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Pragmatism over process – Keoghs secures key immunotherapy judgment

Howard v The Imperial London Hotels Limited [2019] EWHC 202 (QB)

On 6th February 2019, Master Thornett handed down what is believed to be the first judgment on the issue of Periodical Payment Orders (PPOs) as a mechanism for funding future immunotherapy in mesothelioma claims. Peter Kenworthy of Keoghs acted for the defendant, instructing William Vandyck of Crown Office Chambers.

Anyone dealing with mesothelioma claims will be aware that claims for funding of future immunotherapy treatment have become increasingly commonplace. Once the defendants are satisfied that immunotherapy treatment is reasonable and should be funded, issues have arisen as to how to provide that funding.

For some time certain claimant practitioners have been promoting – often very loudly - the use of PPOs, despite it being consistently pointed out by insurers that a PPO is just not appropriate for these claims. The value of a PPO for the more confrontational claimant representatives is that this 'solution' can be imposed by the court – if the case is suitable.

On 10th January 2019 the sole remaining issue in this case came before Master Thornett - whether the court could and should impose a PPO to fund immunotherapy treatment. The defendants had offered to provide a suitable indemnity and in the meantime further interim payments, pending any agreement. However the claimant decided to pursue a PPO despite not having indicated any intention to do so until the very week of the hearing.

After a full day of submissions Master Thornett gave a reserved judgment in the defendant's favour. The approach of Master Thornett is best summarised when he refers to "*the underlying difficulty of trying to 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 a point for alternative drafting*".

Keoghs' view

The important point is the Master's observation that PPOs are not appropriate as a point of principle and the many failings and issues identified with a PPO cannot be overcome by refining the drafting of the order. This judgment should see an end to claimants pushing for PPOs and using the threat of applications to try and impose ever more cumbersome and expensive (to administer and agree) agreements. Insurers have to date demonstrated a willingness to agree various *"informal"* mechanisms to fund immunotherapy treatment. As the judgment in this case highlights, the only options open to the court are to award a global sum to include future treatment, or adjourn the case to allow for future interim payments, both of which have clear issues of their own.

Insurers have always wanted a collaborative and constructive approach to this new and evolving head of loss – with the sufferer's interests at the centre. A clear and simple indemnity is the best solution for everyone. This judgment is a major step in that direction.

Peter Kenworthy

Keoghs

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