Neutral Citation Number: [2019] EWHC 202 (QB)

Case No: HQ18A01101

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 February 2019

Before :

MASTER THORNETT

- -

Between :

Mr GEOFFREY HOWARD

Claimant

- and –

THE IMPERIAL LONDON HOTELS LIMITED

Defendant

- -
- -

Mr Roussak (instructed by **Irwin Mitchell**) for the Claimant
Mr Vandyck (instructed by **Keoghs**) for the Defendant

Hearing date: 10 January 2019

- -

JUDGMENT

Master Thornett :

1. The Claimant, Mr Geoffrey Howard, suffers from malignant mesothelioma. This is a terminal cancer for which he was diagnosed in May 2017. Joint expert evidence is that the Claimant currently has a life expectancy of something between 3 to 6 months. The Claimant was born in December 1945 and so is now aged 73.

2. Judgment on liability was entered in June 2018 and the claim has proceeded to an assessment of damages hearing. Shortly before the trial, the parties agreed a lump sum of £230,000 to compensate General Damages and all heads of past loss, including past costs of the immunotherapy treatment the Claimant has been in receipt of since late July 2018. The treatment has comprised three weekly cycles of Pembrolizumab each at a cost of £4,536.75.

   The remaining and sole issue before me is the mechanism by which the Claimant's continuing costs of immunotherapy (for as long as such treatment is clinically recommended) should be ordered. The Claimant seeks an order that the cost is funded by way of Periodical Payments Order ("PPO"). The defendant denies that a PPO is the appropriate mechanism.

3. Neither counsel nor the court was aware of any reported decision where a claimant in an asbestos exposure claim has taken to trial a claim that future treatment be funded by way of a PPO and the defendant opposes this in principle.

4. The Defendant denies a PPO is the appropriate mechanism but is very clear on an open basis that it otherwise raises little to challenge or qualify the Claimant's entitlement to future funding for his current treatment. It agrees, and indeed waives privilege in asking the court to note that it had already offered in the days preceding trial, to pay for such further immunotherapy and chemotherapy as may be recommended by the Claimant's treating oncologist, either by paying directly for the same or indemnifying the Claimant for the cost. The Defendant similarly makes clear that should further or other treatment become available and is recommended by the Claimant's treating physician then that too will be agreed and paid for insofar as it is reasonable. In the hopefully unlikely event of disagreement, such dispute could be put before the court as part of an interim payment application.

5. This is not, therefore, a case where a claimant's very entitlement to claim the private costs of immunotherapy is challenged on the ground of, for example, it constitutes an unreasonable expense. Instead, the issue is whether the payment of such treatment should be by way of a PPO or by the court generally adjourning the trial of this head of loss in response to the Defendant's current offer and with a clear provision for the Claimant urgently to apply for interim payment(s) in the event of a dispute.

6. Because the Defendant's position concerns method of, rather than entitlement to, compensation, the court was careful to emphasise this at the commencement of the hearing to the Claimant who, despite his obvious ill health, chose to be in court to observe the morning of the trial. He did not give evidence. Nothing in the observations and arguments explored during the hearing nor in this judgment should be taken as undermining the agreed entitlement to the funding of current treatment or minimising in any way the Claimant's sadly terminal condition. Nonetheless, discussion as to the appropriate mechanism obliges the court to focus upon sensitive facts. Mr Roussak acknowledged this and, helpfully, confirmed this was something that had been discussed with and acknowledged by the Claimant.

The relevant legislation and rules

7. Section 2(1) of the Damages Act 1996 ["the Act"] provides that :

"A court awarding damages for future pecuniary loss in respect of personal injury—
(a) may order that the damages are wholly or partly to take the form of periodical payments, and
(b) shall consider whether to make that order".

I am not concerned with those provisions of the Act that provide for such an order where the parties consent.

8. By Regulation 4 of The Damages (Variation of Periodical Payments) Order 2005 ["the Regulations"], the court can make a variable order "in addition to an order for an award of provisional damages" and by Regulation 5 :

"Where the court makes a variable order —

(a) the damages must be assessed or agreed on the assumption that the disease, deterioration or improvement will not occur;
(b) the order must specify the disease or type of deterioration or improvement;
(c) the order may specify a period within which an application for it to be varied may be made;
(d) the order may specify more than one disease or type of deterioration or improvement and may, in respect of each, specify a different period within which an application for it to be varied may be made;
(e) the order must provide that a party must obtain the court's permission to apply for it to be varied, unless the court otherwise orders.

9. By CPR 41.17, when considering whether to make an order under section 2(1)(a) of the 1996 Act, "the court shall have regard to all the circumstances of the case and in

particular the form of award which best meets the claimant's needs, having regard to the factors set out in Practice Direction 41B".

10. Factors to be taken into account in PD 41BPD.1 are to include :

> "(1) the scale of the annual payments taking into account any deduction for contributory negligence;
> (2) the form of award preferred by the claimant including –
> (a) the reasons for the claimant's preference; and
> (b) the nature of any financial advice received by the claimant when considering the form of award; and
> (3) the form of award preferred by the defendant including the reasons for the defendant's preference".

Observation

11. A key distinction between orders for PPO's made under the Act and Regulations and without any additional consensual drafting is that the required element of certainty is achieved by way of an order of comparatively limited scope. As explored by Swift J in AA v CC [2013] EWHC 3679 (QB), there is no provision to enable the court to specify variable periods when payments will or will not be made in the event the claimant's condition or needs change ; or to enable orders that start and end on a date which is uncertain.

The Act makes clear that the annual amount must be identified and fixed as should the intervals of payment. Whilst it is possible to vary a PPO utilising the Regulations, only one such application may be made. Therefore, as with the regime for provisional damages for lump sums, the 2005 Order does not give the courts the power to vary an order by reviewing the claimant's position generally at a future date. The court's power is limited to one consideration whether to vary the order from the typically limited extent provided for in the original order. If the parties have not consensually agreed terms, the limits to review at a later stage are restricted to specific definition as at the date the PPO award is made.

This presents difficulties for a claimant in receipt of immunotherapy who may have an established current need but their future needs are unpredictable, either in terms of duration or prescription. The only certainty is the duration between clinical reviews although, sadly, even those can be curtailed in the event of death. As to prescription, needs can change quickly depending upon the views of treating consultants given this remains a developing area of medicine.

Therefore, a PPO following exclusively the format of the legislation and CPR 41.8 is obliged to award an annual amount paid by way of a regular payment when neither can be said to reflect the anticipated future with very much accuracy. The Claimant observes that element of future uncertainty by way of need is, of course, present in any PPO. The feature of using a PPO in the case of immunotherapy, however, would at its

very commencement be (a) entirely speculative in the case of a claimant not currently in receipt of immunotherapy (b) in the case of a claimant currently in receipt of immunotherapy, be based on a clinical *status quo* of uncertain duration and justification.

It is difficult to immediately follow how scenario (a) could satisfy the relevant provisions. Whilst scenario (b) may sit more comfortably in principle with the relevant provisions it still clearly presents a range of fact sensitive questions whether a PPO is appropriate in principle.

12. Unsurprisingly, in the face of such uncertainty and inflexibility, parties in asbestos claims typically negotiate their own terms. It is not the purpose of this judgment comprehensively to define and review the range of such agreements but it is relevant to note them. This is because one of them (a "float" agreement) remains pleaded as the Claimant's intended scheme for payment.

Briefly, the options include :

(i) "Float" agreements, where the defendant's payments are made into a trust administered by a third party that ensures there is a permanent residual fund or float to pay for the claimant's ongoing treatment. Critically in the context of this case, a "float" agreement does not use the structure of a PPO. The feature of the float is to secure the claimant's position in the event of either delay or dispute about further payment. Provision can be made to return to the court if the reasonableness of a proposed new course of treatment or its expense is disputed. Being a trust for specified purpose, this type of agreement can cater for the event of overpayment and hence reimbursement to the defendant for monies unused. For example, if the claimant dies or the treatment in question ceases to be recommended;

(ii) "Scott" agreements. Similarly, regular payments are made by the defendant, either by way of top-up or reimbursement, into a trust administered by the claimant's representatives in respect of such costs as the claimant continues to incur. The scope of what the payments will be made for and any review of the treatment giving rise to them is for negotiation. Provision can be made to return to the court if the reasonableness of a proposed course is disputed. Claimants expect that the costs of the trust will be paid for by the defendant;

(iii) Negotiated or hybrid PPO's. These might broadly follow the flexibility of the above but retain at least at their foundation the specificity and comparatively more rigid structure of that imposed by the Act and Regulations;

(iv) Agreements to indemnify. In short, the defendant agrees to pay the charges or costs incurred by the claimant for his or her treatment. The principle is one of contract but a difficulty can arise if the parties disagree upon the scope of what

they have agreed in the event a variation in treatment or expense arises. See Hague v British Telecommunications Plc [2018] EWHC 2227 (QB).

The proposed PPO

13. Taking the past costs of the cycles of treatment to date and annualising them, together with the necessary additional regular drug and CT scans, the Claimant maintains an annual cost of £90,000 should be met by a PPO paying quarterly payments of £22,500. In order that he is not troubled by having to administer the receipt and application of such funding directly, the Claimant further proposes a trust fund be set up by his solicitors and administered by a trust department within that firm, the costs of setting up, running and eventual winding up of which should also be paid for by the Defendant.

    Mr Roussak maintains that the direction of such costs by way of a PPO in this case is entirely analogous to the use of a PPO in any very serious personal injury claim. The Claimant here is just as much entitled to look to the certainty and security of a PPO as would a catastrophically injured claimant.

    However, in contrast to a "typical" PPO, in the Claimant's claim :

    a. The uncertainties of the future cost of the Claimant's immunotherapy and the possibility for variation in those costs suggests that adjustment by way of reference to indexation is unnecessary. Hence, the Claimant seeks to disapply any indexation adjustment under section 2(9) of the Act and CPR 41.8(1)(d);

    b. There should be provision for repayment to the Defendant of any surplus funds held on trust when the Claimant's immunotherapy stops. It is undeniable there will come such as point, either upon his death or earlier if, following clinical assessment, it is concluded immunotherapy is no longer effective.

14. Mr Roussak placed particular emphasis upon the provision for refunding of surplus monies as providing fairness and certainty to the Defendant. He submitted this feature resolves the challenge of funding treatment by way of interim payments where any interim payment should never exceed the likely award at trial. He observes that where there has been an interim payment and a surplus arises because the purpose of the payment (even if expressly limited, as it would be in this case) no longer exists, there is no express obligation to refund the monies. The point would have to be taken up by the Defendant either with, as would be by then, either a very ill Claimant or the Claimant's estate. To the contrary, the express provisions for refund provide certainty and clarity to both parties and avoided expense for the Defendant.

15. The Claimant maintains that a PPO that incorporates provision for variation is appropriate because a different regime of immunotherapy might come to be recommended. To satisfy the requirements of deterioration within the Regulations, the

trigger event could easily be defined as when the Claimant's mesothelioma is progressing despite treatment with Pembrolizumab.

The procedural background to the PPO claim

16. An important preliminary issue for the court is to observe and comment upon how the PPO claim in this case has arisen.

17. Proceedings were issued on 23 March 2018. The Particulars of Claim relied upon, as dated pre-issue, referred to an attached Preliminary Schedule that "will be subject to revision in due course". The only Claimant's Schedule produced at trial in the hearing bundle is dated 21 November 2018. Within the heads of "Future Losses and Expenditure", under "Drug Therapy", is the following paragraph :

"The Claimant will commence dual action immunotherapy treatment under the case of his treating oncologist, Dr Szlosarek. It is anticipated that this will be funded through a float agreement with the Defendant and is therefore to be quantified at this stage".

The tabulated claim simply reads "To be quantified Total £ - "

18. Since the hearing, I have had the benefit of seeing the Preliminary Schedule annexed to the filed documents. Dated 23 March 2018, under "Schedule of Future Losses", there is pleaded a "£TBQ" claim for "Private Treatment". The narrative states that the Claimant "claims an amount for any reasonable future treatment, on a privately paying basis. This head of loss will be quantified with the assistance of expert evidence provided by Dr Sloszarek[1]".

Following an explanation of anticipated treatment with Pembrolizumab, the narrative is then clear :

"The Claimant will seek to recover the cost of this future treatment, for so long as it is necessary. In the event the Defendant will not agree to fund the future treatment that may be recommended by the Claimant's treating oncologist, the Claimant will seek a lump sum for the remaining heads of loss and a stay of the claim for future treatment".

19. The case first came before me as a standard thirty-minute telephone "Show Cause" hearing on 13th June 2018, at which judgment was entered. The Claimant's request at that hearing to rely upon expert oncological evidence was adjourned generally with liberty to restore "at short notice and as a matter of urgency". The service of schedule and counter-schedules were directed to take place in respectively November and

[1] Who is, but is not expressly defined to be in at least this document, the Claimant's treating oncologist

December 2018 and the matter be listed for a 1-day assessment before a High Court Judge or Deputy "on the first open date after 7 January 2019[2]".

On 9 August 2018, the Claimant applied to rely upon an already disclosed report (undated but printed on 16th July 2018) from Mr Shah as his expert oncologist and a Consent Order reflecting this and similar permission to the Defendant was sealed on 24 August 2018. The "oncology experts" were to meet and serve a joint report by 9 November 2018.

20. The claim for a PPO has therefore never been the subject of express pleading or claim.

The directions Order of 13 June 2018 had required skeleton arguments to be filed not more than 7 and not less than 3 days before the start of the hearing, as came to be Thursday 10 January 2019. Trial Counsel had apparently introduced themselves and started to discuss the case from Sunday 6th January and, on Monday 7th, Mr Roussak first introduced at least the prospect of the Claimant seeking a PPO in an e-mail. That position was formalised by Mr Roussak's skeleton argument served at 7.30pm on Tuesday 8th January 2019 i.e. one clear day before the trial on 10th January. In response to criticisms in Mr Vandyck's skeleton argument (as had been served a few hours earlier on 8th January and had been drafted in response to Mr Roussak's 7th January e-mail) Mr Roussak produced a draft Order during the evening of 9th January 2018.

21. Given the importance of the considerations as lead to any PPO but, more still, given that Counsel tell me they are unaware of any reported decision of a PPO being awarded without agreement to fund immunotherapy treatment, the very late introduction and confirmation by the Claimant's representatives that a PPO was sought seems surprising. The previous Schedules had not only provided no such indication but, instead, expressly suggested a lump sum would be claimed in the absence of an agreed solution.

22. Mr Roussak described much of the Defendant's objections to the late notice of the claim as "faux naivity".

First, he drew my attention to the permissive rather than mandatory provisions of CPR 41.5(1), as provide that :

"(1) In a claim for damages for personal injury, each party in its statement of case may state whether it considers periodical payments or a lump sum is the more appropriate form for all or part of an award of damages and where such statement is given must provide relevant particulars of the circumstances which are relied on".

[2] A point of practice should be observed here. The progeny of this particular date being inserted in the Order is now unclear. Those familiar with the specialist Asbestos List work will know that one-day assessments are ordinarily listed on Thursdays during term time. Hilary Term 2019, however, did not start until 11 January 2019, which meant no High Court Judge or Deputy was available to hear the trial as listed for the day before. The Queen's Bench Masters also have jurisdiction to hear trials and, because I was available, I conducted the trial. Had this not been the case, the trial of this case may have had to be delayed.

Secondly, he mentioned there having been numerous unrequited overtures from his instructing solicitors to invite the Defendant to settlement discussions. Mr Roussak emphasised how it was difficult to accept how any Defendant could possibly not have contemplated the prospect of the Claimant pursuing a PPO as one of their options. Indeed, the very agreement about the instruction of oncologists to provide expert evidence should have made this clear, if it was not previously.

23. I fear Mr Roussak may be seeking to occupy some very narrow ground to justify the Claimant's position here. Whilst accepting that the Claimant cannot be said to be in breach of any procedural requirement given the wording of r.41.5(1), the above sequence of events is hardly compatible with the overriding objective.

24. First, it is clear from the sub-paragraphs of rule 41.5 that follow how the failure of a party to make clear their intentions may justify the scrutiny and enquiry of the court (with or without request from a defendant) :

"(2) Where a statement under paragraph (1) is not given, the court may order a party to make such a statement.
(3) Where the court considers that a statement of case contains insufficient particulars under paragraph (1), the court may order a party to provide such further particulars as it considers appropriate".

My view is that these provisions should carefully be taken into account by a party who has not given notice of their intention to pursue a PPO. From such point as a PPO is contemplated but not communicated, that decision should be the subject of careful continuing review. Valid reasons for not making the intended PPO claim clear to the defendant(s) from an early point do not readily come to at least my mind.

25. Secondly, as Mr Vandyk submitted, in proceeding in the way the Claimant's representatives have chosen, the medical experts have not been afforded the opportunity specifically to comment about the duration and cost of both current immunotherapy treatment (Pembrolizumab) or any future potential alternatives. Neither has the Defendant had the opportunity to explore and probe how potential future alternative treatments (of the type the Claimant clearly seeks to reserve to claim by way of a variable PPO) could sufficiently be defined within the scope of a PPO. The Defendant and its insurers generally have hardly any time to assess their position. Mr Vandyk confirmed he was not seeking an adjournment but sought to emphasise that the Claimant's representatives apparently tactical choice has created a lack of clarity in the arguments and sufficiency in the evidence that should weigh heavily against the court exercising its discretion to award a PPO.

26. I find these last submissions have some force. Mr Roussak was obliged to concede that the joint report between Dr Shah and the Defendant's Dr Moore-Gillon dated 6th October 2018 did not address the issues pertinent to the court's consideration of a PPO. Indeed, Mr Roussak portrayed the report as having little value at all given the Defendant

had chosen to instruct a respiratory consultant rather than an oncologist (albeit a respiratory consultant with eminent experience and reputation in this field).

I do not think the joint report can simply be glossed over in this way. The report provides very clear indications how expert opinion might have been developed further had the experts been invited to contribute from their medical viewpoint in the context of the requirements and limitations of PPO funding in this case. For example :

26.1 At Para 5, they expert comment how data from clinical trials for medial overall survival or progression free survival "are of great importance in comparing the likely effectiveness of different treatment regimens and the potential role of newly available drugs". In the previous paragraph, they had noted how the Claimant had by then undergone three cycles of Pembrolizumab and will be shortly assessed after the fourth cycle.

26.2 At Para 7 they comment how "It is therefore not possible at present to predict with confidence whether Mr Howard has responded to immunotherapy and, if he has, the duration of any response if such occurs. As a generalisation, individuals with poorer performance status at the outset of treatment have a less favourable response, in terms of prolongation of survival, that those of good status".

26.3 Para 8 identifies the Claimant's estimated expectation of life (as at early October 2018) as "in the range of 6 to 9 months" and, in the context of this sadly short life expectancy, at Para 9 how they "will be able to offer a better assessment if we are informed of the outcome of Mr Howard's imminent assessment after four cycles of Pembrolizumab". Whilst the comments that follow suggest such further information would assist a review of their prediction of life expectancy, it follows how updated review would also be relevant to the question of how any continuing treatment might best be funded.

27. I put to Mr Roussak what evidential support there was for the proposed continuing treatment. The invoices from the Dr Sloszarek, for example, in the trial bundle were not sequential or self-explanatory. More particularly, as Mr Vandyck was keen to stress at the hearing, Dr Sloszarek is neither a witness nor a Part 35 expert and so has no evidence to give.

Mr Roussak took me to Dr Shah's July 2018 report where, under a discussion headed "Immunotherapy", Dr Shah describes the Claimant as "an appropriate candidate for vinorelbine". He discusses trial studies with pembrolizumab and concludes that he felt there was "significant evidence to support the use of pembrolizumab in patients with MPM[3] assuming there are no contraindications…I would advocate treatment at a flat dose of 200mg once every 3 weeks for up to 2 years. The treatment itself would require Mr Howard to travel to a chemotherapy unit once every 3 weeks for an infusion lasting

[3] Malignant Pleural Mesothelioma

approximately 90 minutes". He adds that each treatment of pembrolizumab will cost around £8,000-9,000 which, though a seemingly high cost, is unlikely in the case of most patients to last for more than 2 years. That is because of many patients stop treatment either because of side effects or cancer progression. "These costs are estimates and do not include the costs of dealing with side effects".

On the issue of future variation in immunotherapy treatment, Dr Shah comments:

"It is likely that the standards of care for drug treatment will change over the course of his lifetime[4]. As a result, flexibility should be considered in any settlement as this is the only way of ensuring that he has access to the best treatments as trial results are released".

28. Mr Roussak agreed with me that this last paragraph provided only oblique support for the proposition that any PPO should incorporate a provision for variation. Whilst the phrasing loosely supports the proposition in principle, in my judgment it falls short of the specificity (as best as can be expected) of evidence to justify a future variation in PPO funded immunotherapy.

Indeed, if there is only generalised expert medical comment then this tends to undermine the primary recommendation of certainty in a PPO i.e. before then considering any variation provision. My view is that this generalised comment instead provides greater support for intervalic review of the Claimant's treatment and progress as would be presented and considered by way of interim payment applications.

29. On balance, I have to express my concern about the way the claim for a PPO has been introduced at such a late stage in this case.

It is both unfortunate and unhelpful that at least from the time of the Claimant first receiving immunotherapy in late July 2018 the Claimant, through his solicitors, did not make clear he was now pursuing a PPO claim. Had he done, I am in no doubt it would have deepened the scope and content of the joint oncological evidence. The intended pursuit of a PPO should at the very latest have been confirmed by late November 2018 as part of the Claimant's Schedule pursuant to the June 2018 Order. The wording as instead pleaded effectively perpetuates the lump sum claimed in the earlier schedule, adding only the possibility of an alternative but non-PPO negotiated mechanism.

I therefore do not accept Mr Roussak's point that the PPO claim is implicit or at least falls within a range of predictable options, such that the Defendant's objections are contrived. The practice of late notice if not ambush should be deprecated in all forms of civil litigation. It is not a strong point for a party confirming their position at a late

[4] What life expectancy Dr Shah has in mind here is not expressly discussed, although I note Dr Shah had seen a copy of the Claimant's expert respiratory report from Dr Taggart dated 2.1.18 that had opined that, with Pembrolizumab treatment, the Claimant's life expectancy might improve by an additional 12-18 months although the chance of that was around 30-40%.

stage to argue that the opposing party should have anticipated this. There is a world of difference between awareness of a range of options and confirmation of an elected position in circumstances where to do so can only assist both parties and lead to a fairer and more informed resolution.

I respectfully disagree with Mr Roussak's characterisation of the way the PPO claim was confirmed as falling within the ordinary scope of litigation.

30. These general observations become more acute given the intended immediacy of access to the court in the specialist Asbestos List as I elaborate upon below. Clarity and transparency remain essential factors in all litigation but it seems to me the comparative informality and immediacy of the specialist Asbestos List practice provides even less excuse for conduct to the contrary. Indeed, I am bound to say that I regard the expectations upon parties to provide as full and as early notice as possible of any changes in the way a case is developing (for either side) as even greater where this can be communicated to both opponents and the court in fairly informal terms. In short, it would only have taken a few e-mails for the position to be very different.

The Defendant's arguments against a PPO

31. Observations as to the late (but voluntary) provision of a proposed draft PPO Order by the Claimant aside, it is appropriate to focus upon the Defendant's arguments against a PPO both in principle and in the form proposed in the Claimant's draft Order. The Defendant's submissions here largely cover the same ground.

32. Mr Vandyck took issue with the Claimant's concession that there still existed "slight uncertainties" as to the level of future payment in the event a PPO was ordered. Mr Vandyck's point was that, on the less than comprehensive expert evidence as to future treatment, Dr Shah had reserved a degree of flexibility that could be described as simply open ended and this position is unrealistically reserved in the Claimant's application.

Whether one analyses specifically the draft Order or considers the Claimant's claim in the round, there features an unreasonable proposition that the Defendant should continue to pay a fixed quarterly sum of £22,500 whether or not the Claimant continues to receive the treatment in its current form. Whilst the Claimant proposes to incorporate a provision to apply to vary, there is no obligation upon him actually pursue such an application, leaving open the possibility of the Claimant utilising the monies received for such course or description of immunotherapy as he and his treating oncologist might choose.

There would be no provision for the Defendant to question or challenge any change in his current treatment regime. Effectively, all discretion in respect of the application of received funds lie with the Claimant and such treating oncologist as the Claimant choses from time to time. The proposed provision as to repayment only applies if no immunotherapy charges arise at all. The Defendant is powerless to challenge anything falling short of payment where there is no immunotherapy treatment at all.

This uncertainty is further endorsed by the lack of any indication what duties the Trustees would have. There would exist no provision for any relationship or mediation between them and the Defendant. All that is currently before the court is a proposal that "a trust" be set up. Thereafter, on the face of what has been presented at trial by the Claimant, the Trustees could pay whatever, whenever to whomever so long as it fell within the scope of immunotherapy as recommended an oncologist treating the Claimant.

33. The proposed draft Order does not resolve such concerns, the Defendant submits. Whilst "Initial Immunotherapy" is defined as the administration of Pembrolizumab and associated medical investigations and consultations", "Further Immunotherapy" is defined as "such other drug regime as the Claimant may in due course be advised by his Treating Oncologist to undergo and associated medical investigations and consultations".

Paragraph 7, "Variation of Periodical Payments", provides for the Claimant having "permission to apply for further damages and/or to vary the level of periodical payments if deterioration in his mesothelioma is "sufficient to trigger the First Change Date". However, "First Change Date" is defined simply as the date when the treating oncologist advises that the Claimant should change from "Initial" to "Further Immunotherapy". This rather generalised in definition transition illustrates the Defendant's vulnerability, it submits, to a range of changed treatments without any ability for the Defendant to comment.

Potentially to broaden matters further, "Other Matters" at Paragraph 11 contemplate how if the treating oncologist advises a treatment regime "other than the Initial or Further Immunotherapy the parties may seek further directions and the Claimant further damages to fund that (and any subsequent) regimes".

Mr Vandyck submits that these provisions are some way away from the certainty required by the Act and Regulations.

34. The Defendant does not accept the Claimant's estimated figures for setting up the trust as sufficient for the court to be satisfied this course is reasonable and proportionate.

35. Mr Roussak in reply was keen to emphasise that his voluntary provision of a draft Order at short notice was intended to assist both Defendant and the court and ought not to be subject to fine drafting analysis. If the court concluded one or more aspects of the draft were either inapplicable or should be revised, then this was the very point of the trial process. Ultimately, the medical evidence supported continuing immunotherapy and hence the claim in principle for a PPO remained clear and compelling.

36. That said, Mr Roussak conceded the proposed Order was amenable to redrafting. For example, if the Defendant has genuine concerns that the Claimant might capriciously instruct an oncologist with less than mainstream views, this could be catered for by a

more restrictive definition of "treating oncologist". Similarly, uncertainty as to alternative treatments could be avoided by defining and restricting the scope of permitted treatment under the PPO to Pembrolizumab and that all monies paid should only be spent on that drug. Thus, the variation paragraph could easily be amended so as not to refer to a "First Change Date" but instead to such deterioration that arises "despite continuing treatment with Pembrolizumab".

On the issue of absence of any input permitted to the Defendant, the Claimant conceded this could be incorporated within the variation provisions.

The "Other Matters" at Paragraph 11 he accepted was a broad attempt to facilitate general review as the innate part of a PPO but were not essential to the scheme.

37. Finally, I should mention the Claimant had initially suggested in reply that any input from the Defendant challenging the advice or prescription of the Claimant's treating oncologist would be an unethical attempt to intervene in the treatment of a patient. As the court pointed out, however, it remains the prerogative of any claimant to pay for such treatment as they desire. The question is the recoverability of such expense from the tortfeasor.

Decision

38. I am satisfied that drawing upon interim payments to fund immunotherapy in the circumstances of a case such as this, where the Claimant's life expectancy is very limited, is by far the more flexible and appropriate tool than a PPO. My reasons focus not only upon practical advantages and disadvantages featured in respectively the two mechanisms but also factors in the considerable procedural flexibility and (I believe) efficiency afforded to parties bringing and defending claims in the Asbestos List and as would immediately apply to any interim payment application. This second observation substantially informs and eclipses any process of comparing and contrasting the two mechanisms.

39. In respect of the work of Asbestos List at Central Office in the Queen's Bench Division, I can do no better than paraphrase relevant parts from the helpful summary provided by Master McCloud in the opening paragraphs of Yates (personal representative of the estate of Gladys May Dalton, deceased) v (1) Revenue & Customs Commissioners (2) Association of Personal Injury Lawyers [2014] EWHC 2311 (QB).

The underlying approach to asbestos claims places the doing of justice, at speed and with improved efficiency, at the forefront; formalities of procedure take second place if they interfere with that. Many claims are urgent and sometimes very much so. Most urgent are 'living mesothelioma' claimants where the essence of justice (for both sides) is avoidance of delay in the gathering of evidence during the life of the claimant, and if possible the resolution of the claim before the Claimant passes away. One of the first considerations when considering the timetabling a claim is 'how long does the claimant have to live?' which is a salutary yardstick for any judge and gives a human context to the notion of 'proportionate case management'. Technology and extensive direct access

is provided to the specialist masters using email, an open-door policy, and a 'no nonsense' approach. Hearings are generally as informal as the circumstances permit (without of course departing from the law). Almost all hearings are by telephone. Parties are not discouraged from 'mentioning' claims or asking for a short hearing or a decision by email on matters arising, and it is seldom that party is penalised for bringing a matter back for our attention in good faith. Where an urgent application is made it is expected to be by way of email either directly to one of the specialist Masters or channelled through the QB staff, and without the formality of drafting and issuing a Part 23 form. All that is required is that the evidential and legal requirements for an application are met, rather than the strict form of a Part 23 application notice.

40. I would add to this summary that the intended facility of access to the Specialist Masters has been further enhanced since the date of this judgment now every QB Master has a designated clerk to represent his or her first point of contact.

41. Set against this possibly unique background in terms of civil practice in this jurisdiction, there can be no basis for suggesting that applications for interim payments in urgent living mesothelioma cases run the risk of extended delay before even receiving a hearing date and they will entail the expense of the formalities of procedure. In short, truly urgent interim applications in the Asbestos List ought materially to differ from the inevitable challenges in other applications before civil courts, where judicial and administrative time and resources are under pressure and enjoy no internal protocol for prioritisation.

42. Indeed, I am satisfied that this procedure surpasses by a very wide margin the mechanisms for review, variation and return to court permissible in a PPO of a type contemplated in the 1996 Act and even with the benefit of the additional provisions of the 2005 Order. I anticipate it is probably for reasons at least close to this observation that few expressly pleaded PPO applications proceed in asbestos claims through to trial. Instead, parties seek to negotiate their own bespoke compromise agreements.

43. In considering this case, I see an important distinction between :
    (i) Necessarily comparing the merits of the interim payment approach with a PPO decided and awarded by the court (rather than following agreement), as must be defined entirely within the jurisdictional confines of the 1996 Act and 2005 Order; and
    (ii) Seeking to compare and contrast more generally the choice of a PPO on a consensual or negotiated basis with the variety of other agreements and methodologies currently adopted in this specialist area.

    As to the latter, I do not think it appropriate to offer any comment or to express preference to the alternatives to PPO's. The relevant considerations before me are between a non-negotiated PPO or the interim payment route.

44. In conceding that the PPO as drafted is amenable to amendment and perhaps wider than it could be, it seems to me the Claimant illustrates the underlying difficulty of trying

achieve both certainty and flexibility by way of a PPO in circumstances where the nature and duration of treatment is liable to change at short notice and any alternatives come from an ever growing and developing field of choice. I conclude these are illustrations of the problem with a PPO in principle rather than merely opportunities for alternative drafting.

45. A submission introduced by Mr Roussak developed in closing submissions rather based upon any evidence from the Claimant[5] is that a PPO would enable the Claimant to avoid the anxiety and distaste of continuing to deal with the tortfeasor. Instead, he need only deal with his Trustees. It was therefore unfair to expect him to do otherwise. Such desire fairly fell within the consideration of "all the circumstances of the case" and "the form of award which best meets the claimant's needs under rule 41.7, as well as "the reasons for the claimant's preference" under PD 41.7.1(2)(a).

I regret to observe that the conviction of this submission is somewhat undermined by the lack of any direct evidence from the Claimant in support. Whether this reflects an apparently late decision to commit himself to pursuing a PPO would be entire speculation. Either way, however, the Claimant's third and last witness statement is signed 1st July 2018 i.e. before the commencement of immunotherapy. In the last paragraph (Para 15), the Claimant instead anticipates his next follow-up appointment with his oncologist and remarks how he hoped his condition would be stable *"but if not then I would consider further treatment. I am aware there are private treatment options available and this is something which I would be interested in exploring further. If possible, I would rather this route than entering into a trial in which I could be offered a placebo"*.

46. Sympathetic though I am to the Claimant's position, this commentary falls well short of establishing his preference for a PPO. The reasons why such evidence has not been adduced are unclear. My Order sealed on 25 June 2018 provided that witness evidence be exchanged by 31 August 2018. The Claimant commenced his immunotherapy treatment on 21 July 2018 and therefore the implications of that treatment, both personally and financially, could urgently have been added to his statement even if by then already signed. Alternatively, a request to rely upon a short supplemental statement to reflect recently commenced treatment ought not have been controversial.

Discussion directly from a claimant about preference is surely desirable. In particular, in this case one would have expected the Claimant to explain the difference between continuing contact with his solicitors and professional trustees working within a department at his solicitors firm.

47. I am not persuaded that PPO's through the medium of a trust is a proportionate and cost-effective method for anyone with such a very limited life expectancy as has, sadly, the Claimant. No formal figures for the costs of a trust were put in evidence, a consequence I can only again assume to be the late introduction of the claim.

[5] The Claimant did not give evidence but his three witness statements were included in the hearing bundle.

Nonetheless, Mr Roussak told me his instructing solicitor's estimate of what their internal trust department would charge would be approximately £3,000 for set up costs, £100 per month for ongoing management and approximately £1,000 to wind up the trust. Thus, if the duration of the trust reflects a maximum life expectancy of 1 year, an overall likely cost of £5,000.

Mr Roussak conceded in reply to Mr Vandyck that if the approximation of such expenses was a real concern to the Defendant, then the Claimant might be willing both to define and restrict such costs to these figures.

48. Even if the maximum cost of the trust is limited to £5,000, I do not accept that the costs of funding by way of interim payment applications will obviously be at least the same if not more expensive, and hence the PPO trust route remains cost effective.

I accept that the likely costs that might be awarded against an unsuccessful defendant who had opposed an interim payment application and as necessitated extended evidential exchanges between the parties leading to an attended hearing may well be at or indeed comfortably exceed £5,000. However, that comparison is not immediately appropriate in these circumstances where there is a broad measure of agreement as to funding in principle. I reiterate the Defendant has made its position clear and on open basis as to the Claimant's entitlement to continue to receive funding for his current therapy. I cannot currently envisage why any significant legal costs will be incurred by way of dispute for as long as that programme continues in its current cycles. Indeed, putting to one side whether the Defendant has already either given or come very close to offering an undertaking to indemnify the current regime if it progresses without variation, in the event of the Defendant were somewhat illogically to change its position or (a point of observation by the Claimant) prove tardy in response to requests for further funds at a time when the Claimant was running out money, then the Claimant can easily put on an urgent and relatively straightforward application.

I would not associate that type of application with the sophistry of some contended interim applications. Moreover, any unreasonable deviation from the Defendant's current position would more likely than not result in the Defendant paying the costs anyway. Thus, the comparison is more between a scheme that obliges the Defendant to pay about £5,000 in any event and comparatively more modest costs assuming that the current regime can continue to be funded by agreement.

I accept the interim payment method presents at least a residual risk of a costs exposure to the Claimant in the event he pursues a contended interim payment application but fails to satisfy the court it was appropriate but I counterbalance that risk with the disadvantages and expense a PPO with an added trust facility would unavoidably present. Either way, Mr Roussak's submission that the interim payment route would involve an "enormous amount of work and cost" owing to the need for repeated evidence overstates the position. Not least because any variation in that would always have to be introduced and justified by the Claimant's solicitors even if part of a variation application in a PPO. The distinction between that explanation and one that would be

provided as part of an interim payment application is not immediately apparent. In both cases, the Claimant's solicitors would have to provide evidence of the change in clinical recommendation and its consequential difference in costs (if any).

49. In terms of difference of procedure or method in the event of changed or proposed changed treatment, I am satisfied that interim payment applications are preferable. They avoid the preliminary requirement in a PPO of establishing that the revised treatment approach falls within the definition and scope of the relevant variation provisions of the PPO. To the contrary, the Claimant can instead contemplate a variety of recommendations reflecting changed clinical circumstances without the worry of any preliminary challenge as to interpretation.

50. I am not satisfied any significant disadvantage can be associated with the interim payment route because, as distinct from the Claimant's proposed PPO, it would not carry an express obligation for repayment.

The obvious point here is that it is entirely open to the Claimant easily to avoid this perceived disadvantage by offering repayment in exchange for the Defendant agreeing to put the Claimant more comfortably in funds for his continuing treatment. Indeed, the very repayment paragraphs urged by the Claimant as part of his proposed PPO Order could be incorporated into a Consent Order settling an appropriate interim payment. The Defendant would have an obvious incentive to agree but so would the Claimant to offer it. Whilst under no obligation to do so, the Claimant would otherwise run the risk of any sum assessed by the court being more conservative so as to avoid the risks of overpayment.

I am satisfied these observations answer the Claimant's submissions that interim payments inevitably fail to balance the problems of either underpayment or payment as exceeds the likely award at trial.

51. Although very much in the alternative, the Claimant concedes that if the court was not inclined to award a PPO, then this head of claim should be adjourned with perhaps a direction for review or formal application in a few months' time.

52. I do so adjourn the claim for future costs of immunotherapy. I will not make any specific direction about further listing, however, because it seems to me that following this decision the parties ought to be capable of agreeing a programme of funding without the need (at least immediately) for further court listing, at least in terms of specific directions.

53. On a separate note, however, if either party wishes to raise issues of costs arising from this decision, I suggest they briefly indicate to each other their positions and then notify me of the same. I will then consider what hearing is appropriate.