



PPO Viability

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What test?

There is now no dispute that, in deciding whether to make an order under section 2(1), the judge's overall aim must be to make whatever order best meets the claimant's needs.

Court of Appeal, *Thompstone et al* [2008] EWCA Civ 5

Courts' role?

I see the court's role as ensuring that the allocation has proceeded on the basis of suitably qualified advice, which appears to have taken all relevant matters into account, from a source which has had the advantage of a free discussion with the family as to their hopes and fears for the future.

Mackay J., *RH* [2007] EWHC 1441 (QB)

Courts' role?

It is not, therefore, open to the Defendant to challenge this proposal, or put forward a counter proposal, merely on the basis that there is another way of arranging the award that suits its own interests better. Its role in this exercise is a very limited one, and in view of the respective positions of the IFA experts in this particular case, it does not come into play.

Mackay J., *RH* [2007] EWHC 1441 (QB)

What needs?

The parties also agree that the claimant's 'needs' in Part 41.7 are not limited to the needs that he demonstrated for the purpose of proving the various heads of damage; they include those things that he needs in order to enable him (or those looking after him) to organise his life in a practical way.

Court of Appeal, Thompson et al [2008] EWCA Civ 5

What needs?

For example, if the claimant is not yet living in suitable accommodation, one of his immediate needs will be to buy somewhere to live. The damages assessed under the head of accommodation will not cover the whole of the costs of purchase and adaptation. So he will need enough capital to enable him to buy, adapt and equip a home.

Court of Appeal, *Thompson et al* [2008] EWCA Civ 5

What needs?

Many claimants are advised that, due to the uncertainties inherent in a long life in a disabled condition, they should seek a substantial capital sum for contingencies in addition to that required for their immediate and foreseeable needs; this will provide a degree of flexibility in the future.

Court of Appeal, *Thompstone et al* [2008] EWCA Civ 5

What needs?

The claimant may also wish to purchase some facility for which damages have not been awarded at all or for which partial damages have been agreed on a compromise basis. Such a facility may not be a 'need' in the sense of being an absolute necessity (if it were, it would have been covered by the damages) but it may nonetheless be taken into account by the judge when assessing what order best meets the claimant's needs.

Court of Appeal, *Thompstone et al* [2008] EWCA Civ 5

What needs?

In short, the claimant's needs are not limited to the provision of those things which are foreseeable necessities but must be considered in a wider and more general sense. The decision as to what form the order should take will be a balancing exercise of the various factors likely to affect the claimant's future life.

Court of Appeal, *Thompson et al* [2008] EWCA Civ 5

Comparative Exercise

Lump Sum

-v-

Periodical Payments

But...

At the moment, we have no idea what the discount rate will be and, therefore, how can any comparative exercise be undertaken?

Indeed, until the Claimant's recoverable needs are known, how can we provide advice to the Court with regard to the most appropriate form of award that will best meet the need, when I don't know what the recoverable and irrecoverable needs are?

So...

The only reasonable course of action is to consider 'form of award' once quantum judgment has been handed down.

However, there are cases where one can give a clear indication with regard to a limited number of elements of the claim.

So...

It is accepted by both parties that the award of damages should be paid partly by way of a lump sum and partly as periodical payments. In particular, the award for future care and case management should, it is agreed, be paid by way of annual periodical payments and that any periodical payments should start on 15 December 2015 (which is the usual date for payments by the NHSLA).

Foskett J., *Robshaw* [2015] EWHC 923 (QB)

So...

The extent to which other heads of loss might appropriately be dealt with by way of periodical payments will have to await the outcome of my assessment of the multiplicands for the other continuing losses in the light of James' needs. James will require sufficient free capital to meet his accommodation needs, to pay for items of equipment that will need to be changed periodically (e.g. wheelchairs, adapted vehicles and eye-gaze equipment) and to provide an adequate contingency fund.

Foskett J., *Robshaw* [2015] EWHC 923 (QB)

So...

The parties have invited me to hand down a judgment determining the level of James' needs and the appropriate multiplicands after which submissions can be made on the appropriate form of award in the light of independent financial advice which will then be commissioned. I have been content to approach the case on this basis.

Foskett J., *Robshaw* [2015] EWHC 923 (QB)

Current approach?

One can identify viability at the extremes.

Cases where periodical payments are clearly viable, regardless of the reasonably expected discount rate.

Cases where periodical payments are clearly not viable, regardless of the reasonably expected discount rate.

Clear PPO viability

Short life cases.

Uncertain duration cases.

Risk averse pursuers.

Very high level of annual need.

Expectation of PPO-only offer.

Clear lack of PPO viability

No 'reasonable security'.

Cases with large liability deductions.

Mobility and capacity of pursuers.

Limitations of the law and lack of suitable measures – i.e. prosthetics.

Reliance on statutory funding.

Clear need for future flexibility beyond the scope of the Act and CPR.

Statutory funding

Compensation Payments 7.22

Whilst Councils' charging policies may currently follow DWP guidance in relation to capital, for the purposes of compensation payments (including compensation payments held in Trust) it is recommended that Councils should establish the breakdown of any compensation award and consider whether some elements of compensation payments should be included when assessing a supported person's ability to pay a charge.

COSLA Charging Guidance 2018/19 for non-residential care

Statutory funding

Where someone has been awarded a compensation payment, Perth and Kinross Council will require a breakdown of the compensation award when completing the financial assessment in order to consider which elements have been awarded in order to pay for anticipated future care costs. This amount will then be included as capital in the financial assessment. If this amount is above £26,500, the client will be deemed to be self-funding.

Perth and Kinross domiciliary charging policy

But...

Most cases are not at the extreme.

Therefore, the discount rate needs to be known to determine viability.

That is not to say that at minus 0.75% a lump sum is over-compensatory.

Why do pursuers take and are advised to take investment risk?

Not enough damages at the start – RvJ .

Can't buy ILGS at the 3-year average price.

Reality of real earnings growth.

Mortality risk.

Periodical
payments
oddities

Peters undertakings.

Reverse indemnities and proportionate RIs.

Payments made periodically – AA [2013]
EWHC 3679 (QB):

One way street under the Bill?

The discount
rate

In changing the methodology away from a rate based on ILGS, the Scottish Government has made provision for a portfolio constructed on the basis of portfolios described as cautious and which the Scottish Government believes would meet the needs of an individual in the position of the hypothetical investor who is described in the legislation. This is a different approach to that consulted on, which asked about how awards were actually invested. There are difficulties arising from attempting to set a rate on how pursuers have actually been investing.

On this, data is not generally available and what is available is historical, some of it based on the 2.5% discount rate which prevailed from 2002 until early 2017 and which is, therefore, arguably not reliable. Given that level of discount rate, pursuers may have been forced into taking more investment risk than they were comfortable with in order to generate the necessary return. Also pursuers' circumstances are varied and the individual's particular circumstances will dictate the level of risk they are prepared to take. The portfolio does reflect responses to the consultation that investing in a mixed portfolio of assets provides flexibility and is the best way of managing risk.

The discount rate

Model portfolio.

Current asset allocation based on assumed active management for selection.

Assumed actual passive investment for cost.

Asset allocation for life.

Rebalanced annually.

Predicted inflation.

Predicted returns.

Predicted future taxation rates and costs.

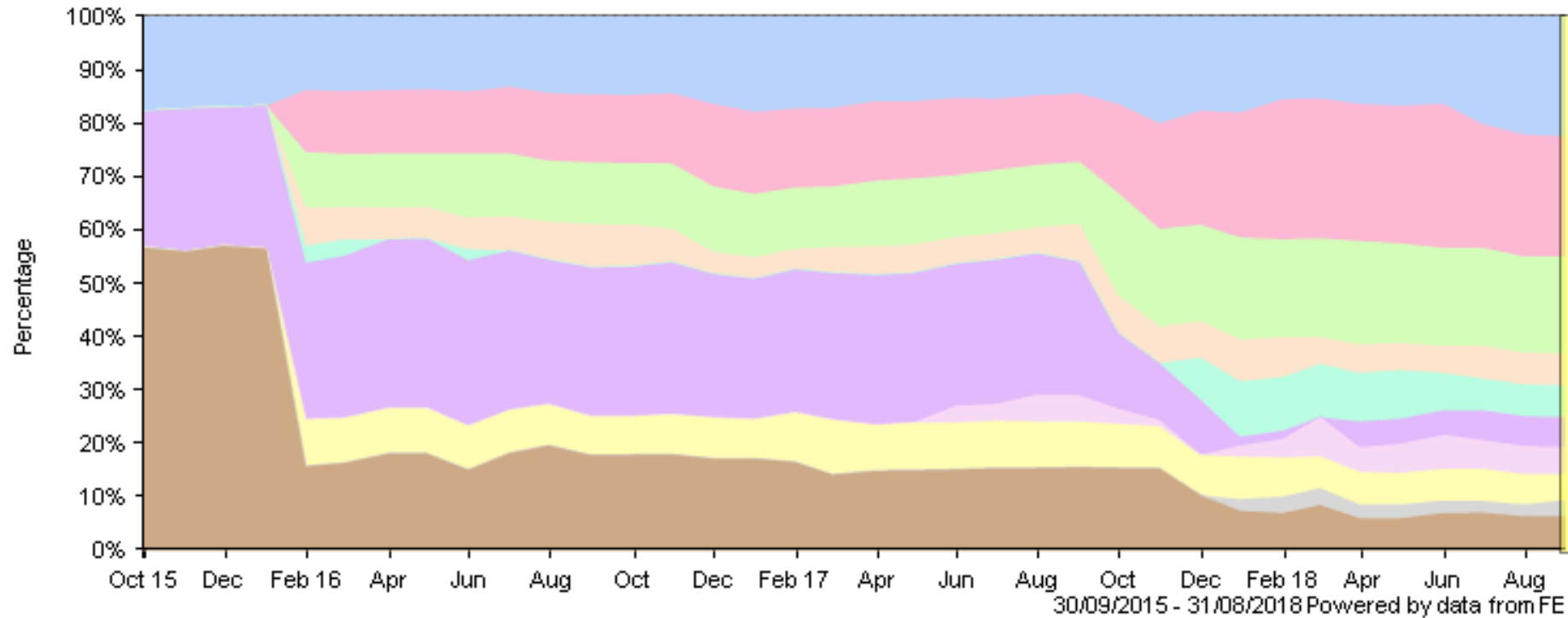
No immediate capital shortfall.

No real earnings growth.

<u>31/12/1999 to 31/12/2007</u>	Bloomberg Barclays Global High Yield	FTSE Actuaries UK Conventional Gilts All Stocks	FTSE All-Share	FTSE World Broad Investment Grade Bond	IA Sterling Corporate Bond	MSCI World
Bloomberg Barclays Global High Yield	1.00	-0.05	0.54	-0.11	0.20	0.68
FTSE Actuaries UK Conventional Gilts All Stocks	-0.05	1.00	-0.29	0.85	0.85	-0.29
FTSE All-Share	0.54	-0.29	1.00	-0.34	-0.02	0.91
FTSE World Broad Investment Grade Bond	-0.11	0.85	-0.34	1.00	0.70	-0.39
IA Sterling Corporate Bond	0.20	0.85	-0.02	0.70	1.00	-0.05
MSCI World	0.68	-0.29	0.91	-0.39	-0.05	1.00

<u>31/12/2007 to 31/12/2017</u>	Bloomberg Barclays Global High Yield	FTSE Actuaries UK Conventional Gilts All Stocks	FTSE All- Share	FTSE World Broad Investment Grade Bond	IA Sterling Corporate Bond	MSCI World
Bloomberg Barclays Global High Yield	1.00	0.22	0.61	0.20	0.49	0.73
FTSE Actuaries UK Conventional Gilts All Stocks	0.22	1.00	-0.01	0.82	0.54	0.08
FTSE All-Share	0.61	-0.01	1.00	-0.07	0.56	0.90
FTSE World Broad Investment Grade Bond	0.20	0.82	-0.07	1.00	0.45	0.02
IA Sterling Corporate Bond	0.49	0.54	0.56	0.45	1.00	0.49
MSCI World	0.73	0.08	0.90	0.02	0.49	1.00

Asset Weightings



Asset holdings as at 31/08/2018

Name	% Weighting
UK Equities	22.49
North American Equities	22.48
UK Corporate Fixed Interest	18.18
UK Gilts	5.99
Japanese Equities	5.95
Global Fixed Interest	5.62
Money Market	5.08
Alternative Assets	4.83
Global Emerging Market Equities	3.00
Others	6.38

Predicting the
future

Economic Scenario Generator



The fact that
you're here means
you will continue to
make poor life
decisions.

GRUHN

A Guide to Economic Scenario Generators

What characteristics of an economic scenario generator are necessary and appropriate for the applications that investment professionals will be encountering in the years to come? With extensive input from Conning's software team, the Society of Actuaries recently released a major white paper that serves as a practical guide to Economic Scenario Generators.

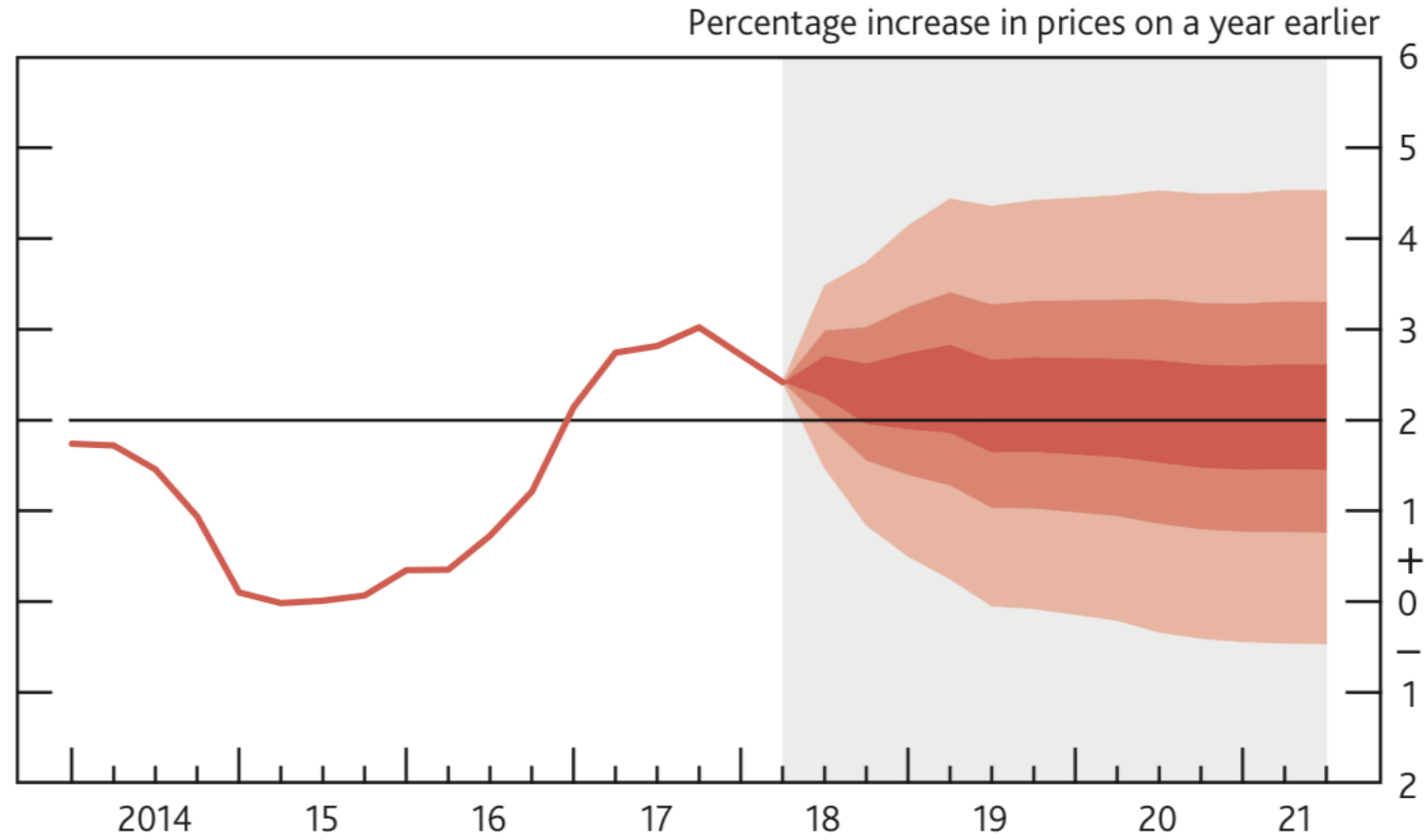
[Learn More](#)

Table 3 – Median RPI simulations

Rate of inflation over the period³ %pa	5 years	10 years	15 years	20 years	30 years	50 years
RPI	2.4%	2.4%	2.6%	2.7%	2.8%	2.8%

Source: Economic Scenario Generator

Chart 5.3 CPI inflation projection based on market interest rate expectations, other policy measures as announced





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