

CONDITIONS IN PERIODIC PAYMENT ORDERS

By Lawrence West QC

*In the Case of **Brock v Rollinson** (Eady, J 13 June 2012), the Defendants made a Part 36 Offer to settle the claim of a protected Claimant which was comprised of a capital payment plus index-linked periodic payments. At the approval hearing, the Defendant insurers sought to have two provisions inserted in then Order- (1) a provision that the Insurers might satisfy their liability for periodic payments by purchasing an annuity and (2) a provision requiring the Claimant to submit to medical examination for that purpose. The first provision was not contested but the second was. Eady J dismissed the Defence application.*

SUMMARY

It is increasingly familiar that Defendants other than those represented by the NHSLA will seek to introduce into periodic payment orders provision for the private Insurer to satisfy their open-ended liability by purchasing an annuity subject to Court approval. There is at present no annuity product available on the market which would replicate the index-linked periodic payment liability. However, some Insurers nevertheless seek to leave open to them the possibility of capitalizing their liabilities at some time in the future. It matters little to the Claimant that such provision be made and therefore this provision is often agreed.

However, the Insurers seek to use the agreement of this term as justification for a provision for the Claimant to be required to submit himself to future medical examinations at the demand of the Defence for the purpose of the Insurer securing a quote for such an annuity. Where it matters to the Claimant to secure finality to the litigious process, the imposition upon him of such a condition may be highly objectionable.

In **OB v CB** (8 November 2010), Mr Justice Tomlinson was faced with such a Defence application and approved the inclusion of such a provision on the grounds that the provision was necessary to make workable the uncontested provision permitting the Insurers the right to secure an annuity should the market ever produce a suitable product.

In **Brock v Rollinson**, the Claimant, the victim of an RTA, suffered serious injuries as a result of which he developed a severe psychological illness which led him to withdraw

cooperation with consultants seeking to examine him. He was uninterested in the litigation or in securing any award of damages – he simply wished to be left alone. His Litigation Friend (his mother) was opposed to any form of order which might perpetuate the litigation in any way.

The Defendant made a Part 36 Offer on the eve of trial constituted by a capital payment plus yearly periodic payments for the Claimant's life, index-linked to ASHE 6115, 80th centile. This was accepted on behalf of the Claimant subject to Court approval.

Mr Justice Eady dismissed the Defendant Insurer's application for the insertion of a provision requiring the Claimant to submit to future medical examination for the purpose of securing quotes for suitable annuities even though the Claimant was prepared to agree to a provision that the Insurers might satisfy their liability for periodic payments by the purchase of an annuity. His Lordship referred to **OB v CB** but noted that Tomlinson J had explicitly stated that he had rendered his *ex tempore* judgment without the benefit of either skeleton arguments or authorities. He also noted the Claimant's argument that the imposition of such a condition would be in breach of the Claimant's rights under Article 8 of the European Convention on Human Rights (not raised in **OB v CB**) but stated that he did not need to decide that issue.

His Lordship stated that the Defendant's Part 36 Offer contained no condition either for the possible replacement of the periodic payments liability by the purchase of an annuity or for future medical examinations and that therefore the Defendant could not require the imposition of a condition for future medical examination over the Claimant's legitimate objections even though the Claimant did agree the first condition.

COMMENT

This application failed primarily because the Defendant had not made acceptance of the Part 36 Offer conditional upon acceptance of the condition of acceptance of future medical examination. Claimants must examine future Part 36 Offers with care to ensure that future offers are not amended in terms making the offer conditional upon agreement to such provisions. Also, if no such condition has been expressed, Claimants should be careful not to agree a term of the Order giving effect to the periodic payment element that the Defendant might satisfy its obligations by substituting with Court approval an annuity. In **OB v CB**, it was the Claimant's agreement to this provision which justified the imposition of the requirement for future medical examination.

If a condition is expressed by a Defence Part 36 Offer, the Claimant may be faced with a dilemma. If the Offer is accepted, the probability is that such conditions will be imposed in the Order. The Claimant might then respond with a Part 36 Offer in the same terms but without the conditions sought by the Defendant.

Finally, a condition sometimes sought by Defendants requiring submission to future examination for purposes of assessing the Insurer's reserve can never be justified.

For Insurers, given that there is no annuity product available to substitute for liability to periodic payments index- linked to ASHE, they must consider carefully the wisdom of insisting upon the inclusion of such conditions in circumstances where the risk is created of complicating the Part 36 system and of perpetuating litigation.

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