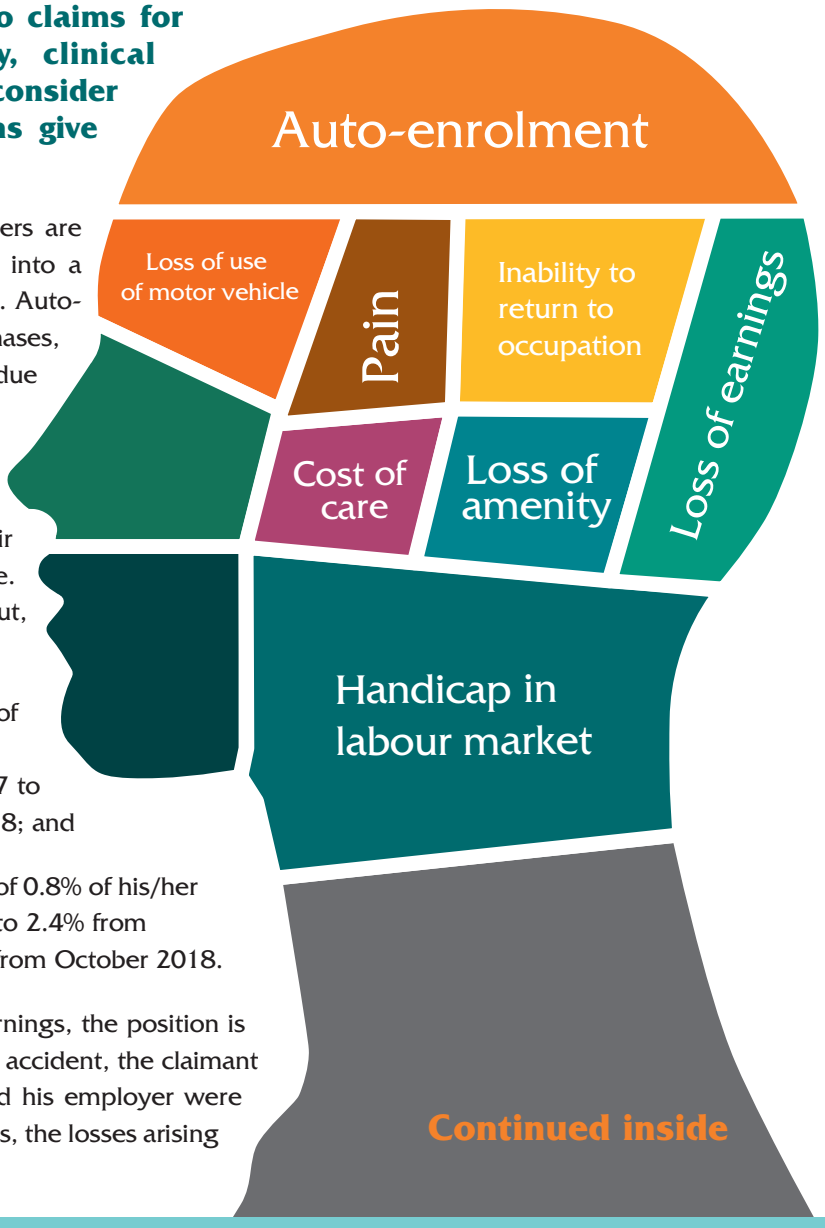
NIFA NEWS 31

Approved Expert Financial Witnesses

The Newsletter from The Network of Independent Forensic Accountants

AUTO-ENROLMENT IN LOSS OF EARNINGS CLAIMS

Those advising claimants in relation to claims for loss of earnings in personal injury, clinical negligence or other cases, should consider whether the Auto-enrolment provisions give rise to a new head of claim.



Under recently enacted legislation, all UK employers are required automatically to enrol their eligible staff into a pension scheme and to make pension contributions. Auto-enrolment, as it is called, is being introduced in phases, starting with larger employers. The introduction is due to complete by October 2018.

Employees are allowed to opt out

Under the new rules employers have to enrol all their employees into an employer's pension scheme. Employees are allowed to opt out of the scheme but, if they remain in it:

The employer is required to make contributions of 1% of the employee's qualifying earnings until September 2017 rising to 2% from October 2017 to September 2018 and then 3% from October 2018; and

The employee is required to make contributions of 0.8% of his/her qualifying earnings until September 2017 rising to 2.4% from October 2017 to September 2018 and then 4% from October 2018.

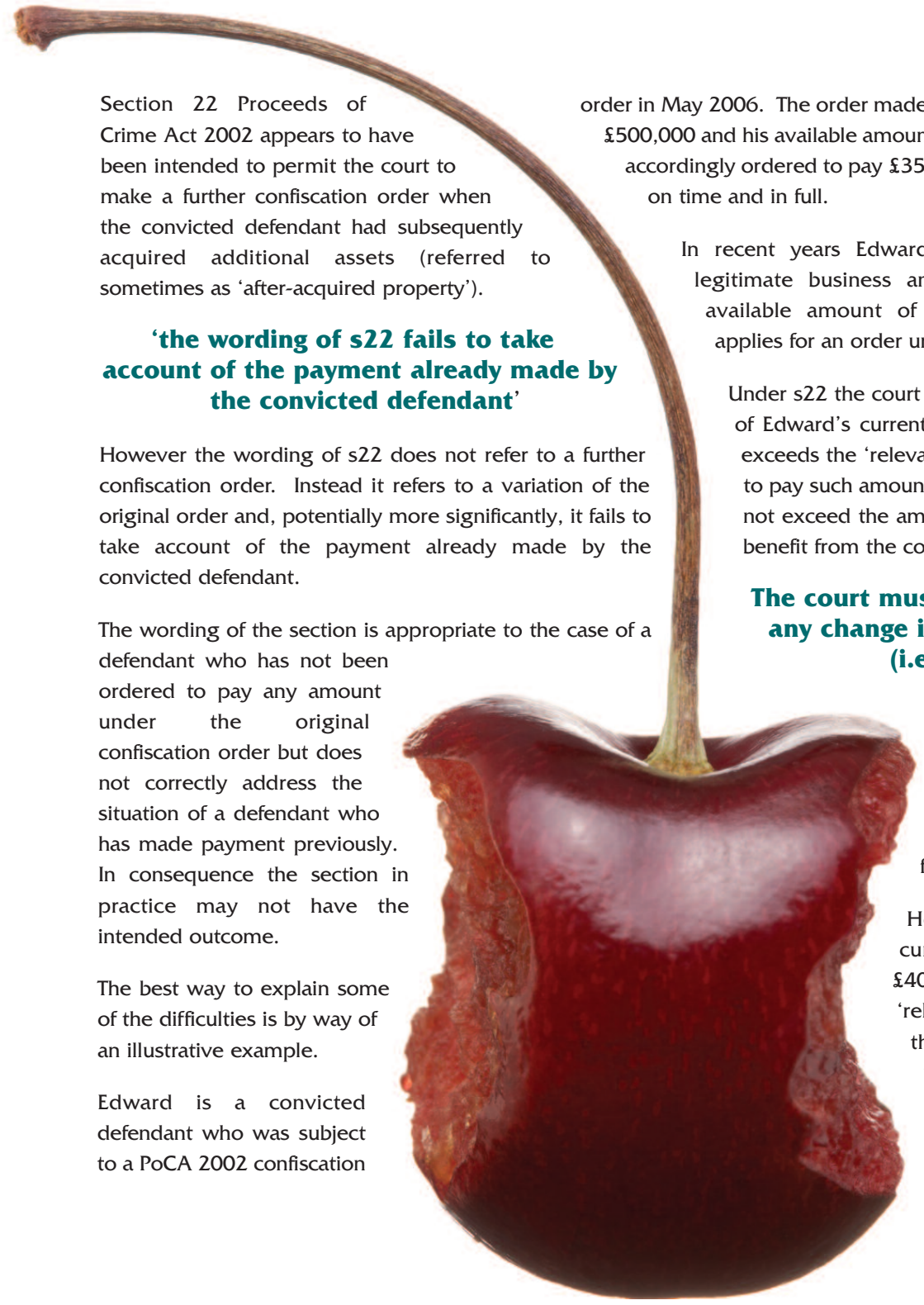
For the purposes of calculating claims for loss of earnings, the position is relatively straightforward if, by the date of the index accident, the claimant was enrolled in a pension scheme and both he and his employer were making pension contributions. In those circumstances, the losses arising

Continued inside

In this issue:

CONFISCATION PROCEEDINGS - A SECOND BITE OF THE CHERRY

The amount payable by a defendant will be limited to his 'available amount' at the time of the confiscation order but any shortfall may subsequently be pursued, sometimes many years later. The calculation of the additional sum is far from straightforward thanks to the unintended consequences of the effect of inflation.



Section 22 Proceeds of Crime Act 2002 appears to have been intended to permit the court to make a further confiscation order when the convicted defendant had subsequently acquired additional assets (referred to sometimes as 'after-acquired property').

'the wording of s22 fails to take account of the payment already made by the convicted defendant'

However the wording of s22 does not refer to a further confiscation order. Instead it refers to a variation of the original order and, potentially more significantly, it fails to take account of the payment already made by the convicted defendant.

The wording of the section is appropriate to the case of a defendant who has not been ordered to pay any amount under the original confiscation order but does not correctly address the situation of a defendant who has made payment previously. In consequence the section in practice may not have the intended outcome.

The best way to explain some of the difficulties is by way of an illustrative example.

Edward is a convicted defendant who was subject to a PoCA 2002 confiscation order in May 2006. The order made then showed his benefit to be £500,000 and his available amount to be £350,000. Edward was accordingly ordered to pay £350,000 and he paid this amount on time and in full.

In recent years Edward has operated a successful legitimate business and in January 2015 has an available amount of £400,000. The prosecution applies for an order under s22.

Under s22 the court will undertake an examination of Edward's current available amount and, if this exceeds the 'relevant amount', can order Edward to pay such amount as it believes is just, but does not exceed the amount found as the defendant's benefit from the conduct concerned.

The court must also take account of any change in the value of money (i.e. inflation).

The value of the available amount of £350,000 in May 2006 is equivalent to £435,308 in January 2015. This is the "relevant amount" for the purposes of s22.

However, because Edward's current available amount of £400,000 does not exceed the 'relevant amount' of £435,308, the prosecution's claim would fail.

PROBLEMS AT THE POST OFFICE

It has widely been reported by the BBC that a confidential report, commissioned by the Post Office, has bolstered the cases of dozens of Subpostmasters and Subpostmistresses who claim to have been unfairly accused of and, in some cases, prosecuted for theft from their post offices.

Having successfully acted for solicitors representing a number of individuals accused of post office thefts, NIFA members have significant experience of the Horizon computer system that is at the centre of the story.

The system, which is used to record over-the-counter transactions, is said to have been found 'not fit for purpose in some branches' but the Post Office has remained adamant that there is 'no evidence' of systemic computer issues.

In our experience, problems have sometimes arisen in franchised branches in which staff, not directly employed by the Post Office, have been accused of theft or false accounting.

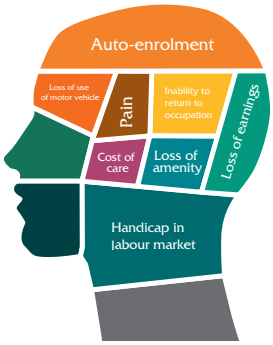
The computer system used to record transactions is said to have been found not fit for purpose

The controversy surrounding the Horizon system is not new. As long ago as 2009, Subpostmasters got together to form the 'Justice For Subpostmasters Alliance', whose website now lists 20 case studies ostensibly posted by Subpostmasters claiming that they had been wrongly accused.

Although admittedly not a representative sample, our experience suggests that robust and diligent forensic accountancy evidence deployed by the defence team can play a vital role in highlighting weaknesses in the Horizon system and the prosecution's case.

AUTO-ENROLMENT IN LOSS OF EARNINGS CLAIMS

continued from page 1



from the accident arguably need to take into account any loss of employer's pension contributions. They may also need to take into account loss of tax relief on the employee's pension contributions.

What is somewhat less clear is what should be claimed in cases in which the accident pre-dates the introduction of auto-enrolment. In those one has to consider whether the claimant, having been automatically enrolled, might have opted out. The answer to this is likely to be determined by both the claimant's own evidence and also statistics that ought to be capable of being obtained from the employer as to the percentage of employees undertaking roles similar to the claimant who have actually opted out of making contributions.

Not a valid head of claim

A final point that needs to be borne in mind is that the defendant may well argue that the employer's contributions to an employee's pension under the auto-enrolment provisions are simply payments made in lieu of a salary increase and is therefore not a valid head of claim. The argument in such a case would be that an employer intending to award, say, a 2% pay rise to its workforce might, in the face of legislation (that imposed an obligation to pay a 1% pension contribution to all its staff), may reduce the pay rise to 1% so as to mitigate the additional pension cost.

It is clearly going to be very difficult ever to prove that an employer's pay awards had been influenced by the auto-enrolment rules. Indeed, an employer would be very ill-advised to admit it had acted in this way albeit that it is difficult to envisage circumstances in which any employer would have awarded pay rises to its staff without being mindful of the cost of the auto-enrolment provisions.

Ultimately we would expect that all claims for loss of earnings, going forward, will need to include consideration of the implications of pension Auto-enrolment.

Beyond All Question

NIFA, THE NETWORK OF INDEPENDENT FORENSIC ACCOUNTANTS, SETS AND APPLIES HIGH STANDARDS TO BE DELIVERED BY OUR APPROVED EXPERT FINANCIAL WITNESSES

www.NIFA.co.uk

NIFA Accredited Forensic Accountants

Adam Stronach Harwood Hutton Ltd
Beaconsfield, Buckinghamshire
01494 739500

Johnny Webb, Webb and Co
Belfast, County Antrim
02890 918499

Roger Isaacs Milsted Langdon LLP
Bristol, Taunton, & Yeovil
0117 945 2500

David Muggridge Ackland Webb Ltd
Canterbury
01227 811745

Chris Hatcher Watts Gregory LLP
Cardiff
029 2054 6600

Phil Ewing Harrison, Beale and Owen Ltd
Coventry
024 7663 1303

David Winch Accounting Evidence Ltd
Cumbria
01229 716651

Kate Hart Roffe Swayne
Godalming, Surrey
01483 416232

Fiona Hotston Moore Ensors
Ipswich
01473 220034

Raymond Davidson Bartfields
Leeds
0113 244 9051

Bee Chew Wilder Coe LLP
London (NW1)
020 7724 6060

Brian Spence BTMR Ltd.
Manchester
0161 300 3458

Clive Adkins Kilby Fox
Northampton
01604 662 670

Peter Smith Quantis
Northumberland
01670 511 999

Martin Berry Hobsons
Nottingham
0115 962 1590

Melvyn Sobell & Michelle Fisher
Sobell Rhodes LLP
Pinner, Middlesex
020 8429 8800

Philip Allsop Barber Harrison & Platt
Sheffield
0114 266 7171

Norman Cowan Wilder Coe LLP
Stevenage
01438 847200

Martin Jackson Jackson Calvert
Sutton Coldfield
0121 355 0404

John Kenny, Providence Forensic
Accounting Experts Ltd, Wicklow, Eire
00 35340461033

BOUND BY MISTAKE?

A recent court judgment in a case has highlighted the risks of removing the standard clause in expert determination agreements that provides that the determination will not be binding in the event of 'manifest error' by the expert.

In the case of Premier Telecommunications Group Ltd v Webb [2014] EWCA Civ 994 the court considered a company (Premier Telecommunications Group Ltd) whose 60% shareholder, Mr Ridge agreed to buy out the minority 40% shareholder, Mr Webb. Messrs Ridge and Webb agreed that the price to be paid for the shares would be determined by Grant Thornton ('GT').

Mr Ridge took issue with GT's determination and applied to the court to have it set aside. In the absence of a "manifest error" clause the fact that the valuation may have been wrong would not be sufficient to cause it not to be binding. The burden on the applicant was to demonstrate that GT had materially departed from its instructions.

The Court of Appeal upheld the decision at first instance that, regardless of any errors that GT may or may not have made, it had not departed from its mandate and its decision was binding on the parties.

The case highlights the risks and uncertainty of referring matters to an expert for determination especially if safeguards are not built in to the process to deal with determinations that are either manifestly wrong or which fall outside pre-determined parameters.