommodation now (as opposed to after the trial) and that the amount of money requested is reasonable. He does not need to decide whether the particular house proposed is suitable; that is a matter for the Court of Protection. But the judge must not make an interim payment order without first deciding whether expenditure of approximately the amount he proposes to award is reasonably necessary. If the judge is satisfied of that, to a high degree of confidence, then he will be justified in predicting that the trial judge would take that course and he will be justified in assessing the likely amount of the final award at such a level as will permit the making of the necessary interim award."*

Eeles in operation

16. The impact of Eeles can be seen in High Court decisions such as **Kirby v Ashford & St Peter's Hospital** [2008] EWHC 1320 (QB) *[citation is 2008 although actually decided 3.4.09]*, a decision of Mrs Justice Swift and **Chrissie Johnson v Compton-Cooke** [2009] EWHC 2582 (QB), Mr Justice MacDuff. At paragraph 23 of his judgment, MacDuff J sets out the correct approach following Eeles in an easy to read format:

- *Assess the likely amount of the final judgment leaving out of account those heads of damage which the trial judge might want to deal with by a periodical payments order. This should comprise special damages to date, damages for pain, suffering and loss of amenity, and (usually) an estimated award for accommodation costs to include future running costs. This assessment should be carried out on a conservative basis.*
- *Save in circumstances set out below, the interim award would be a reasonable proportion of that assessment – even a high proportion if the assessment had been truly conservative, the object being not to keep the claimant out of his money but to avoid the risk of overpayment. For this part of the process there was no need to have regard to what the Claimant wished to do with the money; if he was sui juris, it was no one's concern. If he was a patient the expenditure would be controlled by the Court of Protection.*

- *There could be a second phase to the exercise. Where the Court could "confidently predict" that the trial judge would wish to award a larger capital sum than that covered by general damages, special damages, interest and accommodation costs, those additional capital elements could be brought into the assessment.*
- *However, before taking into account these "second phase" heads of damage the court should be satisfied to a high degree of confidence that there was a real need for the interim payment requested. The court would then be justified in predicting that the trial judge would make those additional capital awards, and the assessment could then take account of those anticipated awards, so as to permit the making of the necessary interim award.*

17. The case of **FP v Taunton & Somerset NHS Trust** [2011] EWHC 3380(QB) came back before the courts for a second contested interim payment application in December 2011. Hickinbottom J rejected submissions made on behalf of the Claimant that **Eeles** did not apply in cases where there may be an inevitable shortfall in the capital sum compared with needs, or where the claimant can show a real and immediate need. He found that it was still necessary to go through the 2-stage process, saying:
"Eeles requires a disciplined and structured approach to interim payments that ensures that 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."

The difficulty in managing an accommodation claim at the interim stage

18. Before Eeles, a claimant was able to secure an interim payment to purchase the property of his choice. All that was necessary was to show that the claim was of high value overall and the claimant would be awarded a large interim payment to do as he wished with it. Defendants might argue that granting the interim payment and allowing the claimant to purchase a property they considered to be unsuitable would "slant the level playing field". Generally, courts were persuaded that it was up to the claimant to decide what property to purchase; they would do so knowing that ultimately the trial judge might not allow the full cost but it was the claimant's money and he was entitled to run

that risk. In any event, the money was going into a capital investment and so would not be "lost".

19. Post-Eeles, there is far greater scrutiny of the claimant's choice of property when an interim payment is sought for accommodation. The Roberts v Johnstone method of calculation means that there will always be a shortfall between the sum recovered and the true cost of property. If there is then also a dispute about the reasonable cost of a property, the judge at the interim stage may be persuaded to use the defendants' figures for the purpose of a conservative estimate. Allowing for other interim needs to be met, the probability is that there will not be enough in the "pot" at the first stage to award a sufficient sum for the claimant to buy his property of choice. The judge then has to enter the second stage of Eeles and consider whether it can be predicted with a high degree of confidence that the trial judge will capitalise a further sum. Generally, where there is a need for accommodation, the judge will accept that a capital sum will be allowed for purchase and adaptation of a property. However, how much will that capital sum be? The judge can be highly confident that it will not be less than the sum based on the defendants' evidence but it may be difficult at the interim stage for the judge to be confident that the claimant's evidence will prevail. Defendants used to complain that claimants were able to purchase a property of their choice, do work to it and establish a status quo, making it unlikely that the trial judge would then reject their choice as unreasonable and prefer the defendants' evidence. The risk is that claimants will now be faced with a choice of buying a property deemed to be suitable by the defence expert or sitting it out in unsuitable accommodation until trial.

20. In **Kirby v Ashford & St Peter's Hospital** [2008] EWHC 1320 (QB), Swift J accepted that there was a reasonable need for a property to be purchased before trial and that the trial judge would make a capital award to cover the reasonable costs of such accommodation but she was not satisfied that there was a real need to purchase the property identified by the claimant or one of comparable size and price. She did order an interim payment at a lower level so that if a suitable property became available before trial it could be purchased and a care regime established.

21. In **Griffin v Ponsonby** [2013] EWHC 3410 (QB), the defendant produced a draft accommodation report the day before the hearing proposing cheaper alternatives to the claimant's expert's proposals. It is clear from the judgment that the judge (Mrs Justice Andrews) took a very cautious approach generally and was concerned about eh risk of over-compensating the claimant at the interim stage. She said at paragraph 19:
"Taking into account what the Court of Appeal has said, which is that the objective is not to keep the claimant out of his money but to avoid any risk of overpayment, it seems to me that the only appropriate approach in a case such as this, imperfect as it is, is to take as the starting point the bottom line figure of the defendant's expert…."

22. However, There are cases where the judge hearing the interim payment is able to confidently predict that the sum sought by the claimant is the amount a trial judge would allow, notwithstanding that the defendant puts forward expert evidence to suggest a cheaper property would be appropriate. An example is the decision of Mr Justice Kenneth Parker in **Farrell v Salford Royal Foundation NHS Trust**, 12th December 2014 (unreported but a copy of the judgment can be supplied on request).

23. Mrs Farrell had been left tetraplegic as a result of clinical negligence. She and her husband lived in a small house which was plainly unsuitable for her. All the experts agreed she needed to move as soon as possible. She had received an interim payment of £500,000 and sought a further one of £750,000. The defendant responded to the application for an interim payment by producing a miserly and unrealistic Counter-Schedule and suggesting that the sum sought was far more than the lump sum likely to be allowed. The parties' respective accommodation experts had given their views as to the likely purchase price of a suitable property. There was some overlap between the bottom of the claimant's expert's range and the top of the defendant's. The defendant suggested that the court should take the mid-point of its expert's range as the reasonable sum for the purpose of a conservative assessment. The claimant had carried out an extensive property search over a period of 18 months. She had experienced a difficult situation when she lost out on a property due to not having funds available. She had

finally found one suitable property costing just above the top of the defendant's expert's bracket but within that suggested by her own expert. Evidence placed before the court detailed the efforts made to find a suitable property and gave specific reasons why other cheaper properties had been rejected. The judge agreed that the claimant should have the funds to purchase the property she wished to. The reality was that there were no suitable properties currently available in the price range indentified by the defendant's expert, whom the judge described in the course of the hearing as an "armchair expert" as he had expressed a view on the likely purchase price without taking the steps the claimant's expert had to properly research what was currently available. We had repeatedly invited the defendant to meet to discuss accommodation or to ask the defence expert to assist in the search but such offers had not been taken up. The case demonstrates that defendants will not be able to defeat proper applications simply by putting forward unsupported alternative figures. Judges will be prepared to look behind defendants' figures provided there is a sufficient evidential basis for them to do so.

24. It is also important to consider the alternative of a lesser interim payment before it is too late. Haddon-Cave J declined to make any interim payment for accommodation in the case of **Crispin v Webster** [2011] EWHC 3871 (QB) where the application had been presented on the basis of one particular house. At the interim stage, he was unable to say with the required degree of confidence that house would be reasonable. The application had effectively been put on an “all or nothing” basis although at the end of the hearing Counsel invited the judge, if against the claimant on her primary case, to order a lesser sum to allow her to “consider her options”. The judge effectively found that secondary case had come too late and that the claimant would have to make a fresh application if it was to be pursued. In **Farrell**, we considered carefully whether a lesser sum could be made to work, concluding that the sum sought really was the minimum required to allow the claimant to move before trial. The exercise of considering a lesser sum strengthened our presentation as we were able to demonstrate the analytical approach required by **Eeles**.

25. A particularly difficult situation may arise where there is a dispute as to whether a claimant should be cared for at home or in a residential placement. An application failed in **Jessica Brown v Emery** [2010] EWHC 388 because the court refused to take account

of the costs of private accommodation, there being a dispute as to whether that was the appropriate way to meet the claimant's needs. Reading the judgment, it is clear that the application failed on the evidence, which was described by the judge as *"not particularly cogent"*. Perhaps more significant is the case of **Mabiriizi v HSBC Insurance** [2011] EWHC 1280. In that case, the claimant who was in a low awareness state had been discharged home but it was agreed that the family home was wholly unsuitable for his needs. The defendant argued that he should be transferred to a suitable residential placement. That was hotly disputed on behalf of the claimant. Mrs Justice Sharp (as she then was) declined to award the cost of purchasing a suitable property at the interim stage, despite expressing concern that this would leave the claimant in "unsuitable accommodation for an uncertain period". She thought it more appropriate for the claim to be directed towards an early conclusion so that the substantial issues between the parties could be tried. The decision may also have been influenced by the defendants' assurance that they would fund the cost of appropriate rental accommodation in the interim.

26. In **Sedge v Prime** (25th April 2012, Lawtel), the Claimant succeeded on an application based upon the cost of rental accommodation to enable a "trial run" of care in a home setting. It is notable that the Claimant chose to put the case that way. John Leighton Williams QC did say that this decision was not to be regarded by Claimant's solicitors as encouraging trial runs of community care at insurers' expense.

27. By contrast, in another case decided in the same week (**Oxborrow v West Suffolk Hospitals NHS Trust** [2012] EWHC 1010 (QB)), Tugendhat J rejected what I regard as a rather disingenuous argument by the defendants that a capital sum should not be allowed for housing as the claimant's long term needs could be met by renting. They produced no evidence on the application. They also relied upon the proximity to trial although it was quite clear the claimant's representatives had done all they could to press the interim payment and that there was delay on the defendants' part. More recently, Mrs Justice Whipple noted in **AC v St George's Healthcare NHS Trust** [2015] EWHC 3644 (QB) that *"there is no precedent to support the case for renting as an alternative to*

purchase of accommodation for severely injured claimants. The court in ***Smith*** *recognised that in no reported case to date has any Claimant been* <u>*required*</u> *to rent rather than buy".* [The reference is to **Smith v Bailey** – cited below.]

28. **Mabiriizi** appears to have been fairly well evidenced. However, that is not to say that an application for an interim payment to purchase property can never succeed where there is a real dispute in principle as to where the claimant should be cared for in the long term. Evidence may clearly demonstrate that there is no realistic alternative to private accommodation. If that is the case, why would the defendants then want to fund rental of temporary accommodation? That would be wasted expenditure. This is a situation where the parties may wish to cooperate and think sensibly about cost effective ways to meet the claimant's needs pending the trial. In some cases, I have had "interim settlement meetings" to deal with the accommodation issue. The opportunity for both sides to discuss the evidence and any concerns can be extremely useful and avoid the need for an expensive contested hearing.

29. What is clear is that it is now necessary to grasp all the issues relevant to an accommodation claim at the interim payment stage. Good evidence is required. For example, claimants should serve statements from the family detailing the huge difficulties faced in the existing accommodation, how the search for property has been approached and why the particular property is reasonably required. The expert evidence must be firmed up. It may be necessary to demonstrate that the other side's expert has taken an unreasonable view. For a claimant to succeed what is essential is to establish the very real need for accommodation and that the family cannot be expected to wait until after trial. Urgency is an important aspect. See the case of **PZC v Gloucestershire Hospitals NHS Trust** [2011] EWHC 1755 which failed because the judge was not satisfied that the need for accommodation was so urgent that it could not wait until after the outcome of the trial.

30. A comment from the insurance side described the Court of Appeal's judgment in **Eeles** as:

"a welcome decision which we hope will halt the inexorable rise in substantial interim payment awards in high value clinical negligence and personal injury claims. Where a claimant is awarded a large interim payment, there is always a danger that it will be used to purchase an inappropriate property or initiate an unnecessarily expensive care regime, which will then be difficult to argue against at trial."

I believe this is fair comment. There are good reasons on both sides why a claimant should not purchase an inappropriate and overly expensive property. Equally though, a claimant should not be prevented from buying an entirely appropriate property or forced into committing to one that does not fully meet his needs simply to secure something before trial.

Ways around Eeles

31. The cases reported since Eeles highlight a number of arguments open to claimants.

(i) A reasonable proportion of the likely final award may be a high proportion: **FP v Taunton & Somerset NHS Trust** [2009] EWHC 1965 (QB). The capital sum was taken to include loss that would accrue between the date of the application and the trial and was then just sufficient to cover the interim payment sought. Blair J allowed the application on the basis that provided the estimate was a conservative one a reasonable proportion might be a high one. In **Harry Brown v Guy's & St Thomas' NHS Foundation Trust** (2011) Med LR 387, 90% of the capitalised sum was said to be a reasonable proportion. Other cases have adopted that percentage, see **AC v St George's Healthcare NHS Trust** [2015] EWHC 3644 (QB) where Whipple J reviewed similar cases and also allowed 90% as a reasonable proportion.

(ii) The case is an exceptional one: **Mollie Johnson v Chesterfield & Derbyshire Royal Hospital NHS Trust** (Lawtel). Before Eeles, the claimant had been awarded an interim payment of £700,000 and had purchased a property. A further interim payment was sought to allow its adaptation. HHJ Bullimore acknowledged that post-Eeles, the original sum would probably not have been allowed but found that the situation was now a "desperate one". The property had been purchased but was standing empty while the claimant and her family

continued to live in unsuitable accommodation. The judge found that the property having been purchased, the trial judge was likely to allow a further lump sum for the purpose of adaptations and ordered a further interim payment of £200,000.

(iii) The effect of a finding of contributory negligence means that a higher percentage is likely to be awarded by way of lump sum so that the judge can confidently capitalise other heads to meet a need for accommodation: **Russell v Partington** (Irwin J, 23.10.09, Lawtel).

(iv) Eeles does not apply on the facts of the case because a PPO is never likely to be made: **Preston v City Electrical Factors** [2009] EWHC 2907 (QB). In that case, contributory negligence had been agreed at 50%. There was a significant dispute on quantum. The claimant had a care regime in place and required a further interim payment to continue with it. On the defendants' figures, there would have been virtually no lump sum left after deduction of previous interim payments. That could never be in the claimant's best interests; therefore the judge could confidently predict that the trial judge would not want to make a PPO. Note it was not sufficient simply to point to the 50% deduction; a detailed analysis of the defendants' figures was required.

The current climate: is the tide turning?

32. As the impact of **Eeles** was felt, it appeared that judges were perhaps less inclined to order substantial interim payments than before. However, there have been a number of recent cases (in addition to **Farrell**, above) which suggest that judges are not being blinded by attempts by defendants to defeat proper applications with unsubstantiated assertions. In **Moore v Plymouth NHS Trust** [2013] EWHC 3193 (QB), Mr Justice Stuart-Smith appears to have been fairly unimpressed with the defendant's attempt late service of medical evidence upon which they relied to assert that life expectancy was significantly reduced and that the case should be approached as an acceleration of damage case. Although prepared to accept that these were issues for trial, the judge took a sensible view looking behind the defendant's evidence and concluding that in the circumstances the figures put forward by the defendant at the interim stage were to be

treated as an "irreducible minimum". On that basis, he ordered the interim payment sought since it could (just) be accommodated within the defendant's figures.

33. Likewise, Mrs Justice Whipple was unimpressed by the defendant's position in **AC v St George's Healthcare NHS Trust,** where it is clear strong evidence had been presented by the claimant. The defendant argued that the claimant should rent until trial and that the trial judge could then consider the appropriate model for accommodation. It was also argued that the defendant as disadvantaged as it had not had time or permission to obtain much quantum evidence. The judge rejected this, saying that the issue was a narrow one going to the claimant's reasonable accommodation needs and, given that the defendant had bene alerted tot eh application eight months earlier, there had been a reasonable amount of time for the defendant to put in hand its own investigation of the accommodation issues.

34. In **Smith v Bailey** [2014] EWHC 2569 (QB) Popplewell J upheld an interim award made by a Master. The defendant had raised contributory negligence and suggested that at the interim payment stage the burden was on the claimant to establish the amount he was likely to recover after taking account of the possibility of contributory negligence. Upholding the Master, the judge held that on an interim payment application there was an evidential burden on the defendant to put before the court material raising an issue of contributory negligence. In other words, defendants will not be able to defeat applications simply by asserting that there might be a finding of contributory negligence without a proper evidential basis for that.

35. A similar approach was taken in relation to causation issues in **Sellar-Elliott v Howling** [2016] EWHC 443 (QB). Mr Justice Sweeney dismissed an appeal against an interim payment order. In doing so, he considered the position where a defendant was advancing a positive case on causation but had not served evidence in support of her case in advance of the interim payment hearing (as the time for service of evidence within the litigation had not been reached). The judge held that CPR 25.6 made it clear that there was no obligation on either party to file supporting evidence; there was simply

an option to do so. The court would always be alert to the possibility of an interim payment application being made for an improper purpose and would deal with it accordingly, but there was nothing improper about the application in the instant case. The patient had served supporting evidence and the doctor, as was her right, had chosen only to serve limited evidence in response. The master had been right to find that he should decide the application on the evidence before him. It was also clear that, on that evidence and in the absence of anything to the contrary from the doctor, the master had been entitled to find the patient's expert evidence compelling and sufficient to satisfy CPR 25.7(1)(c), recognising the apparent strength of the patient's evidence and recognising the need for some contrary reasoning if he was to be persuaded otherwise.

36. In **Barrett v East and North Hertfordshire NHS Trust** [2014] EWHC 416, Mrs Justice Swift had to consider defence arguments that the purchase of a property should not be allowed at the interim stage. It was contended that there was an issue as to whether it was in the claimant's best interests to move out of a care home into his own property. Swift J examined the evidence carefully, placing particular reliance on the evidence of those who knew the claimant well and who had seen his reactions to his current regime and the idea of an alternative arrangement. This is another illustration of how judges can be persuaded to enter into a proper consideration of the evidence rather than simply accepting that arguments raised by defendants must be put off to the trial judge.

37. **Practical tips for interim payment applications**

(i) Think of the interim payment stage as a case within a case. As with any case the quality of the preparation and the evidence determine the outcome.

(ii) Start thinking about an interim payment at an early stage, well before needs become desperate.

(iii) Consider the qualifying conditions. Have they been met? Is liability in dispute? Primary liability must be resolved or at least clear before an application can be made. What could be done to deal with liability promptly? Might settlement discussions about liability and an interim prove fruitful for both sides?

(iv) Is seeking a substantial interim payment the right strategy for the particular case? In most catastrophic injury cases it will be but there are some cases (perhaps those with a real dispute about how accommodation should be managed or where there is split liability) where the better strategy might be to expedite trial.

(v) Engage with defendants as to what evidence would need to be produced to allay concerns about making an interim payment. When real cooperation exists between the parties, dealing with an interim payment application can offer an opportunity to scrutinise expenditure in a balanced way to ensure both sides are getting cost effective solutions.

(vi) Think about timing of the application and the time it will take to list it. Do not delay but ensure there is sufficient time to gather the necessary evidence. Think of the hearing as a "mini-trial".

(vii) It undoubtedly helps to have as full a Schedule as possible. Consider also producing another Schedule demonstrating a conservative estimate. The court will largely ignore the claimant's "best case" Schedule. Putting a conservative assessment before the court, with reference to both sides' evidence gives the court something other than the Counter-Schedule to work from.

(viii) The statement in support of the application is important and pays close attention.

(ix) Test the evidence as you would if preparing for trial.

(x) Ensure there is good clear evidence of real need if the application seeks any more than sums that will clearly be met from past loss and general damages.

(xi) Appreciate that how an interim payment application is handled can set the tone for the litigation. **Eeles** has reinforced the need for proper and careful preparation at the interim stage. Taking that approach will not only affect the application itself but will also get preparation in the case as a whole off to a good start.

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