A indicated in these papers is repeated by him or by others who behave in a similar manner they may well find themselves on the receiving end of applications in the criminal court for ASBOs, or in the civil court for injunctions, but that is for another day. I dismiss this claim for judicial review.

Claim dismissed.

B

Solicitor: Head of Legal Services, Gosport Borough Council, Gosport.

Reported by Elanor Dymott, Solicitor

C

Queen's Bench Division

D

*Regina (Kemp) *v* Denbighshire Local Health Board and another

[2006] EWHC 181 (Admin)

2005 Oct 20; Nov 28;
E 2006 Feb 17

Langstaff J

Restitution — Quasi-contract — Money had and received — Recovery of interest — Claimant seeking funding for accommodation and care in nursing home — Defendant rejecting demand — Claimant seeking judicial review and restitution of sums paid out — Defendant agreeing to reimburse claimant before claim reaching permission stage — Whether court having jurisdiction to award interest on sum reimbursed — Whether restitutionary claim "debt" — Whether claim
F *instituted — Whether causal link between reimbursement and claim — Supreme Court Act 1981 (c 54), s 35A (as inserted by Administration of Justice Act 1982 (c 53), s 15, Sch 1)*

The claimant, who suffered from senile dementia and other medical conditions, resided at a nursing home the cost of which he paid. The claimant's son took the view that the claimant should be entitled to be funded fully by the
G National Health Service in respect of both the accommodation and the care which he received at the nursing home. A special review panel concluded that the claimant was not, and had not at any stage been, entitled to funding for the healthcare he was receiving. The claimant sought judicial review of that decision which included a claim for restitution of sums paid out and interest pursuant to section 35A of the Supreme Court Act 1981. Prior to that claim proceeding so far as the permission stage, two further special review panels recommended that the
H claimant receive full reimbursement of the sums paid out. The defendants refused to pay interest on those sums arguing that they were being reimbursed consequent on the acceptance of a recommendation by the special review panel and not by way of a judgment.

On the claim for interest and the question whether a restitutionary claim was a "debt" for the purposes of section 35A of the 1981 Act—

Held, that a restitutionary claim was a "debt" for the purposes of section 35A of the Supreme Court Act 1981; that the only trigger point for the application of section 35A was the institution of proceedings which, in a claim for judicial review, was when the claim form was submitted; that where the sum was paid before the claim had proceeded to judgment uncertainty as to outcome did not affect the jurisdiction to make an award, although it was relevant to the exercise of the discretion; that there was a causal relationship between the issue of proceedings and the payment of the sum to the claimant; and that, accordingly, the court had a discretion to make an award of interest on the sum to be repaid (post, paras 86, 91–93, 126).

Woolwich Equitable Building Society v Inland Revenue Comrs [1993] AC 70, HL(E) considered.

The following cases are referred to in the judgment:

Brawley v Marczynski [2002] EWCA Civ 756; [2003] 1 WLR 813; [2002] 4 All ER 1060, CA

Jefford v Gee [1970] 2 QB 130; [1970] 2 WLR 702; [1970] 1 All ER 1202, CA

Pickett v British Rail Engineering Ltd [1980] AC 136; [1978] 3 WLR 955; [1979] 1 All ER 774, HL(E)

R v Hackney London Borough Council, Ex p Rowe [1996] COD 155

R v Holderness Borough Council, Ex p James Robert Developments Ltd (1992) 66 P & CR 46, CA

R v Liverpool City Council, Ex p Newman (1992) 5 Admin LR 669

R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213; [2000] 2 WLR 622; [2000] 3 All ER 850, CA

R v Royal Borough of Kensington and Chelsea, Ex p Ghebregiogis (1994) 27 HLR 602

R (Boxall) v Waltham Forest London Borough Council (2000) 4 CCLR 258

R (Cowl) v Plymouth City Council (Practice Note) [2001] EWCA Civ 1935; [2002] 1 WLR 803, CA

R (Kaya) v Immigration Appeal Tribunal [2003] EWHC 2716 (Admin)

Woolwich Equitable Building Society v Inland Revenue Comrs [1993] AC 70; [1992] 3 WLR 366; [1992] 3 All ER 737, HL(E)

Wright v British Railways Board [1983] 2 AC 773; [1983] 3 WLR 211; [1983] 2 All ER 698, HL(E)

The following additional cases were cited in argument:

Anufrijeva v Southwark London Borough Council [2003] EWCA Civ 1406; [2004] QB 1124; [2004] 2 WLR 603; [2004] 1 All ER 833, CA

British Steel plc v Customs and Excise Comrs [1997] 2 All ER 366, CA

Dearling v Foregate Developments (Chester) Ltd [2003] EWCA Civ 913, CA

R (KW) v Avon and Wiltshire Mental Health Partnership NHS Trust [2003] EWHC 919 (Admin)

Sengoz v Secretary of State for the Home Department [2001] EWCA Civ 1135; The Times, 13 August 2001, CA

Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669; [1996] 2 WLR 802; [1996] 2 All ER 961, HL(E)

CLAIM for interest and costs

By a claim form, the claimant, William Kemp, suing through his son and litigation friend, Derek Kemp, claimed judicial review of the decision of the defendants, Denbighshire Local Health Board and Powys Local Health Board, taken through the All Wales Special Review Panel on 10 November 2004, that the claimant was not entitled to funding for the healthcare which he was receiving at the Canterbury House Nursing Home,

Rhyl. The claimant sought, inter alia, (1) a declaration that he was entitled to continuing NHS healthcare; (2) a declaration quashing the decision of the first/second defendant of 10 November 2004 that he was not entitled to funded healthcare; (3) restitution of sums paid out; (4) interest pursuant to section 35A of the Supreme Court Act 1981; and (5) costs. The first defendant subsequently agreed to reimburse the claimant in full and accepted that it was responsible for the continuing cost of his care.

An order of Stanley Burnton J dated 22 August 2005, as varied, set out the position as follows: (a) the claim for judicial review had not proceeded so far as permission stage; (b) the substance of the claim had been conceded in financial terms; (c) the claimant asserted that the defendant accepted that the defendant had been in error of law in the earlier decision; (d) the court's decision was needed as to whether a different basis for calculating interest should be utilised, and whether and to what extent the claimant should recover his costs.

The facts are stated in the judgment.

Robert Weir for the claimant.
Fenella Morris for the defendants.

Cur adv vult

17 February 2006. **LANGSTAFF J** handed down the following judgment.

1 On 9 August 2005 the claimant applied for an order that the defendants pay the claimant £109,922·43, together with interest and costs. Only the issues in respect of interest and costs remain for determination. Those applications have thus far involved submissions made by counsel orally before me on two occasions, have involved written submissions, and are such that I have been invited to have regard to a transcript of the oral submissions on the first of those occasions. The necessity or desirability of those arguments, and that expense, coupled with the voluminous documentation which has been put before me is itself subject to argument to the extent to which it may considerably have increased the costs incurred by both parties.

2 In order to determine the issues which I have to resolve it is necessary to set out the factual history underlying the claim for judicial review, the procedural history of this particular case, and the submissions. I shall deal with each in turn.

Background to the claim

3 William Kemp, the claimant, was born on 28 April 1913 and is therefore now 92 years of age. He suffers, and has suffered for some years, from senile dementia of an Alzheimer's type. This condition is complicated by the fact that he also suffers from diabetes, which has on occasion rendered him hypoglycaemic, from polymyalgia rheumatica, respiratory disease and rheumatoid arthritis to mention the main conditions. He has on occasion behaved aggressively, and on occasion with disinhibition.

4 Since June 1999, he has resided at the Canterbury House Nursing Home in Rhyl, which is a nursing home for the elderly mentally ill. He is a patient. His son, Derek, who is the litigation friend, holds an enduring power of attorney for him, which is registered with the Court of Protection.

5 Prior to 1 April 2003, the North Wales Health Authority was the health authority responsible for funding any of the claimant's National Health Service ("NHS") needs. On that date it was abolished. The Denbighshire Local Health Board became the successor in title and responsible, since 1 April 2004, for funding any NHS needs of the claimant. The liabilities for the North Wales Health Authority up to the date of its abolition became vested in Powys Local Health Board, the second defendant.

6 The issues in the case concern the funding of the claimant's placement at the Canterbury House Nursing Home. He paid for this through his son Derek.

7 For the period between June 1999 and December 2001, the claimant paid the entirety of the charges levied by the local authority in respect of his accommodation at the Canterbury House Nursing Home.

8 The claimant's son took the view, on his behalf, that the claimant should be entitled to be funded in full by the NHS in respect of the accommodation and care which he was receiving at the Canterbury House Nursing Home. In 2004 the claimant, acting through his son, contacted the Parliamentary and Health Service Ombudsman to challenge the failure of the defendants to pay for this care since June 1999. He was advised to seek a review of the decision that the claimant was not and had not at any stage been entitled to continuing NHS funding. Following his request, a special review panel was convened on 10 November 2004. It came to the conclusion that the claimant was not entitled to funding for the healthcare which he was receiving. This decision of the All Wales Special Review Panel of 10 November 2004 was the subject of the judicial review proceedings before me.

9 On the last day of a three-month period beginning with the date of this decision the claimant issued judicial review proceedings before the Administrative Court. No pre-action protocol was completed because, according to the claim form:

> "there has been insufficient time since being instructed by the claimant and obtaining expert evidence due to the requirement to issue proceedings within three months as required by CPR r 54.5(1)(b)."

10 To understand the criticisms that are made of the approach of the special review panel, it is necessary to review the underlying law as to which there is little or no dispute between the parties.

11 The National Health Service Act 1977 places upon the Secretary of State for Health a duty to continue to promote a comprehensive health service: section 1(1). Section 1(2) provides that the services so provided shall be free of charge "except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed". By section 3 it is his duty to provide, amongst other matters, "medical, dental, nursing and ambulance services". The duty so to provide is qualified. Provision has to be to such extent as the Secretary of State considers necessary to meet all reasonable requirements: section 3(1), introductory words.

12 Section 21 of the National Assistance Act 1948, as amended, provides that a local authority may, with the approval of the Secretary of State, and to such extent as he may direct, make arrangements for providing

residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them. Section 21(5) provides in effect that references to accommodation in the 1948 Act may cover nursing services which are provided in connection with accommodation: see *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, para 27 .

13 Section 21(8), as amended by section 66 and paragraph 5(3) of Schedule 9 to the National Health Service and Community Care Act 1990, provides:

> "nothing in this section shall authorise or require a local authority to make any provision authorised or required to be made (whether by that or by any other authority) by or under any enactment not contained in this Part of this Act *or authorised or required to be provided under the National Health Service Act 1977*." (My emphasis.)

14 Local authorities are permitted, by regulation, to make charges in many circumstances for the accommodation which they provide. The NHS, in general, is not. Accordingly, in any case in which a person is accommodated in residential accommodation, and is in need of care and attention not otherwise available to him or her, it will be critical (financially) to know whether or not that accommodation and the care that comes with it are to be paid for in its entirety by the NHS, or provided at a charge by the local authority.

15 The resolution of that issue was illuminated by the decision of the Court of Appeal in *Ex p Coughlan*. The conclusion to which the Court of Appeal came at para 30(d) was that no precise legal line could be drawn between those nursing services which were and those which were not capable of being treated as included in such a package of care services provided by a local authority. Lord Woolf MR, giving the judgment of the court, said, however, at para 30(e):

> "as a very general indication as to where the line is to be drawn, it can be said that if the nursing services are (i) merely incidental or ancillary to the provision of the accommodation which a local authority is under a duty to provide to the category of persons to whom section 21 of the 1948 Act refers and (ii) of a nature which it can be expected that an authority whose primary responsibility is to provide social services can be expected to provide, then they can be provided under section 21. It will be appreciated that the first part of the test is focusing on the overall quantity of the services and the second part on the quality of the services provided."

The court declared, at para 48, that it was for the health authority to decide what should be the eligibility criteria in its area in the co-operative framework envisaged by the relevant circulars. In doing so it could take account of conditions in its area. The criteria could not, however, place a responsibility on the local authority going beyond the terms of section 21.

16 In respect of Wales, a circular in 1995 required health authorities to develop local policies and eligibility criteria for continuing healthcare. In response, eligibility criteria were produced relevant to the present case, clarified in 2001 in response to the decision in *Ex p Coughlan*.

17 The special review panel which considered the claimant's case on 10 November 2004, had regard to eligibility criteria for continuing healthcare, in guidance on social services' responsibility for continuing social care, which had been agreed in April 1999 between North Wales Health Authority and the relevant local authorities. It held that the eligibility criteria at paras 6.1 and 6.2 were such that upon a proper application of them to the material available in respect of the claimant, he was not eligible for continuing NHS funding.

18 Para 6.2.1 is to the effect that "NHS responsibility" was indicated where a multi-disciplinary team, following assessment, agreed that an individual met one or more of a number of specified criteria and "thereby requires regular input from a designated member of the community/hospital mental health team under the direction of a consultant psychiatrist". "Regular" meant not less than weekly; and it was noted that the function of the "designated member" could be delegated to a designated member of the registered mental nursing home staff who possessed the required skill and experience.

19 The decision-making process by which the criteria were to be applied was set out in para 5. Relevantly, that provided:

> "The method for determining whether a person meets the criteria is a multi-disciplinary, multi-agency one using appropriate and agreed assessment tools. Patients and their carers will be kept informed and will be involved throughout the process."

One of the complaints made by the claimant was that the All Wales Special Review Panel of November 2004 did not approach the application of the eligibility criteria in this way. There was no multi-disciplinary assessment before it.

20 In para 6.1 of the eligibility criteria the 1999 guidance states that the NHS is responsible for arranging and funding continuing in-patient care on a short- or long-term basis where the complexity, nature or intensity of the person's nursing care meant that they required supervision from the NHS on an ongoing and regular basis. It was noted that the complexity of a person's need for nursing care might be demonstrated by their aggregated care needs based upon the use of one or more agreed dependency tools. In a table set out at para 6.1 the circumstances in which a person required basic nursing care of the type given to a predominantly bedfast person, which would be the responsibility of local authority social services, is contrasted with those of a person who is totally dependent for all aspects of survival on the skills of a registered nurse, based on one or more agreed dependency tools, e g Barthel ADL or the Health Authority Assessment Tool (appendix IV), or who is comatose.

21 Prior to issuing the claim form seeking judicial review of the November 2004 decision, the claimant instructed solicitors who in turn arranged for Professor Kevin Gournay CBE, a professor of psychiatric nursing, to visit the claimant at the home on 14 January 2005. He produced a 40-page report on 14 February 2005 which, between paras 108 and 126, reviewed the eligibility criteria and expressed his view that on both the Barthel Index, and the Assessment Tool at appendix (IV), the claimant should have been declared eligible. Amongst other matters, he indicated that the level of dementia from which he assessed the claimant to be suffering

A was such that "there is no reasonable body of nurses or doctors who would not say that Mr Kemp's dementia falls at the severe end of the spectrum of severity" (para 150); that the claimant's sexual disinhibition, double incontinence, propensity to pull at doors, attempts to abscond, unpredictable sleep pattern and array of physical health problems were such that, in aggregate, he required overall the skills of a registered nurse
B (para 152) and that his need to be in Canterbury House Nursing Home was driven primarily by his healthcare needs: para 155.

22 He also expressed the view that, whereas the claimant met some of the criteria set out by the health board if they were properly applied to his case, those specific criteria seemed out of keeping with the spirit of both the *Ex p Coughlan* [2001] QB 213 judgment and an ombudsman's report into NHS funding for long-term care, of February 2003, and were, in his view,
C unduly restrictive. He was, however, unspecific as to which were the criteria concerned.

23 The judicial review claim form sought a declaration that the claimant was entitled to continuing NHS healthcare, and an order quashing the decision of the first/second defendant of 10 November 2004. In addition to those, and four further declarations which related to the substance of
D a claim for eligibility for NHS funded healthcare, the claimant sought damages for negligent misrepresentation/negligence, and "further and alternatively, restitution against the first and/or second defendants", interest and costs. It apologised for a failure to serve accompanying documents with it. Those documents, and detailed grounds supporting the application, were dated 11 February 2005.

24 The grounds were set out in 71 paragraphs. Five of those related
E to the claim for damages on the basis of negligent misstatement or misrepresentation. The claim for negligence was "because no responsible health authority or local health board in the position of the defendant could have found other than that the claimant was entitled to continuing NHS healthcare". The claim was said to be one for negligent misstatement or misrepresentation in and about the making of the assessments. A further
F four paragraphs dealt with the claim in restitution. This asserted that the claimant paid money from June 1999 until the date of the proceedings as a direct result of and in reliance on the defendants' error of law; that the claimant paid under a mistake of law, or was only liable to pay the nursing home as a result of the defendants' mistake of law and would not have been liable to pay otherwise. It is asserted that the money was paid to the defendants' use.

G **25** Interest was sought pursuant to section 35A, as amended, of the Supreme Court Act 1981.

26 On 9 February 2005 the second defendant wrote to the claimant's solicitors. This was not in response to a protocol letter, for there had been none. (It was no doubt prompted by a letter of 4 February alerting the defendants to the possibility of proceedings.) In the third from last
H paragraph of its letter it said that those caring for the claimant could make an application for continuing NHS healthcare funding at any time if it was felt that he had become eligible. This, however, fell short of offering any further assessment so far as reimbursement of past expenses was concerned. It cast no doubt upon the correctness of the decision of 10 November 2004. Prior to the date of issue of proceedings, the second defendant made no

suggestion that there might be any further review which would have an impact upon the reimbursement of long-term care costs, save that on 15 November 2004 the chair of the special review panel wrote to the claimant's son to say that if he was unhappy with the outcome of the panel hearing he might have grounds to appeal further if either (i) new information became available which was not considered by the panel, or (ii) he believed that the panel was not consistent and did not follow agreed procedures. In either of those instances, the case would be reheard by a freshly constituted special review panel—but a 14-day appeal period was given. The chair's letter concluded:

> "As you know, you cannot appeal just because you disagree with the decision made by the special review panel. However, you may be able to pursue relevant elements of your case through the complaints process and you will be given information about this on request." (Details of that complaints process do not appear to be before the court.)

27 The defendants, as will be seen, emphasise that the claimant did not take advantage of any of those routes of complaint.

28 On 24 February 2005 the defendants offered a further All Wales Special Review Panel to reconsider the claimant's case. This offer was accepted. In the meantime, however, the defendants filed summary grounds of resistance arguing that the decision of November 2004 was reached lawfully, applying lawful criteria. They also sought a stay whilst the claimant exhausted his alternative remedies.

29 On 31 March 2005, the second review panel met. It had before it a copy of the expert report from Professor Gournay, and a statement in support of the claimant's case from the nurse manager of Canterbury House, one Ada Vos.

30 Although the claimant had asked for a multi-disciplinary assessment of his health and nursing needs to be provided for the panel to consider, and although the eligibility criteria which fell to be applied envisaged a multi-disciplinary team assessing the patient's circumstances, none had been performed. In the absence of such a multi-disciplinary assessment, the second panel felt unable to determine eligibility from 29 May 2002 onwards (though felt able to determine that the claimant's needs were such before that date that funding of his placement should be the responsibility of the NHS). There was an adjournment to allow this to happen.

31 On 11 April 2005 Collins J, before whom the application had come on paper, directed that it would be sensible to see what was decided by the review, although he was reluctant to defer the claim.

32 On 6 May 2005 a multi-disciplinary assessment by the local health board assessment team was performed.

33 On 13 May 2005, a third special review panel met. That recommended that the claimant should receive full reimbursement for the remaining period of care (i e up and until 8 May 2005) and that the first defendant should be responsible for the continuing cost of his placement at the Canterbury House Nursing Home.

34 On 17 May 2005, the claimant's solicitors notified the court that the issue of the appropriate rate of interest to be applied, as well as the question of payment of costs remained outstanding. They were then awaiting the defendants' response.

A 35 At this stage, therefore, and pending only formal acceptance by the second defendant of the recommendation of the panel, the principal matter in dispute between the parties had been resolved. Cudgels were now taken up over the issues of interest and costs.

36 Both claims were rejected by the defendants. Interest was rejected upon the basis that the money was being reimbursed consequent upon the
B acceptance of a recommendation by the special review panel, and not by way of a judgment debt. The special review panel process provided for what was termed interest to be provided by a calculation which differed from that of the claimant: the established procedure was for the rate of interest to be based on the Retail Price Index ("RPI"), calculated on the annual average of RPI in each calendar year, and to be compounded annually. The defendants rejected any liability for costs, and took particular exception to the
C claimant's solicitors' letter of 13 June 2005 which warned the defendants that if a hearing should prove necessary to determine the outstanding issues of interest and costs, the claimant's funding arrangements (under a conditional fee agreement) necessitated an increase in the insurance premium from £6,000 to £18,000 which the claimant would then seek from the defendants.

D 37 On 15 August 2005, Richards J adjourned the application for permission to an oral hearing, to be listed on the basis that the substantive hearing was to follow immediately if permission were granted. That was followed a week later by directions for the hearing which began before me, given by Stanley Burnton J. It is necessary to recite paragraphs 5 and 6 of his order:

E "5. The court will determine these issues on the written submissions of the parties unless either party requests an oral hearing. That oral hearing will take place on 20 October 2005. If the parties are content for the matter to be decided on the written submissions they must each so inform the ACO so that the hearing date may be vacated.

"6. The parties should be aware that if an oral hearing is requested and the court considers it to be unnecessary, a special order for costs may be
F made."

Position by October 2005

38 The position following the order of Stanley Burnton J (as varied, inconsequentially for present purposes, by Harrison J) was that: (a) the application for judicial review had not proceeded so far as permission stage;
G (b) the substance of the claim had been conceded in financial terms; (c) the claimant asserted that the defendant accepted that the defendant had been in error of law in the earlier decision; the defendant refutes this (since I have seen no evidence of any such acceptance in terms this is, I think, overstatement by the claimant); (d) the court's decision was needed as to whether a different basis for calculating interest should be utilised, and whether and to what extent the claimant should recover his costs.

H

Submissions of the parties

39 For the claimant, Mr Weir centrally argued that the claimant would obviously have succeeded in his claim. He maintained that the claimant had brought what, in effect, was a successful restitutionary claim. A claimant is

entitled to make a claim for restitution, as well as for the more traditional remedies available on judicial review: see CPR r 54.3(2). If that claim had been brought in the Queen's Bench Division, it would have been a common law claim to which section 35A of the Supreme Court Act 1981 readily applied. The date from which interest should run was the date on which the money was paid over to the defendant, and was subject therefore to the obligation upon the defendant to make restitution of it. The rate of inflation must compensate the individual for the loss of use of his money and for the fact that the defendant has had the benefit of that money.

40 Mr Weir maintained that interest is not payable to update the capital value of money: that was not interest, but inflation. He asserted that interest and inflation were separate concepts. For this, he relied upon the speech of Lord Wilberforce in *Pickett v British Rail Engineering Ltd* [1980] AC 136. There Lord Wilberforce said, at p 151:

> "Increase for inflation is designed to preserve the 'real' value of money: interest to compensate for being kept out of that 'real' value. The one has no relation to the other. If the damages claimed remained, nominally, the same, because there was no inflation, interest would normally be given. The same should follow if the damages remain in real terms the same. Apart from the inflation argument no reason was suggested for interfering with the exercise of the judge's discretion."

Lord Denning MR in *Jefford v Gee* [1970] 2 QB 130, 146 said:

> "Interest should not be awarded as compensation for the damage done. It should only be awarded to a plaintiff *for being kept out of money* which ought to have been paid to him."

41 It has become conventional, he submitted, for courts to award interest on one of two bases such that it would not be a proper exercise of the court's discretion to award interest on any other basis (to do so would introduce undesirable uncertainty in litigation). The first was the Commercial Court rate which was Bank of England base rate plus 1%; the second was either judgment debt rate or special investment account rate. He suggested that there was no jurisdiction in which the court had endorsed the principle that the rate of interest should be set by reference to RPI. The special account interest appropriate to the period June 1999 to May 2005 should be calculated upon the total sums paid over on behalf of the claimant to the defendants during that period, and divided by two (to take account of the fact that the loss occurred throughout the period, and adopting the broad brush approach endorsed by the Court of Appeal in *Jefford v Gee*), but after May 2005 should be at the full rate since there had been no further loss after that date.

42 As to costs, the relevant principles were those set out in *R (Boxall) v Watham Forest London Borough* (2000) 4 CCLR 258. That was a case in which the decision subject to judicial review was the conclusion of a local authority that neither of two claimants was in need of accommodation. Permission was granted for the review to proceed, but before it could come to a full hearing, the defendant offered new accommodation to the claimants. The claimants thus contended that the defendant eventually gave them what the judicial review application set out to achieve, although the defendant maintained that the result was independent of that application. He referred

A me to paras 16, 25 and 26 in particular. There Scott Baker J reviewed *R v Liverpool City Council, Ex p Newman* (1992) 5 Admin LR 669, in which Simon Brown J had said:

> "where, as here, the discontinuance [by the claimant of his judicial review application] follows some step which has rendered the challenge no longer necessary, which in other words renders the proceedings
B academic. That may have been brought about for a number of reasons. If, for instance, it has been brought about because the respondent, recognising the high likelihood of the challenge against him succeeding, has pre-empted his failure in the proceedings by doing that which the challenge is designed to achieve—even if perhaps no more than agreeing to take a fresh decision—it may well be just that he should not merely fail to recover his own costs but indeed pay the applicant's. On the other
C hand, it may be that the challenge has become academic merely through the respondent sensibly deciding to short-circuit the proceedings, to avoid their expense or inconvenience or uncertainty without in any way accepting the likelihood of their succeeding against him. He should not be deterred from such a course by the thought that he would then be liable for the applicant's costs. Rather in those circumstances, it would seem to
D me appropriate that the costs should lie where they fall and there should accordingly be no order. That might equally be the case if some action wholly independent of the parties had rendered the outcome of the challenge academic. It would seldom be the case that on discontinuance this court would think it necessary or appropriate to investigate in depth the substantive merits of what had by then become an academic challenge. That ordinarily would be a gross misuse of this court's time
E and further burden its already over-full list."

43 In *Brawley v Marczynski* [2003] 1 WLR 813, an action was settled, save as to costs. Longmore LJ stated, at para 18:

> "there is in my judgment no tradition in these matters of there being 'no order as to costs' merely because a dispute has been settled except as
F to costs. No doubt if it is truly impossible to say what the likely outcome would have been it is a possible order."

Longmore LJ then referred with approval to the judgments of Butler-Sloss and Simon Brown LJJ in *R v Holderness Borough Council, Ex p James Roberts Developments Ltd* (1992) 66 P & CR 46, where they indicated that costs applications have to be entertained and resolved and that that might
G involve an evaluation of the prospects of success. In the light of that, Longmore LJ endorsed the principles which Scott Baker J had set out in *R (Boxall) v Waltham Forest London Borough Council* 4 CCLR 258, in particular where he noted that at each end of the spectrum of possible results there will be cases in which it is obvious which side would have won had the substantive issues been fought to a conclusion, but that in between the position would, in different degrees, be less clear. How far the court would
H be prepared to look into the previously unresolved substantive issues would depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties. Mr Weir argued that the claimant here would have succeeded. He had a strong claim for restitution. Given that the defendants did not now deny entitlement to repayment, the

claim, whether viewed as one for judicial review or one for restitution, had been effective and the defendant's offer to use RPI as a tool for assessing interest to be awarded was unjustifiable. The costs could be divided into three parts. First, it was necessary to incur costs prior to judicial review because there had been no multi-disciplinary assessment, as required by the defendants' own procedures, and the instruction of Professor Gournay was necessary both to fill that gap, and to give an expert view as to whether, on the facts, the criteria were established. The claimant could have no faith, given the delay in arranging a hearing of the special review panel in the first place, in the system. He had waited 19 months for the review. He had not been offered a further one. He was paying £490 per week as an ongoing liability. There was no guarantee that he would be paid interest at an appropriate rate because the policy was to repay RPI. It was appropriate to issue in the Administrative Court because what was at stake was not only the application of the criteria, but the lawfulness of the eligibility criteria and associated guidance, and the costs of preparing for that were thus necessarily incurred. Secondly, costs were incurred after the judicial review proceedings were begun, both in reaching agreement on the principal sum due, and because the offers which were made did not provide for appropriate interest, and sought to impose a confidentiality clause upon the claimant which was unwarranted, when he was entitled to restitution. Thirdly, the costs of the hearing before me were incurred because of the defendant's unjustifiable approach.

44 For the defendants, Miss Morris dealt with the issues of costs first, and interest second. As to the latter, she argued that the present case did not fall within section 35A of the Supreme Court Act 1981. Section 35A provides:

> "(1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and [omitting irrelevant words] the date of the payment."

This was not a case in which judgment was given. To fall within the section, there would have to be proceedings for the recovery of a debt or damages, and payment of a debt or damages would have to be made prior to judgment. Here, the money was paid by decision of the special review panel. It was neither damages, nor a debt. Alternatively, the policy operated by the defendants, together with the guidance, provided for interest calculated on a compound basis, adopting the rate of RPI. Section 35A, if applicable, provides for a discretion. That discretion should be exercised so that any others who are reimbursed through the statutory scheme are reimbursed in accordance with the scheme, and not by being awarded interest on some other basis. There had been no challenge to the legality of the provisions within the scheme as to interest. If the court were to award a higher rate of interest than that provided for under the scheme, it might create a "perverse incentive" by encouraging people to issue claims for judicial review at the same time as, or before making applications under the statutory process, so

A that they might secure interest and costs. She pointed out that the claimant was one of many represented by the firm of solicitors who acted for him, and it had been suggested that there were "test case" elements about it, with other such cases waiting in the wings. As to costs, she contended that there was an alternative remedy which had not been pursued. Thus in *R (Cowl) v Plymouth City Council (Practice Note)* [2002] 1 WLR 803, para 14 Lord
B Woolf MR emphasised that even if the alternative procedures did not convey the whole of the remedy that could be contended for in judicial review proceedings, their non-use by a claimant could result in his application for permission being rejected:

> "The parties do not today, under the Civil Procedure Rules, have a right to have a resolution of their respective contentions by judicial review in the absence of an alternative procedure which would cover
C exactly the same ground as judicial review. The courts should not permit, except for good reason, proceedings for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the litigation process. The disadvantages of doing so are limited. If subsequently it becomes apparent that there is a legal issue to be resolved, that can thereafter be examined by the courts which
D may be considerably assisted by the findings made by the complaints panel."

He took the view that in that case, which related to the closure of a nursing home for the elderly, the complaints procedure should have been used. Lord Woolf MR continued, at para 27, to emphasise that that particular case would have served some purpose:

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> "if it makes it clear that the lawyers acting on both sides of a dispute of this sort are under a heavy obligation to resort to litigation only if it is really unavoidable. If they cannot resolve the whole of the dispute by the use of the complaints procedure they should resolve the dispute so far as is practicable without involving litigation. At least in this way some of the expense and delay will be avoided."

F There were here alternative remedies. The claimant could have appealed against the decision, as the review panel had indicated. He could have complained through the local statutory complaints procedure. He could have gone back to the Health Service Ombudsman as the ombudsman himself had suggested.

45 Moreover, this was a case in which the claimant sought costs when
G the litigation had yet to reach the stage of permission. *R (Boxall) v Waltham Forest London Borough Council* 4 CCLR 258 was a case which considered the position after the grant of permission. As to applications for costs at a pre-permission stage, Scott Baker J had made reference in para 14 of his judgment to *R v Royal Borough of Kensington and Chelsea, Ex p Ghebregiogis* (1994) 27 HLR 602. An order for costs had been made.
H But in that case there was a letter before action which was a model of clarity which was essentially ignored by the defendant. The principle was that it was only in a very clear case that an order for such costs should be made. He went on to note that in *R v Hackney London Borough, Ex p Rowe* [1996] COD 155, Sedley J refused a costs order in a case which he did not regard as plain and obvious noting that:

"The attempt to recover costs had simply incurred further public expense on both sides. He pointed out that the practice on costs should do nothing to discourage sensible settlement and pointless expeditions to the court that incurred further costs. With that I entirely agree."

46 There was no pre-action protocol letter here. Very shortly after writing a letter indicating that judicial review would follow, proceedings were issued. This had ignored the options indicated by a letter from the review panel indicating the circumstances in which a re-assessment could be sought. Less than two weeks later the defendants had offered another panel hearing: making it reasonable to conclude that if the pre-action protocol had been complied with by the claimant, proceedings would not have been issued. Instead, there would have been the further panel hearing. There was no reason to think that the result would have been any different, save as to costs which would simply not have been incurred.

47 She argued that the challenge to the criteria themselves had been abandoned. The general rule is that there would be no pre-permission costs in judicial review. She argued that permission would not have been granted in any event given the availability of the alternative remedy. Judicial review of the November 2004 panel would not necessarily have succeeded: this was not a natural conclusion from the fact that a later panel, with different evidence, and in possession of a multi-disciplinary assessment, as well as the long report from Professor Gournay, had come to a different conclusion. The costs, which she described as huge, being in excess of £60,000, had been incurred because the claimant had chosen to pursue a path which Parliament and the courts had said he should not have pursued, and which produced costs wholly disproportionate to what was at stake.

48 Moreover, a claim for restitution if brought at common law would not necessarily have succeeded: it would have faced the same hurdles as did the claim for judicial review, because its success would depend upon showing that the decision of November 2004 was wrongly based, and in any event could not be said to be an open and shut claim.

49 As well as those more general submissions, Miss Morris took issue with two particular points. The first was the claim for the cost of Professor Gournay's report. This should not be paid because CPR r 35.4 provides that no party may put in an expert's report without permission, and a court may limit the amount of the expert's fees and expenses that a party who wishes to rely on any expert may recover from any other party. No permission was obtained; and there was no need for the report in the light of the voluminous evidence. Secondly, she maintained that the issues of interest and costs before me should have been determined on paper: they did not require a hearing of the substantive issues (and indeed, I should note that the substantive issues were not significantly canvassed before me, the parties appearing respectively to urge and to acquiesce in the principle expressed by Simon Brown LJ in *R v Holderness Borough Council, Ex p James Roberts Developments Ltd* 66 P & CR 46, cited above, as applied in subsequent cases). Stanley Burnton J had clearly drawn attention to the need to be parsimonious in expenditure: such that even if I felt minded to award the costs of the matter to the claimant, I should not include in those the costs of the oral hearing which should lie where they fall.

Discussion

50 The principal sum has now been agreed between the parties as £108,911·71. The defendants have agreed to discharge the ongoing liability of Mr Kemp in respect of his accommodation at the Canterbury House Nursing Home. In the light of the undertaking to pay, the claimant has not proceeded with the substance of his claim for judicial review of the November 2004 decision. Thus I am invited to award not only costs, but interest in respect of a claim which might not have succeeded, and might not even have passed the permission stage. Had it failed at the permission stage, there would have been no question of reimbursing the costs of the claimant. Rather, a question might have arisen whether there would be any claim by the defendants for costs to be paid by the claimant in respect at least of the acknowledgement of service. There would be no question of any award of interest. That would be so whether or not the defendant subsequently took a decision, pursuant to its policy, to repay sums expended by or on behalf of Mr Kemp in respect of his accommodation, or to discharge the future costs of that accommodation and care. In this latter case, "interest" to be awarded would be that pursuant to the policy—i e compound interest, calculated at the rate of retail price inflation, as opposed to simple interest at a rate and for a duration dependent on the exercise of the discretion of the court.

51 Accordingly, I direct myself that I should form a view as to the chances of success which the claimant would have had in (a) obtaining permission to apply for judicial review; (b) succeeding on the substance of the application in showing that the decision of 10 November 2004 should be set aside; but also (c) persuading the court that a consequence of success upon the substantive issue would be success upon the restitutionary claim brought as part of the review proceedings (or, alternatively, that if viewed as a freestanding claim it would itself have succeeded).

52 It is only in the broadest terms that the substantive merits of the application, or the restitutionary claim, have been addressed before me. This appears to me to be because both parties acknowledge the force of the approach enjoined by Simon Brown LJ in the *Holderness* case 66 P & CR 46, cited with approval in *Boxall's* application 4 CCLR 258 by the Court of Appeal, per Scott Baker LJ (see para 43 above) and, as the defendants point out, summarised in simple terms by Wyn Williams QC sitting as a High Court judge in *R (Kaya) v Immigration Appeal Tribunal* [2003] EWHC 2716 (Admin) in which, on an application for costs before determination of review proceedings, he said, at para 11:

> "it is not for me, at this stage, in effect, to rehear a substantive challenge . . . It seems to me that I have to approach it on this basis: does a comparatively cursory reading of the papers, albeit a reading which is intended to be informed, demonstrate to me, clearly, that the [defendant] was very likely to lose and the claimant very likely to succeed as at the permission stage?"

53 If money is paid by one party to another, because the payer recognises that he should make the payment (whether because he recognises a legal or moral obligation, or it is simply his policy or choice to do so) a court would not in the absence of legal action be in the position of awarding costs nor, at common law, interest upon the sum paid over, nor could a legal action then succeed once the money had been paid. Even if an action were brought

for any shortfall in payment, it is difficult to see how payment of interest calculated upon the whole, part of which had already been paid, would attach to any order for payment over of the shortfall part. It is, therefore, beside the point to argue, as the claimant does, that he had a valid claim in restitution which he might have brought as a freestanding claim. Even if it is right that he could have brought and succeeded upon it, it is not what he did.

54 It follows that if the claimant had challenged the decision of the defendant prior to commencing proceedings, and the defendant had then agreed to make payment, there would be no question of the payment of costs or (at common law) of interest. CPR r 54.3(2) provides: "A claim for judicial review may include a claim for damages, restitution or the recovery of a sum due but may not seek such a remedy alone." An award may, by section 31(4) of the Supreme Court Act 1981, as amended by section 4(c) of the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, be made if the application for review contains a claim for it, and

> "the court is satisfied that such an award would have been made if the claim had been made in an action begun by the applicant at the time of making the application."

55 Because the claim for costs and interest is dependent upon the claim for restitution in the review proceedings, I have to be satisfied that (on the broad brush approach which is advised by the case law) the judicial review proceedings would have proceeded beyond the permission stage, have had good chances of success, and also that the claimant had also a valid common law claim for restitution. The latter two are plainly linked: the claim that funding was the responsibility of the NHS, and thus to be paid in full, as opposed to the responsibility of the local authority, and thus to be paid in part if at all, was critically dependent upon the proper allocation of financial responsibility as between NHS and local authority: a matter, in turn, dependent upon proper implementation of the applicable policies, or the adoption of alternative policies in so far as the applicable policies were unlawful.

56 Thus, at its heart, the claim for both the judicial review and that which could have been brought at common law depended upon the court's view of a decision which was evaluative. To show that such a decision was wrong, and should be set aside, does not answer the claim for restitution unless it can also be shown that the only proper result of the evaluative process was that continuing care of the claimant, and past care of the claimant, was for the NHS to have responsibility.

57 A further problem for a court assessing that which another court would probably have found is that it has also to take into account that even if a decision favouring the claimant was to be made by another court, hypothetically hearing the restitutionary claim, it would not necessarily answer the question as to the period in respect of which there should be repayment. Whether Mr Kemp's health needs in June 1999 were such that the NHS should then have funded his nursing home fees is a very different question, potentially, from whether the NHS should fund those fees in 2005: and it is entirely possible that, at periods in between, a legitimate assessment might have passed the responsibility from local authority to NHS, or back. The claimant's submissions are such as to invite me to regard the question of an assessment in November 2004, properly

A conducted, as being determinative of the whole period since 1999. I do not think it is so easy.

58 If the claimant were successful, therefore, in establishing that the decision of November 2004 was not properly taken, it would not determine whether, not to what extent, the force of the material that might have been available for proper consideration in November 2004 was such as to demonstrate that the health needs in the receding past (as to which there B could be no multi-disciplinary assessment specifically prepared for the November hearing) were or were not such as to require NHS funding. I note that the second review panel approached its determination by having regard to that which it could glean from the medical records relating to Mr Kemp. Those records were also before the hearing in November. On the same basis, the November hearing came to a different conclusion. Whereas this C might be explicable on the basis that the decision of one or other panel was perverse, I prefer to regard it as indicating that the decision, at least as to the earlier years of the claimant's accommodation at the Canterbury House Nursing Home, was one in which there was a relatively fine judgment to be made on the central issue, and one on which responsible bodies, and therefore courts, might reasonably differ.

D 59 I cannot, therefore, be satisfied that, on the facts as I see them, and adopting the approach set out above, this case is one in which the claimant would be very likely to succeed in a restitutionary claim, and still less satisfied that the claimant would have enjoyed the same success by that route in securing the repayment of principal as he has consequent upon the decision of the third review panel.

60 As to the earlier part, a court would have had regard to the evidence E that might have been given by Dr Gwyn Pierce-Williams, who was the claimant's general practitioner. In the Spring of 2005 he produced a short report, which described the claimant's condition since June 1999. This indicated that the claimant was difficult to manage in the early months, but appears then to have "really settled down". Then diabetes intervened, as well as chronic obstructive pulmonary disease which required steroids the taking of which, in turn, complicated diabetic management; and in August F 2003 he had a transient ischaemic attack (which I interpret as a "stroke") and "his physical health has gently declined since". The mental problems are said now to be rarely a problem, and readily controlled, as is his diabetes. This report thus presents a fluctuating picture, inclining therefore to greater uncertainty of prediction as to that which a court would have decided.

61 Both Dr Crowther (report, 9 May 2005) and Professor Gournay deal G principally with the present, although the latter, whilst acknowledging a change in "Crichton" scoring, which would indicate a worsening condition from 2003 to 2004/2005, attempts an assessment in respect of the whole period against the eligibility criteria set out at paras 6.1 and 6.2.

62 Despite, however, the fact that I have considerable doubts that a claim for restitution for the whole of the period would have succeeded, I consider it likely that it would have succeeded for part. I note, in H particular, the paucity of information contained by a Mary Morris in a report to the review panel of November 2004, which I can only assume on present material was spoken to at the hearing itself. Although the matter has yet to get to the stage of permission, the defendants have not chosen to provide any substantial evidence to contradict the approach of Professor

Gournay which is compelling at least as to the recent past. Accordingly, in my view, a claim at common law would probably have succeeded at least as to part, if not as to the whole of the period. This, however, is not sufficient to answer the costs issue. It is necessary also to review the chances of success of the present claim at the permission stage.

Chances of success at the permission stage

63 In my view, a claim for permission in the present case would have faced considerable hurdles. Before applying for permission, a claimant should normally comply with the pre-action protocol for judicial review. It is common ground this was not complied with. A claim should not normally be made until 14 days after the protocol letter has been received by a defendant. The reason given for failure to comply with the protocol was "late instructions from the claimant": see also, para 9 above. Lateness of instruction does not explain why the claimant himself could not have taken action earlier. In this case, the actions of his son are the relevant actions. He had known for some considerable time of the forthcoming hearing. The format adopted by the local health board for presentation of the information to the special review panel (of which he had sight prior to the hearing) indicated that claims could potentially be made that the policy and criteria were unlawful, or the criteria not properly applied: two out of the six allegations eventually made at para 34 of the grounds, with one (the allegation that a proper determination required a multi-disciplinary investigation and report) of those two being heavily relied upon before me.

64 The defendants in fact responded after 14 days of the claim by offering a further review panel. There is no material before me to suggest that that would not have been the response if there had been an appropriate protocol letter. If that had occurred, there would have been no proceedings (or, if proceedings had been taken, permission would have been refused—an alternative remedy was available).

65 Nor do the claimant's problems in this respect stop there. Miss Morris argued that, quite apart from the defendants' offer, there were three other measures of which the claimant should have taken advantage. These were: (a) a further review panel; (b) the complaints procedure; and (c) a complaint to the ombudsman. The possibility of the first was raised in the letter (dated 15 November 2004) which gave Mr Kemp written notification of the outcome of the panel hearing. It said:

> "I should inform you that if you are unhappy with the outcome of the panel hearing you may have grounds to appeal further if: 1. New information becomes available which was not considered by the panel. 2. You believe that the panel was not consistent and did not follow agreed procedures. If either of these instances your case will be reheard by a freshly constituted special review panel."

66 The letter went on to say that if the recipient believed that such a course of action was applicable he should inform the All Wales Continuing Care Reviews Manager within 14 days of the receipt of the letter, and to advise him that he could not appeal just because he disagreed with the decision made by the special review panel.

67 The claimant's answer to this is both factual, and argumentative. As to fact, para 14 of the witness statement of Gareth Morgan, Mr Kemp's

A solicitor, is to the effect that the 14-day period (which he read as if it were a time limit) had expired before Mr Kemp gave instructions. Mr Weir argued that there was no guarantee that any review would itself have the multi-disciplinary assessment which he maintained was key. The appeal grounds were limited, and did not permit a challenge to the eligibility criteria. Such had been the delay, in any event, that the claimant had lost confidence in the review process. Mr Kemp had waited 19 months for a decision, whilst his B son continued to pay nearly £500 per week on his behalf.

68 With one exception, I do not think these answers to be satisfactory. The elapse of the 14-day period may have hampered the solicitor, but it was no fetter to Mr Kemp. If his challenge was to the absence of a multi-disciplinary assessment, the failure to do which was the principal thrust of the attack upon the validity of the panel's decision when the matter was C argued before me, and was said to be "key", then that fits exactly with a complaint that the panel did not "follow agreed procedures". It is arguable, though with less force, that "new information" would cover input such as that from Professor Gournay.

69 The one exception is that the further review would not permit a challenge to the eligibility criteria. However, this ground was not developed significantly before me in argument as a challenge to the panel's decision of D November 2004. I regard it as arguable, but only thinly. Since the central issue of materiality was the reimbursement of funds dispensed, this would not have been a very satisfactory reason to reject the offer of a review. Accordingly, I think there is considerable force in arguing that there was an alternative remedy which was simply not pursued. As to the second alternative procedure, that by way of complaint would not, in my judgment, E have stood as a suitable alternative remedy in the present case (despite the approach taken in *Cowl's* application [2002] 1 WLR 803). The third, however, a further complaint to the ombudsman about the procedures, and about the criteria, was potentially effective. As Miss Morris said in argument, it has not been argued before in other cases, so far as she knows, that the possibility of reference to an ombudsman would not have been a satisfactory alternative procedure. However, the claimant pointed me to the F general remit of the Health Service Commissioners, under the Health Service Commissioners Act 1993. It permits an investigation of maladministration, but section 3(4) does not authorise a commissioner to question the merits of a decision taken without maladministration by a health service body in the exercise of a discretion vested in that body; and by section 4(1) the 1993 Act provides that a commissioner shall not conduct an investigation in respect of G action in relation to which the person aggrieved has a right of appeal, reference or review to a tribunal constituted by or under any Act, or has a remedy by way of proceedings in any court of law unless the commissioner is satisfied that in the particular circumstances it is not reasonable to expect the person to resort or have resorted to it.

70 In this particular case, Mr Kemp had complained to the ombudsman on 8 April 2003. That resulted in the review panel, but only 19 months later. H Given the continuing expenditure, I do not think that a court would have weighed this heavily against granting permission: but it would have had some weight.

71 Despite my comments in respect of the possibility of complaint, and further reference to the ombudsman, the combined force of the absence of a

protocol letter, and the availability of further review, is such that I consider Mr Kemp would be more likely than not to have been refused permission at the permission stage of this application.

72 If the judicial review had proceeded, my assessment is that there is some merit in the complaint that the defendants had not followed the advice to obtain a multi-disciplinary assessment, despite the guidance to that effect by the Welsh Office in NHS Responsibilities for Meeting Continuing Healthcare Needs (1995), paras 19–21, the eligibility criteria themselves, in particular at para 5, and a 2004 circular from the Welsh Office, paras 13–17. Accordingly, it was at least arguable that the investigation conducted by Mary Morris for the purposes of the review panel of November 2004 was not one which could be described as a "multi-disciplinary assessment" which would involve the input of the varying different healthcare professionals caring for the claimant, and that in the absence of such an assessment the procedure was flawed since taking an informed decision was central to the review panel's determination, and hence the method of so informing it was an important part of the process.

73 My view is that if the claim had passed the permission stage it would probably have succeeded on that procedural ground, if not on the four perversity grounds also argued.

74 In summary, this reasoning is my basis for concluding that in relation to the questions I posed myself earlier. (a) The chance of obtaining permission to apply for judicial review would have been less than evens. (b) If it had been obtained, the claimant would have been likely to have succeeded, at least in obtaining a fresh review hearing, though there was a real chance that he might not. (c) It is probable, though not certain, that a restitutionary claim would have succeeded, or a further panel would have reached a determination such that there would have been reimbursement of some at least of the sums paid out, though it is less certain that it would have resulted in repayment of the entirety. I should add that no serious attempt was made before me to argue that either of the cases in negligence would have any realistic prospects of success.

75 As noted above, in *R v Royal Borough of Kensington and Chelsea, Ex p Ghebregiogis* 27 HLR 602, Brooke J said that it was only in a very clear case that the court should exercise its power to order costs against defendants in relation to judicial review proceedings which have not proceeded to the leave stage. This is, in my view, not a very clear case, nor an exceptional one. I do not take the view that it was the existence of judicial review proceedings that precipitated the defendant conceding that a further review panel should be held (the threat of proceedings would have been sufficient). As Sedley J decided in *R v Hackney London Borough, Ex p Rowe* [1996] COD 155 (*Boxall's* application 4 CCLR 258, para 15), the attempt to recover costs has simply incurred further public expense on both sides. I agree that the practice on costs should do nothing to discourage a defendant in a position such as this from sensibly offering a further review. I have considered the guidance in *Brawley v Marczynski* [2003] 1 WLR 813. In the circumstances of this case, I consider it appropriate that there should be no order as to costs.

76 A secondary issue arose as to whether or not, if I had been minded to grant the costs generally of the claim thus far, I would have provided that the payment of those costs should extend to the costs of the hearing before me

A which, as I have indicated, were substantial. Stanley Burnton J indicated that the issues of costs and interest should be resolved on the papers. The claimant wished to proceed, against the resistance of the defendant, to argue this case orally. The claimant's reasons were that the amounts of interest and of costs at stake were "not insignificant".

77 However, as the submission developed it became plain that much of the reason for arguing the case was not for the benefit of Mr Kemp, but for B future claimants, who plainly are waiting in the wings. I do not think that the possibility of other similar cases justified oral argument before me in this one. They would inevitably be different cases on their facts. The challenge to the eligibility criteria is the least attractive of the grounds of appeal before me. That is the one matter of substance which this case might have in common with others. The claimants in those cases may recover costs, or C not, depending upon whether, in the circumstances of the particular case, and the way it has been conducted, it is appropriate to do so or not. The principles in *Boxall's* application 4 CCLR 258, *Ex p Rowe* [1996] COD 155 and *Ex p Ghebregiogis* 27 HLR 602 will apply to those cases as the apply to this, though it is entirely possible the result may be different. My award, or otherwise, in this case does not compel an exercise in the same way in a D different claim, albeit in Wales and seeking reimbursement of funds paid out from the NHS.

78 The costs have been very considerably increased. The saving of the court's resources, the saving of the costs of the parties, and the proportionality of expenditure to the issues in my view argued against, rather than for an oral hearing. The claimant had that right, of course, as Mr Weir pointed out; but if I had been minded otherwise to order costs to be E paid to the claimant, I would have provided by an order such as Stanley Burnton J had in mind that that should not extend to the costs of and associated with the hearing before me in so far as they would have exceeded the cost of preparing written submissions.

79 I have to consider whether or not the costs of the hearing should, instead, be paid by the claimant to the defendant. For reasons which will F become apparent when I review the issues between the parties in relation to the award of interest, I shall resolve this only after receiving further submissions.

Interest

80 The claimant can have no claim to interest unless he can show a right G to receive it. The only right which he has is if section 35A of the Supreme Court Act 1981 applies, for there is no claim to interest at common law since there is no contract in this case which conveys a right to it. Interest under section 35A is payable only if there is a judgment for damages, or in respect of a debt, or if payment is made before judgment.

81 Accordingly, the questions for my determination are as follows. (a) Is the sum paid by the defendant properly to be classed as a debt, to which H the provisions of section 35A apply even though there has been no judgment? (b) If so, should I exercise the discretion of the court to award interest, knowing as I do that there is no obligation to make such an award, and that the statutory scheme provides for the award of a sum which is called "interest"? (c) If I do think it appropriate to exercise my discretion, at

what rate, and in respect of what period is it appropriate to make such an award?

82 Resolution of the first of these issues depends upon the proper classification of a claim in restitution in circumstances such as the present. The fact that restitution may be neither properly classed as a claim in debt, or a claim for damages, may be indicated by the fact that the CPR were specifically amended to permit restitution to be brought as an ancillary claim to judicial review where previously it had provided for just "debt and damages". If it had been clear that the latter two words covered "restitution", there would have been no need to add "restitution" specifically to those claims which could be made. Accordingly, the wording of the CPR is either implicitly such as to distinguish restitution from debt or damages, for the purposes of judicial review at any rate or, at best from the claimant's perspective, is unclear.

83 In the claimant's submissions Mr Weir claims that the expression "debt or damages" in section 35A has been construed broadly and includes a claim for restitution. He says that it is common ground that interest is payable. That is not the case. The defendants' submissions do not accept either proposition.

84 Mr Weir relies on *Woolwich Equitable Building Society v Inland Revenue Comrs* [1993] AC 70. That case concerned payments of tax made by a building society to the revenue under the terms of regulations which it sought to challenge. The regulations being ultra vires, the demand was unlawful. On 31 July 1987 Nolan J held that the regulations were ultra vires and void (a decision subsequently upheld by the House of Lords). The revenue repaid the building society the moneys with interest from 31 July 1987, but refused to pay any interest in respect of the period up to the date of judgment. The building society claimed repayment of the interest under section 35A. The headnote suggests that once the House had upheld the right of the building society to recover the sums paid, interest was to be paid thereon by section 35A.

85 However, it is apparent from the judgment of Ralph Gibson LJ in the Court of Appeal that there was there no issue between the parties. It was accepted that interest would be payable as if the sum repaid were a debt within the meaning of section 35A. There is thus no reasoned consideration of the question by any appellate court. None the less, it would be surprising if the point had not been taken if it had been thought there was any substance to it. Thus, although the judgments do not justify the headnote in this respect, the point summarised by that headnote is at least persuasive. The only other citation on which Mr Weir relied—*Goff & Jones, The Law of Restitution*, 6th ed (2002), pp 669 to 670—provides no independent consideration of the point.

86 Does reasoning from first principles compel me to the conclusion indicated by the express addition of "restitution" within the CPR, or to the view expressed in the headnote to the *Woolwich* case? If the concession had not been made in the *Woolwich* case, I should in any event have been attracted to the idea that "debt" in section 35A extends so as to cover sums of money subject to an obligation, however arising, to repay them. The sum for which restitution may be ordered (at least in circumstances such as the present) is a liquidated sum. To restrict the scope of "debts" to those arising under a contract would seem to me unduly narrow. The essential

A characteristic which lies behind Parliament's intention to give a power to award interest in a proper case is that there should be some obligation to pay over the money. Accordingly, I reject the defendants' hesitation over accepting whether section 35A is capable of applying to a sum such as the present, if it is capable of being the subject of a restitutionary claim.

87 I have already taken the view that I cannot be certain that a claim for restitution would succeed, though I thought it more probable than not. Nor B could I be sure as to the extent of the capital to be repaid on the success of such a claim. Interest is dependent upon this. For instance, if the claimant had been found at trial to be entitled to restitution of the payments made for three quarters of the time when Mr Kemp had been in the Canterbury House Nursing Home, the current payment across by the health board would, as to the remaining 25% of the principal, be gratuitous.

C 88 Next, I have to be satisfied that section 35A applies to a claim which is made ancillary to judicial review where the judicial review proceedings have not reached nor passed the permission stage. In the *Woolwich* case there had been a judgment.

89 Section 35A requires there to be proceedings before interest may be awarded under the section. Contrary to the defendants' submissions, judgment is not necessary where there are proceedings, in the case of any D sum paid before judgment: section 35A(1)(a). Finally, the requirement that there should be proceedings means that, absent proceedings, there can be no award pursuant to the section.

90 The defendants here contend that the sum was paid over to the claimant because of the application of the policy which the defendant had adopted. That policy was, they say, the cause of the payment over of the E principal sum. It was not paid in relation to any proceedings that were on foot. Accordingly, payment of the sum was not causally related to the fact that proceedings had been taken. It was causally related only to the application of the policy, which was provided for outside the proceedings. Accordingly, on this argument, no right to interest arises.

91 Powerful though these points are, I reject them. The wording "proceedings (whenever instituted)" of the section discloses only one trigger F point for the potential application of section 35A: the institution of proceedings. Whether or not a claim on administrative law grounds is permitted to proceed beyond the permission stage, the proceedings allied to it for the recovery of debt or damages (and, in this case, restitution) must be capable of trial as if they were common law proceedings, albeit relating to a public law decision. They are, in my view, instituted when the judicial G review claim form is submitted.

92 For the purpose of an award of interest, it is not necessary to consider the chances of success if the claim had proceeded to trial where the sum is paid before judgment. In many cases for the recovery of a specific sum there may be arguments which might have found favour with a court, yet it is implicit in the section that payment of the sum claimed attracts the power of the court to award interest upon it. Uncertainty as to the outcome H if the case had been fought is relevant to the exercise of the discretion, but not to the existence of the jurisdiction to make the award.

93 There is a causal relationship here between the initiation of proceedings and the payment of the sum. Although it was not in my view necessary to issue the proceedings to recover the sums claimed, it was the

fact that the issues which those proceedings raised had been ventilated which caused the defendants to arrange for a second, and then a third, review panel with the result that the sum was paid over. Although the award may have been under the policy, there is sufficient causal relationship to make the payment one to which section 35A applies. Again, however, the facts here may be relevant to the exercise of my discretion.

94 The defendants' solicitors in a letter of 22 June 2005 stated that the defendant would follow "its established procedure for applying interest to moneys reimbursed via the special review panel". According to this procedure, the rate of interest to be applied is based on the Retail Price Index (calculated on the annual average of RPI in each calendar year). Interest is compound. As at 28 July 2005, the defendant calculated the interest due on this basis to be £9,178·19. The claimant sought payment of interest at special account rate, as though the claim were a conventional personal injury action, which would amount to approximately twice that sum.

95 As to the period for which interest should apply, there is nothing between the parties. Each agree that it should apply from June 1999 until payment of the full principal sum, whether payable pursuant to the policy or under section 35A. The issue of principle is whether it is appropriate to exercise the power under section 35A at all.

96 The claimant argues that uprating the principal sum so that its purchasing power remains the same (which is, broadly, the effect of up-rating by reference to RPI) is not to award interest at all. In *Pickett v British Rail Engineering Ltd* [1980] AC 136, 151 he pointed to the passage in the speech of Lord Wilberforce, cited at para 40.

97 That passage does not relate directly to the exercise of the discretion under section 35A. It was concerned with whether or not the trial judge's award in respect of interest upon a sum of general damages (intended to compensate for non-pecuniary loss) should be restored. The argument for the paying party was that the lump sum award for general damages is assessed at a value appropriate not to the date of any injury, but to the date of the assessment of those damages. Accordingly, the assessment kept pace with inflation and there was therefore no proper reason for any further increase.

98 The distinction which Lord Wilberforce made was not one which compels a court to regard, for instance, a contractual provision for "interest" at a rate which is less than or equal to RPI as being in truth no provision for interest at all. It was designed to meet the argument addressed in that case. It is to the effect that a person who was entitled to a payment of a sum of money should be compensated for not having it by an increase in that sum which represents two elements: both the amount necessary to maintain the purchasing power of the principal sum, and an additional amount to represent loss of use of the principal sum in the meantime: see also, per Lord Edmund-Davies, at p 164, and Lord Scarman, at p 173.

99 Lord Diplock in *Wright v British Railways Board* [1983] 2 AC 773, 781–782 said:

> "My Lords, it has been recognised since mediaeval times that interest exacted for the loan of a capital sum of money may comprise two elements: one, a reward for taking a risk of loss or reduction of capital;

A the other, a reward for foregoing the use of the capital sum for the time being. The former, or risk element, was early recognised in canon law and the law merchant as legitimate; the latter element was regarded as the sin of usury . . . This distinction . . . still holds good today. In times of stable currency the rate of interest obtainable on money invested in government stocks includes very little risk element. In such times it is, accordingly, a fair indication of the 'going rate' of the reward for B temporarily foregoing the use of money. Inflation, however, when it occurs, exposes all capital sums of money that are invested temporarily in securities of any kind instead of being spent at once on tangibles to one form of risk, amounting to a certainty, that upon realising the security there will be *some* reduction in the 'real' value of the money received for it, whatever other kind of risk the security selected for investment may C attract. As was pointed out in *Cookson v Knowles* [1977] QB 913 that element of risk which is presented by inflation is taken care of in a rough and ready way by higher rates of interest obtainable as one of the consequences of it."

This confirms my view of the dual purpose (generally speaking) of interest rates.

D **100** Both *Pickett v British Rail Engineering Ltd* [1980] AC 136 and *Wright v British Railways Board* [1983] 2 AC 773 were cases in which the House of Lords were considering the proper approach to the award of interest in respect of non-pecuniary loss. The speeches in the former, and that of Lord Diplock in the latter do not, therefore, constitute binding precedent as to the principle to be applied when considering pecuniary loss, E though the recognition of the two functions which a rate of interest will serve—maintaining the real value of the money, on the one hand, and providing recompense for being deprived of the use of it, on the other—is highly persuasive. It suggests that in a compensatory claim, both elements should be recognised and that if there were reason to award interest at all under section 35A the interest rate selected should fulfil both objectives, and should do so after the application of any liability to tax.

F **101** No submissions as to the impact of tax have been addressed to me. I draw attention to it, therefore, as potentially being a relevant consideration should this judgment later be relied upon in subsequent cases. For instance, if that element of an award which was intended to restore money to the same purchasing power in 2005 as it had had in 1999 is to be subject to taxation at the hands of the recipient, it will fall short of that object, and give support to G an argument that the court should award a rate which recognises the twin purposes identified in *Pickett's* case and in *Wright's* case at such a level that after likely taxation the first may at least be achieved in full, and the second not rendered nugatory by tax demands.

102 *Jefford v Gee* [1970] 2 QB 130 was relied on by Mr Weir as setting forth matters of principle which extended beyond the confines of the personal injury case which formed the basis of its consideration. He relied H on the words of Lord Denning MR already mentioned: para 40 above. By saying: "Interest should not be awarded as compensation for the damage done. It should only be awarded to a plaintiff *for being kept out of money* which ought to have been paid to him" he thus recognised the second of the two purposes of an award of interest to which the House of Lords in

Wright's case [1983] 2 AC 773 and *Pickett's* case [1980] AC 136 had referred. Interest in a personal injury case is thus not simply restitutionary (in the sense of restoring the value of the money lost), but also compensatory (though it is not recompense for the damage which forms the subject matter of the claim, the "damages done" to which Lord Denning MR referred, but rather for being deprived of the use of the money which has been laid out in expenses).

103 His judgment went on, at p 146, to recognise that, although in principle interest should run separately on every item of expenditure from the date it was incurred until trial, as a practical matter the court should deal with computation on broad-brush lines. This has resulted in the formulaic approach of awarding either half the rate of applicable interest for the entirety of the period, or the full rate from the mid-point of the period of loss. Though they might seem to be the same (and in many cases will be), the second approach is liable to work better justice because it ensures that the focus is on the period of loss. If the loss were to end, say, a year before trial, application of the latter principle would ensure a full rate upon the whole of the loss for that last year. The first approach would not. It is thus this second approach which is now more often, and in my view more appropriately, utilised in personal injury cases than the former. It is arguably more consistent with the principle espoused by Lord Denning MR, at p 146.

104 Mr Weir argues, by analogy with personal injury cases, for the adoption of the special account rate. In practice, that for which he contends amounts to the application of that rate from the mid point of the period of loss.

105 In her skeleton argument, Miss Morris's contention to the effect that section 35A did not apply was developed only by reference to whether a sum payable in restitution fell within the description "debt or damages" as intended by the section. I reject that for the reasons I have given. She appeared to think that the consequence of it being within that description would be that an automatic entitlement to interest might arise. It does not do so: the power to award such interest is discretionary (save in some respects which do not apply to the present case—such as the mandatory award in respect of non-pecuniary loss in a personal injury case). Jurisdiction to award interest under section 35A must be kept distinct from the discretion to do so.

106 Her other points are directed essentially to the exercise of my discretion. She points out that the defendant has taken an administrative decision to repay money expended. It applies guidance. The defendants are bound to act within that guidance unless they have good reason to do otherwise. She claims that to pay interest over and above that which the guidance provides (i e at a rate producing a sum in excess of compound RPI) would be ultra vires, and irrational on the grounds of inconsistency with other payments made to other recipients of restitutionary sums paid under the policy.

107 She also pointed out that there was no challenge to the guidance in so far as it related to the basis upon which interest would be paid upon any sums restored, following a panel recommendation in favour of a claimant. This led the claimant to make an application to amend the terms of the originating application.

A **108** On the 1 December, following the final part of the hearing on 28 November, the claimant sought to amend paragraph 9 of section 6 of the claim form to add the words "pursuant to section 35A of the Supreme Court Act 1981 and at the special account rate" after the word "interest" and to insert as a new paragraph 10 a claim for: "A declaration that the calculation of interest as set out in the 'All Wales [Continuing Care] reimbursement cases—financial procedure' and based on the Retail Price Index is unlawful."

B **109** The claimant maintains that the defendant is not prejudiced by this late amendment, and that the necessity for it arose because of the defendant's written submission of 22 September 2005 which for the first time in the proceedings made reference to the guidance. The lawfulness of this was queried, it is said, by para 12 of the claimant's written submissions in reply of 29 September 2005.

C **110** Though inevitably it would delay the conclusion of this reserved judgment, I invited the defendants' response. That was provided on 9 December 2005. The defendants consented, conditional upon permission being given to file a draft amended summary ground of resistance and the claimant bearing the costs of and occasioned by the proposed amendment (including additional costs incurred by the defendants in filing evidence in support of their amended case).

D **111** In those draft amended summary grounds of resistance, the defendants maintain the following. (a) The policy is fair and lawful. It is based on guidance issued by the Department of Health, which recommends that interest is paid on the basis of RPI. The reason for this is that persons to whom reimbursement is made are not obliged to repay the state benefits which they have utilised to meet the charges which were found to have been

E wrongly imposed on them. To that extent, they therefore enjoy an unintentional windfall as a result of the reimbursement, putting them in a better position than they would have been if the purchasing power of the reimbursed sums had simply been maintained. (b) The policy was adopted after consultation. (c) It has been approved by the Health Service Ombudsman (who, the defendants point out, has taken a keen interest in protecting the rights of patients to whom reimbursement is due). (d) It has

F been reviewed and maintained by the National Assembly for Wales. (I should comment that this does not seem to me to bear on its legality.) (e) The defendants also points out that

> "a challenge to the policy may only properly be made on notice to the Department of Health, Department for Work and Pensions and the National Assembly for Wales since they will be affected by the declaratory

G relief sought".

112 If I had thought that the jurisdiction of the court to consider whether or not to award interest to the claimant was to be determined by the validity of the policy, or otherwise, I would have permitted the amendment to be made despite the late stage at which it has been addressed

H to me. I do not, however, so regard it. For the reasons which I have given, I consider the court has jurisdiction. The issue then becomes one of discretion. I do not consider that the court's discretion is fettered by the existence of the policy, though it is undoubtedly an important factor to which I should have regard. Despite the consent of the defendants, they continue to take the point that the matter cannot proceed to argument

unless permission is granted for judicial review on that ground, and yet they invite me to withhold such permission. Having regard to the overriding objective, I do not consider it necessary in justice in all the circumstances of the case to permit the amendment to be made. Nor do I consider that further consideration of the issue on its own, as would be necessary, with leave given to those other public authorities to whom the defendant referred as interested parties to intervene, would be consistent with the objective of saving costs as between the parties, saving the resources of the court, and ensuring that the expenditure of income is proportional to the importance of the issues to the parties involved. I shall not, therefore, permit the amendment.

113 I have, however, had regard in exercising my discretion to the witness statement of Hazel Reese which has expanded upon the submissions of counsel as to the reasons which underlie the particular policy. In a witness statement of 8 December 2005 she noted that the Health Service Ombudsman for Wales had responded to complaints that the amount of interest received by application of the policy was too low by expressing the view (to the Permanent Secretary to the Welsh Assembly Government) that a person receiving reimbursement should not be treated less favourably in terms of interest than if that person had pursued his or her claim through the courts. However, after taking into account that the policy in Wales, as in the rest of the United Kingdom, was that the social security benefits paid out during the period of the reimbursement would not retrospectively be recovered from care home residents, the ombudsman expressed satisfaction with the policy.

114 I am not bound by the approach of the ombudsman. When I began hearing the case, I was inclined to the view that a sum should be paid by way of interest which not only updated the principal sum to correspond with inflation, but also awarded what might be described as true interest in terms of compensation for being kept out of the money paid over. Ironically (since it was the claimant who insisted upon an oral hearing) if I had resolved the matter on paper, that is what I would have decided. However, as the hearing continued I became less certain. If Ms Reese is correct that there will in most cases be benefits paid to care home residents in excess of those which would have been paid if the NHS had funded care, it seems to me that the need for some payment additional to RPI has been met generally in respect of people in the position of Mr Kemp.

115 I can see considerable force in treating the claimant in a manner which is consistent with that of other beneficiaries of positive recommendations by special review panels. However, although the discretion to award interest should be exercised consistently as between cases, the consistency that is required is a consistency of approach, not necessarily of result. The claimant's case is entitled to individual consideration.

116 The underlying logic to that which Suzanne Louise Wright in her witness statement of 8 December 2005 says on behalf of the defendants is that compensation is provided, over and above restoration of purchasing power by application of the RPI, to an individual by reason of his ability to retain benefits which are not to be repaid. Accordingly, it is unnecessary to provide for a rate of interest which includes such an element, for that would be to compensate the recipient twice for the loss of use of his money.

A **117** That argument recognises that there should be a payment over and above that necessary to restore the purchasing power of the principal sum. However, it applies only to those cases where an individual is actually in receipt of such benefits.

118 In the absence of information as to those benefits which Mr Kemp received, which he would not have received had he retained, rather than paid out, sums in respect of his care home accommodation, I am unable to know B whether this logic, which applies in the general case, applies to the particular one before me.

119 This knowledge is important to the exercise of my discretion. I am inclined to the view that if Mr Kemp has been in receipt of such payments, I will not exercise my discretion to permit payment of anything further by way of interest: he has already been recompensed, and it would (a) be C inconsistent with the approach which should be made in other cases to award him a different interest rate, and (b) might make it necessary to bring into account, as against the sum of interest he claims, the amount of the benefits he has received. This involves the sort of time-taking calculation, the avoidance of which led Lord Denning MR in *Jefford v Gee* to prefer a broad brush approach which could be generalised to all similar cases. By parity of reasoning, if, however, the claimant has received no such benefits D then in my view it will be appropriate that he should be recompensed. I shall now consider the basis of recompense which would it would then be appropriate for me to order on this assumption.

120 What has been argued before me is that if interest is to be awarded pursuant to section 35A it should be at special account rate, as it would be if the claim were a personal injury one. Although this is not a personal injury E claim, no alternative rate has been contended for by Miss Morris (other than an invitation to decline to exercise my discretion on the basis that compound RPI will do the job). Accordingly, on this premise, I would adopt that rate, to be calculated from the mid-point of the loss.

121 There remains one further matter, however, to consider. The defendants argue that no interest should be payable from a date when, but for the claimant's intransigence in refusing to agree a form of indemnity, he F would then and there been paid out.

122 The indemnity as initially offered, however, contained a confidentiality clause which in my view the claimant was entitled to object to signing. It would be wrong to compel him to agree to the confidentiality of the payment on pain of foregoing what could be a significant sum by way of interest.

G **123** Once again, however, the claimant's response failed to draw the attention of the defendants to his objection to signing the confidentiality clause. When he did so, the defendants were prepared (themselves after a further six-week delay) to offer an alternative form of indemnity letter, the wording of which seems to me to be entirely unexceptional. This was on the 25 November 2005. I am invited to set a date by reference to this letter.

H **124** However, critical to this letter was not simply the confidentiality clause, but also the sum of money to be referred to at para 3. Without determination of the amount to be paid by way of interest, this sum could not, it seems to me, sensibly be determined. It was open to the defendant to pay the sums to be reimbursed at any time following approval by the

defendant of the recommendation of the special review panel. Accordingly, in my view, the appropriate end date for the interest calculation is the date of actual payment. If payment has not thus far taken place, it may be set, and any appropriate interest calculation done, as at 14 days from the date of this judgment, and judgment debt rate interest applied until payment thereafter on the whole of the sums still to be repaid inclusive of the interest element.

125 It will be seen that the exercise of my discretion as to interest is one which depends upon further information which the claimant is in a position to provide. Since preparing an initial draft of this judgment, I have been told that the claimant would wish to make submissions on the issue of recoupment of social security benefits. It seems to me that he should have the opportunity of doing so since, as I have indicated, I would have been minded to award interest at special account rate had it not been for the further material provided by the defendant which enlightened me as to the reasons for the adoption of "RPI only" in the financial guidance applied by the defendant. That only arose, after submissions had finished, in response to the claimant's application to amend the claim form. The claimant has not thus far had an adequate opportunity of answering it. I think it right that the claimant should have the opportunity both to put further material before me, if he contends that he received nothing by way of additional state or local authority benefit which he may retain, and to argue, if he thinks it appropriate to do so, that the court should not rely on the evidence of Hazel Reese in the way I have indicated. However, this material and those submissions must be provided within a limited period of time. I direct that unless the parties are able to agree what sum should be paid by way of interest in the light of this judgment thus far, any further material from the claimant showing to what extent, if at all, he has received social security or allied benefits which (a) he would not have been paid if he had not parted with the payments he has made to Canterbury House Home and (b) which will not be recouped must be provided to the court within 21 days. Secondly, I give liberty to the claimant to file any evidence he may wish in response to the issues raised by Ms Hazel Reese to which I have referred above, within the same time period, together with any submissions as to the way in which I should exercise my discretion as to the award of interest. I direct that any submissions in reply by the defendants be provided within seven days thereafter. I shall consider whether to invite further oral submissions once I have received the further evidence, if any, and the submissions of the parties. The defendants themselves have asked for the costs of the hearing before me. I shall reserve a decision on this issue until I have resolved the questions arising as to interest.

Summary of conclusions

126 (a) I refuse leave to amend the claim form. (b) I decline to award costs to the claimant. (c) Had I awarded costs, I would have made a exception for the costs of the oral hearing before me in any event. (d) I have yet to determine if I should award the defendants their costs of that hearing. That decision will be heavily influenced by the position as to interest. (e) The court has jurisdiction, if it wishes to exercise it, to make an award of interest upon the entirety of the principal sum (to be) repaid. (f) I shall consider whether to exercise my discretion to award interest

A pursuant to section 35A Supreme Court Act 1981 upon receiving and considering further submissions from the parties in accordance with the timetable set out at para 125 above. (g) The court must be provided with any evidence and submissions to be relied on by the claimant within 21 days of the date of this judgment, with the defendant's response within seven days thereafter. (h) If I decide to exercise my discretion, it will be on the footing that the claimant should be paid interest calculated from the B mid-point of the period of loss until payment (or 14 days from the date of this judgment, whichever is earlier) at the special account rate. Counsel should be able to agree the sum due as a matter of arithmetical calculation, and should notify me accordingly. (i) If it is the case that the principal sum has not yet been paid over, I am inclined to exercise my discretion to the extent that I shall order judgment debt rate of interest on the whole of C the sum payable from the date of the first hearing before me, since I see no reason why the sum should not then have been paid over at least to the extent of the principal and that amount of interest which the defendants were prepared to concede.

127 I am prepared to determine any consequential applications that may be made on paper, unless either party wishes to make them orally.

D *Order accordingly.*

Solicitors: Hugh James, Merthyr Tydfil; Hill Dickinson, Liverpool.

B J U

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These pages will be reissued in the next part

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Note

End of starred cases in this issue of The Weekly Law Reports. Cases following are those intended for publication in The Law Reports.

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