

PRACTICE DIRECTION – STRUCTURED SETTLEMENTS

THIS PRACTICE DIRECTION SUPPLEMENTS CPR PART 40

NATURE OF STRUCTURED SETTLEMENT

- 1.1 A structured settlement is an order or agreement in settlement of a claim which includes, or consists of, payment by instalments over a specified period which may be for the remainder of the claimant's life. The payments are either funded by an annuity from an insurance company or, where the party paying is a government body, by payments direct from that body.
- 1.2 The part of such a settlement which is to be paid by periodical payments attracts tax benefits and statutory guarantees of payment if entered into in accordance with the Damages Act 1996 and Income and Corporation Taxes Act 1988.

CONSIDERING THE ISSUE OF A STRUCTURED SETTLEMENT

- 2.1 Parties should raise the question of a structured settlement in respect of future loss with the court during case management in every case where future loss is likely to equal or exceed £500,000, and in any other case where a structured settlement might be appropriate. In addition, the court may explore the issue of its own initiative.
- 2.2 In any such case, the reasonable cost of:
 - (1) financial advice from an independent financial adviser or accountant; and
 - (2) any reasonably necessary advice from a party's medical and legal advisers,will be regarded as a cost in the litigation. Accordingly, those costs will be subject to general rules on assessment of costs. To guard against the possibility of compromise of the necessary impartiality, financial advice should not involve any implicit or explicit recommendation that the adviser or his firm should be involved in future financial management on behalf of the claimant. It should and in the case of a child or patient must be provided on a fee-paying basis, and should not be dependent upon the receipt of a commission if that advice is followed. There is, however, no bar to any adviser subsequently being involved in arranging a structured settlement or managing any funds in consequence of the advice given.
- 2.3 This paragraph applies where the claimant is of full age and capacity. Where a judge has found in favour of the claimant at trial and the claimant wishes and the defendant is prepared to consider entering a structured settlement, the claimant or his legal representative should ask the judge:
 - (1) not to enter judgment;
 - (2) to state the award to which he has found the claimant to be entitled, either by:

- (a) identifying a lump sum consisting of the total amount of damages which in accordance with his judgment should be awarded; or
 - (b) identifying the annual amount of any recurring losses which it is anticipated will continue for a future indefinite period separately from the balance of the award, stating the lump sum amount of the balance of that award; and
- (3) for an adjournment:
 - (a) for the purposes of drawing up a structured settlement; or
 - (b) where advice has not previously been sought, to enable advice to be sought as to whether a structured settlement should be entered into.
- 2.4 In every case where there is a claim in respect of a child or patient, the parties or their representatives must put before the court advice as to the general desirability and appropriateness of the claimant entering into a structured settlement. Such advice must consist of or include the financial advice referred to at paragraph 2.2 above, which must consider the specific matters identified at paragraph 5 below.

CONSENT ORDER FOR A STRUCTURED SETTLEMENT

- 3.1 Where a claim settles before trial, an application should be made in accordance with CPR Part 23 for the consent order embodying the structured settlement to be made, and for the approval of the structured settlement where the claimant is a child or patient.
- 3.2 If the claimant is not a child or patient, the consent order may be approved without a hearing.

APPROVAL HEARINGS

- 4.1 The annuity rate applicable to a structured settlement may remain available only for a short time. Therefore where a hearing is required, immediately on the issue of his application notice, the claimant or his legal representative should seek an early date for the hearing, being a date before the expiry of any period within which acceptance of that annuity rate is permitted.
- 4.2 For the purpose of such a hearing the following documents and evidence must be filed not later than midday on the day before the hearing:
 - (1) counsel's or legal representative's opinion, together with the report of a financial adviser (as referred to in paragraph 2.2 above), considering –
 - (a) the general desirability of entering into a structured settlement; and
 - (b) the specific matters set out in paragraph 5 below;
 - (2) a draft of the proposed agreement;
 - (3) details of any assets available to the claimant other than the value of his claim; and

- (4) where the claimant is a patient, the approval or consent of the Court of Protection.

CONTENTS OF WRITTEN ADVICE

- 5 A written advice or report filed in accordance with paragraph 4.2(1) should specifically address the following matters:
 - (1) whether or not the sum payable in compensation is sufficient to fund periodical payments, which will fully meet the anticipated annual and recurrent losses occasioned by the injury. This will in particular need to be considered where the damages are reduced by reference to factors such as contributory fault;
 - (2) the balance between immediate payment by way of capital sum and subsequent periodical payments. In particular, where there is continuing expense of care, the amount of the periodic payments should aim to cover the anticipated costs, unless there is good reason to depart from this benchmark, whilst leaving an appropriate sum (whatever is reasonable, depending upon the circumstances of the case) to allow for unexpected contingencies. A proposal that the sums payable should in either respect be less than these benchmarks will require justification, though either may, of course, be greater. An example of this would be where periodical payments or a lump sum cover some or all of the claimant's probable loss of earned income. Another example would be where a lump sum includes payments in respect of pre-trial losses;
 - (3) the balance between any of the different forms of structure and the reasons for striking that balance;
 - (4) whether or not the amount of periodical payments to be made should be increased in steps, so that the payments would increase on the anticipated date that certain events with important financial consequences may occur. In any such case, the structured settlement should specify the event that will give rise to the proposed step increase. Where possible, the structured settlement should also specify the specific date of and the amount of the proposed step increase. Over-complication is to be avoided. Examples of events that may give rise to a step increase are where –
 - (a) the child/patient becomes unable to care for him or herself independently in respect of:
 - (i) mobility;
 - (ii) toileting and bathing;
 - (iii) dressing;
 - (b) gratuitous carers can no longer continue to provide care;
 - (c) the child/patient is able to work to some extent at the date of assessment of damages but later becomes unable to continue to work;
 - (d) some anticipated long term therapy becomes necessary, at cost;

- (e) the claimant is due to leave primary for secondary, or secondary for tertiary education;
 - (f) accommodation needs are anticipated to increase at a future date; and
 - (g) (in respect of income loss) it is anticipated that the claimant would have received a promotional increase in pay;
- (5) whether there is sufficient flexibility within the balance between capital and income, and the nature of funding, to provide for anticipated needs throughout the claimant's lifetime; and
 - (6) the extent to which any arrangement for periodical payments may affect the ability of the claimant to receive income related benefits otherwise provided at no or low cost by the state or by a relevant local authority.

CONSIDERATION OF OTHER MEANS OF MEETING FUTURE INCOME NEEDS

- 6 Advisers should consider means of meeting future income needs other than or in addition to a structured settlement where these may be more appropriate. Such means may include an award of provisional damages, an indemnity, or an appropriate form of trust.

OBTAINING COURT OF PROTECTION APPROVAL

- 7.1 To obtain the approval of the Court of Protection the claimant's legal representative should lodge the documents and information set out in the above paragraphs together with a copy of the claim form and any statement of case filed in the proceedings in the Public Guardianship Office, Archway Tower, 2 Junction Road, London N19 5SZ by midday on the fourth day before the hearing.
- 7.2 If an application for the appointment of a receiver by the Court of Protection has not already been made:
 - (1) two copies of the application seeking his appointment (Form CP1);
 - (2) a Certificate of Family and Property (Form CP5); and
 - (3) a Medical Certificate (Form CP3),
 should be lodged at the same time as the documents and information mentioned in paragraph 4.2 above. Forms CP1, CP3 and CP5 may be obtained from the address set out in paragraph 7.1.

DRAFT ORDERS

- 8.1 Wherever possible a draft order should also be filed at the same time as the documents in paragraph 4.2 above.
- 8.2 Examples of structured settlement orders are set out in an annex to this Practice Direction. They may be adapted for use as individual circumstances require.

OBTAINING PAYMENT OUT OF MONEY IN COURT

- 9 Where it is necessary to obtain immediate payment out of money in court on the order being made, the claimant's legal representative should:
 - (1) notify the court office the day before the hearing so that the court is aware of the urgency; and
 - (2) bring to the hearing a completed Court Funds Office Form 200 for authentication by the court upon the order being made.

ANNEX

PART 1 – STRUCTURED SETTLEMENT ORDER

(Order to settle for a conventional sum and for an adjournment to seek advice on the formulation of a structured settlement).

Title of claim

UPON HEARING (Counsel/Solicitor) for the Claimant and (Counsel/Solicitor) for the Defendant

AND UPON the Defendant by (Counsel/Solicitor) having undertaken to keep open an offer of £..... in full and final settlement of the claim and the Claimant having undertaken to limit the claim to £.....

[AND UPON the Claimant's Solicitors' undertaking to instruct appropriate advisers to advise upon a structured settlement and to use their best endeavours promptly to make proposals to the Defendant's Solicitors as to the most equitable formulation of a structured settlement and after to seek (further directions/ approval) from the Court if necessary]*(delete as required)*

IT IS ORDERED that this claim be adjourned (until (date)) (with permission to both parties to apply in respect of the further hearing relating to further directions providing for a structured settlement as undertaken by the Claimant's Solicitors) and that these proceedings be reserved to the *(Trial Judge)* unless otherwise ordered

AND IT IS ORDERED that the costs of these proceedings together with the cost relating to any proposal for a structured settlement be *(as ordered)*

PART 2 – STRUCTURED SETTLEMENT ORDER

(Order giving effect to and approval of a structured settlement)

Title of Claim

UPON HEARING (Counsel/Solicitor) for the Claimant and (Counsel/Solicitor) for the Defendant and upon reading the advice(s) obtained on behalf of the Claimant as to the desirability and appropriateness of the terms in the Schedule to this Order ("the proposed terms")*(identifying the advice(s))*

AND UPON being satisfied that the terms of the Practice Direction to CPR Part 40 in respect of structured settlements have been complied with

AND the Claimant and Defendant having agreed to the proposed terms

AND UPON the Judge having approved the terms of the draft Minute of Order, the Agreement and the Schedule to this Order

AND UPON the Claimant and the *(insurer/Government department/self-funding body)* undertaking to execute the agreement this day

BY CONSENT

IT IS ORDERED

(1) that of the sum of £..... (*total sum in Court*) now in Court standing to the credit of this claim the sum of £..... be paid out to (*insurers/payee, or as appropriate*) on behalf of the Defendant to provide payments as specified in the Payment Schedule to this Order

(2) (*other relevant orders*)

(3) that all further proceedings in this claim be stayed save for the purpose of carrying the terms into effect

(4) that the parties have permission to apply for the purpose of carrying the terms into effect.

SCHEDULE

(*Attach proposed terms and set out any other terms of the settlement*).

