Briefing Note

Discount Rates

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Introduction

This is a short briefing note, prepared following yesterday's announcement by the Lord Chancellor that the discount rate to be applied when calculating multipliers for future loss claims will be reduced from 2½% to -0.75% (that's minus 0.75%).

The discount rate had been unchanged since 2001 and a decrease was broadly expected. That announced, however, is markedly in excess of what was anticipated by commentators.

The full reasoning behind the reduction is not wholly clear, although the Lord Chancellor has accepted a need to be guided by conservative investment returns gained from indexed linked gilts (which had formed part of her review). The Lord Chancellor described this as *"The only legally acceptable rate I can set".* There are significant implications for all parties to personal injury litigation. Claims for future loss will rise significantly. There will be a consequential effect on the insurance industry and upon those public services which carry large personal injury liabilities, the NHS being a clear example. In fact, within the announcement, the Lord Chancellor committed the government to ensuring appropriate funding for the NHS Litigation Authority to cover the change. A similar statement was made in relation to GP's and Medical Defence organisations.

The government plans to launch a consultation in the coming weeks to consider whether the framework for Claimants and Defendants should be changed by legislation and the Chancellor is to meet representatives of the insurance industry to assess the impact of the announcement.

In practical terms the announcement calls for immediate action from both Claimant and Defendant lawyers. This Briefing Note sets out to provide a short summary of steps which should be considered and taken in response.

Immediate Steps

1. The new discount rate comes into effect on 20th March 2017. Any case coming to trial before then will be unaffected.

2. In relation to any claim which will come to trial after that date, and involving a claim for future loss, the existing basis upon which the claim has been pursued is likely to be flawed. Every case in that category will require close consideration.

3. **It is immediately necessary to review any case where there is a Part 36 offer.** Claimant's offers may well, now, undervalue the extent of the claim. It may be necessary to withdraw existing Part 36 offers and professionally negligent not to.

4. Defendants need to look closely at their own Part 36 offers which may now not provide the desired protection against costs at trial.

5. Provided a Part 36 offer remains open, the other side may accept it as of right. However, the costs consequences which follow after expiry of the relevant period (21 days) must be determined by the Court unless agreed. If a Defendant has accepted a Part 36 offer which is now a manifest undervalue, it is unclear whether the Court would apply the usual order.

6. Similar points arise in relation to Calderbank and other non-Part 36 offers, save that such offers fall outside the Part 36 regime and are governed, accordingly, by principles of accord and satisfaction. If a Defendant accepts an offer which now undervalues the claim, the issue falls to be determined by looking to see whether a binding contract was formed.

7. For obvious reasons, any ongoing negotiations or pending settlements now need to be put on hold and considered further.

8. Any Schedule of Loss containing a future loss claim will need to be rewritten.

9. Any future claims based upon the Ogden Tables require recalculation. The effect of a negative discount rate is to enhance damages on the basis of early receipt rather than to discount them. It is not clear whether that is how the new discount rate is to be applied or whether there should simply be no allowance for early receipt within the damages at all.

10. For exactly the same reason, Counter-Schedules already settled meeting future loss claims now require reappraisal.

11. Since all of this introduces unexpected and additional work, not necessarily limited to rewriting schedules (further financial advice may be required), amended cost budgets will be required in many claims.

12. Similarly, the value of many claims will have markedly increased. Limits placed upon Claim Forms and Particulars of Claim, which affect the issue fee, may no longer be applicable and will themselves require review.

Additional Issues

13. The balance of advantage and disadvantage as between a Periodical Payments Order and a lump sum award has now changed. If the effect of the discount rate is to enhance damages for early receipt (see above) a PPO may be significantly more attractive to an insurer than was previously

the case (and, conversely, less attractive to a Claimant). More cases may attract Periodical Payment Orders than before and their attractiveness needs to be weighed carefully in every case.

14. In relation to interim payments, such payments should rise in proportion to any rise in the value of claims attributable to an increase in future losses. Claimants should be able to recover higher interim payments (subject to the *Roberts -v- Johnstone* position below).

15. Accommodation claims are now significantly affected. The question arises as to whether the historical *Roberts -v- Johnstone* calculation can now apply at all. It would, in most cases, lead to a negative amount. It is more than likely that this principle will come under attack and judicial consideration in due course. New ways of assessing the value of rehousing and accommodation in significant cases may now be required.

Some of these steps are more urgent than others. The full implication of the change will take time to become apparent, and may be far reaching. Since the last discount rate endured for 16 years it is reasonable to assume that the position will not reverse for some time.

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