



2017 EWHC 3044 (QB)

Case No: HQ17P02037

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/2017

Before :

MASTER DAVISON

Between :

| | |
|--|------------------|
| MARK VICTOR FLANAGAN (By his litigation friend KAREN SUZANNE GREEN) | <u>Claimant</u> |
| - and - | |
| GRANT ALEXANDER BATTIE | <u>Defendant</u> |

Mr Stephen Killalea QC (instructed by Slater & Gordon (UK) LLP) for the Claimant
Mr Steven Snowden QC (instructed by Kennedys Law LLP) for the Defendant

Hearing dates: 2 November 2017

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER DAVISON

Master Davison :

Introduction

1. On the evening of 30 May 2015 the claimant was riding his bicycle along Colebrook Lane, Loughton, when the defendant pulled out from a minor road into his path and there was a collision. The claimant sustained an “extremely severe” brain injury due to a massive intracranial bleed. The defendant subsequently pleaded guilty to an offence of driving without due care and attention and liability is not in issue. But the claimant stands to have his award reduced by up to 25% because he had neglected to wear a cycle helmet. Between May 2016 and May 2017 the defendant made a series of interim payments totalling £150,000. Very recently another £50,000 has been paid, making the overall total £200,000. Proceedings were issued on 9 June 2017. By Application Notice dated 14 July 2017 the claimant seeks a further (and much larger) interim payment.
2. The circumstances and the basis of the application are set out in the following material, all of which I have carefully read:
 - Report of Dr Liu (neurologist) dated 14 June 2016
 - Witness statement of claimant’s solicitor dated 16 October 2017
 - Immediate needs assessment of Case Manager, Mr Alan Wright, dated 3 February 2017
 - Case management progress report of Mr Wright dated 26 July 2017
 - Witness statement of Mr Wright dated 11 October 2017
 - Report of Dr Sembi (neuropsychologist) dated 30 June 2017
 - SMART report of Dr K Elliott dated 11 August 2016
 - Speech and Language Therapy report of Dr Taylor-Goh dated 30 June 2017
3. At the time of his accident, the claimant was 50 years old and living on his own in a first floor council flat in Loughton. He had worked as a painter and decorator. But he suffered from rheumatoid arthritis and had not worked for some time due to a flare-up or general deterioration of that condition. He was separated from his partner and had no involvement with their 4 children. He remained close to his elderly parents, his brother and his brother’s partner, all of whom live in Islington.
4. At the scene of the accident he had a Glasgow Coma score of 14/15. He was taken by ambulance to Whipps Cross Hospital where he was ventilated and intubated. He was subsequently transferred to the ICU Unit of the Royal London, where he remained an inpatient until 7 July 2015. He was then discharged to the Homerton and from there to the Royal Hospital for Neuro-Disability in Putney. He was there from 24 September 2015 to 1 April 2016, at which point he was transferred to the Gardens Neurological Centre, Sawbridgeworth, where (with one re-admission to the Royal London) he has remained. For present purposes, it is unnecessary to describe the exact course of his injuries and treatment. As at examination by Dr Liu in June 2016, he had severe weakness of all 4 limbs (tetraparesis) such that he was effectively tetraplegic; he was doubly incontinent; he required to be fed via a PEG; he had a tracheostomy for airway management; he had widespread cognitive impairments. He lacks the capacity to manage his property and affairs. A professional Deputy was appointed by order of the Court of Protection dated 15 August 2016. His litigation friend is his brother’s partner, Karen Green.
5. Since Dr Liu’s examination, there has been modest (but nonetheless significant) improvement. He “self-decannulated” (i.e. removed his own tracheostomy) in January 2017 and has managed without it since then. He is no longer fed through a PEG. He is able to sit up and has some limited use of his hands. He can now transfer without the use of a hoist. His speech has returned to the point where he can just about make himself understood – though on formal assessment his “sentence intelligibility” is still less than 50%.
6. The interim payment is sought in order to enable the claimant to transfer from the Gardens Neurological Centre to a house or flat of his own where he will have a full rehabilitation

package. The payment initially sought was £1.3 million and this would have enabled him to buy a suitable property. The claimant no longer seeks £1.3 million. He now seeks £500,000 which is to enable him to rent a property with a full support team in place to provide care and therapies. His Case Manager, Mr Wright, describes this as preparatory to “a more permanent move to a purchased property”. Moves like this are commonplace in catastrophic injury cases and are sometimes called a “trial of independent living”. The proposal for this one comes at an earlier stage of the proceedings than would ordinarily be the case. The reasons put forward for it are as appear in the following paragraphs.

7. The dominant reason is that the Gardens Centre is not a satisfactory environment for the claimant and there is a risk that he will in the future be moved to an even less satisfactory environment (a standard nursing home). The evidence comes from Mr Wright and from Dr Sembi, the neuro-psychologist. Both (but especially Dr Sembi) have been critical of the care that the claimant is receiving at the Gardens Centre. In Dr Sembi’s opinion, the Centre had “failed to provide comprehensive co-ordinated inter-disciplinary goal-oriented neurorehabilitation”. This had been “sorely lacking” and he wished to be “clear in [his] disappointment”. (His disappointment partly stemmed from the fact that the treating clinicians at the Gardens Centre appeared somewhat disengaged from their patient. They were “limited in what they could say”; the occupational therapist had had “little contact” with the claimant and “was unsure which patient he was talking about”; the speech and language therapist was “unsure whether [the claimant] was having any [therapy]” and the physiotherapist was unable to say “why an integrated goal orientated multidisciplinary neurorehabilitation programme was not in place”.) The clinicians at the Gardens Centre acknowledged that the input from the external therapists had been followed by further improvement in cognitive functioning. But there was, in Dr Sembi’s view, a limit to how much or how effectively the care there could be topped up or supplemented by visiting, privately-funded therapists because those visiting clinicians would have “limited influence on the daily care he receives at the Centre by its staff”. This was all the more unsatisfactory because the claimant was motivated to engage with therapies and was very keen to be discharged to the community. A further factor was his poor rapport with the Centre’s staff. Dr Sembi’s opinion, which was expressed with a good deal of emphasis, was that he could see “no point whatsoever in him remaining at the Gardens Centre”. In the body of his report and in the Summary section at the beginning, he stated as follows:

“If it is the opinion of his treating team that he can be supported well in the community then I would absolutely support that his own accommodation must be sought immediately and a comprehensive support package, including 24 hour care with support workers, needs to be put in place immediately. If this cannot happen within a short period then, in my opinion, it is appropriate to consider that he be moved to another specialist brain injury centre who are able to meet his needs for multi-disciplinary neurorehabilitation more appropriately as a matter of urgency.”

8. Because the claimant is now somewhat less dependent than he was when he had a tracheostomy and a PEG, the funding of his placement at the Gardens Centre (albeit that the claimant’s family and advisers have considerable reservations about the Gardens Centre) is in question. According to the latest Case Management report, (which I see no reason to doubt), the claimant meets the criteria for continued funding only because he still requires skilled feeding. The funding may be withdrawn at the next review or at a subsequent review. Responsibility for funding the claimant would then transfer from the relevant NHS Clinical Commissioning Group to the local authority. In practical terms, this would be likely to mean a transfer to a nursing home with no rehabilitation provision at all.
9. Additionally to the above, the claimant and his family (which means his brother and partner and his parents) are very keen for him to move to a community setting, if possible somewhere closer to London. The mental strain on the claimant’s family, in particular his brother, Lee, of his general situation and his present placement has been a significant cause of concern and has drawn comment from Dr Sembi. Lee became acutely distressed during Dr Sembi’s first visit to the claimant and himself stands in need of psychiatric treatment.

10. If ordered, the interim payment would be expended as follows. A suitable rental property would be identified in the estimated price range of £3,000 to £3,500 pcm. The support worker care package would be stepped up to a 24/7 operation with a team leader at a monthly cost in the region of £35,000. The need for case management during the periods immediately prior to and post transition would be higher than normal and would be £49,000 for the full nine month period. The therapies of physiotherapy, OT, speech and language and neuropsychology would be £12,500 pcm in the 6 month period straddling discharge, tailing off to around £7,500 pcm. Deputy / COP fees would be £500 pcm. An adapted vehicle would be purchased for around £65,000. The total costs of setting up the claimant in his own rented property and caring for him there for 6 months, together with the costs of stepping up the package of external care prior to transition (so as to prepare the team and the claimant) are estimated at £500,000.
11. That estimate has not been the subject of any serious challenge. The defendant has deployed no evidence to dispute the figures. I have no material from the defendant's side to suggest that the sums allocated to care and therapies are unreasonable or are likely to be spent in some other way.

The law governing interim payment applications

12. The law governing interim payment applications is contained in CPR rr 25.7(1) (a) & (4) and in *Eeles v Cobham Hire Services* [2009] EWCA Civ 204. It is accepted that the claimant falls within the scope of rule 25(1) (a), i.e. that the defendant has accepted liability to pay damages. Sub-rule (4) provides that the amount of the interim payment is not to exceed a reasonable proportion of the likely amount of the final judgment.
13. In the days of exclusively lump sum awards, it was not usually too difficult to assess the likely amount of the final damages and tailor the interim payment accordingly. Further, it was not usually the concern of the court how the money was then spent. But the advent of Periodical Payment Orders brought with it a complication. The complication was that a court considering whether to make an interim payment had to recognise that heads of future recurring losses might be dealt with by way of PPO rather than a capital sum. On the face of it, those heads of loss therefore needed to be left out of account. But if they had to be brought into account in order to provide enough money to fulfil the purpose of the interim payment, then, in order not to trespass upon the trial judge's discretion, the court considering the interim payment had to have a high degree of confidence that the trial judge would capitalise them.
14. In respect of an interim payment for the purpose of buying a house (which was the issue in *Eeles*), that meant that the court needed to be satisfied that there was a real, reasonable and immediate need for the house. If that need existed, it was a safe bet that the trial judge would endorse the interim decision of the court by capitalising sufficient of the various heads of future loss to pay for it and hence, all other things being equal, the interim payment could be made.
15. The above is only a summary. The relevant passages from *Eeles* are at paragraphs 43 – 44 of the decision.

“43 The judge's first task is to assess the likely amount of the final judgment, leaving out of account the heads of future loss which the trial judge might wish to deal with by PPO. Strictly speaking, the assessment should comprise only special damages to date and damages for pain, suffering and loss of amenity, with interest on both. However, we consider that the practice of awarding accommodation costs (including future running costs) as a lump sum is sufficiently well established that it will usually be appropriate to include accommodation costs in the expected capital award. The assessment should be carried out on a conservative basis. Save in the circumstances discussed below, the interim payment will be a reasonable proportion of that assessment. A reasonable proportion may well be a high proportion, provided that the assessment has been conservative. The objective is not to keep the claimant out of his money but to avoid any risk of overpayment.

44 For this part of the process, the judge need have no regard as to what the claimant intends to do with the money. If he is of full age and capacity, he may spend it as he will; if not, expenditure will be controlled by the Court of Protection.

45 We turn to the circumstances in which the judge will be entitled to include in his assessment of the likely amount of the final judgment additional elements of future loss. That can be done when the judge can confidently predict that the trial judge will wish to award a larger capital sum than that covered by general and special damages, interest and accommodation costs alone. We endorse the approach of Stanley Burnton J in the Braithwaite case [2008] LS Law Medical 261 . Before taking such a course, the judge must be satisfied by evidence that there is a real need for the interim payment requested. For example, where the request is for money to buy a house, he must be satisfied that there is a real need for accommodation now (as opposed to after the trial) and that the amount of money requested is reasonable. He does not need to decide whether the particular house proposed is suitable; that is a matter for the Court of Protection. But the judge must not make an interim payment order without first deciding whether expenditure of approximately the amount he proposes to award is reasonably necessary. If the judge is satisfied of that, to a high degree of confidence, then he will be justified in predicting that the trial judge would take that course and he will be justified in assessing the likely amount of the final award at such a level as will permit the making of the necessary interim award.”

16. An additional factor was identified at paragraph 39 of the decision. This was that the court had to be wary of tying the trial judge’s hands in a different way. If the accommodation and/or care regime established with the aid of the interim payment was doubtful in terms of suitability and expense, the claimant might thereby have obtained an unfair advantage in the litigation. That property or regime would, by the time of the trial, have become a *status quo* with which the trial judge might be reluctant to interfere. (This was, indeed, one reason why the Court of Appeal refused the interim payment in *Eeles*. The proposal in that case was to buy a 9 bedrooed Hall with separate bungalow – a purchase that the Court regarded as arguably going beyond the claimant’s reasonable needs and capable of conferring on him an unfair advantage in terms of establishing a *status quo*.)

The submissions of the parties

17. I will set out the submissions of the parties as they were made to me at the hearing, though a point which emerged during argument (and subsequently canvassed in supplementary written submissions) rendered some of them redundant.

The claimant’s case

18. Mr Killalea QC based the application upon the propositions that the Gardens Centre was obviously unsuitable; the claimant and his family were strongly in favour of moving to independent accommodation which was highly likely to be a permanent solution; that move was supported by the medical evidence; there were no realistic alternatives; there was the added imperative that the claimant’s placement even at the Gardens was in jeopardy.
19. As to valuation of those heads of claim which were in play for the purposes of the application, he offered the following:

| <i>Item</i> | <i>Value</i> |
|---|----------------------|
| General damages for pain, suffering and loss of amenity | £200,000 to £250,000 |
| Past losses | £93,000 |
| Total past losses (say) | <u>£318,000</u> |
| <i>Future losses</i> | |
| Accommodation (<i>Roberts v Johnstone</i> type award) | £100,000 |
| Accommodation (Adaptation costs of £100,000 and annual additional running costs of £5,000 per year) | £175,000 |
| Therapies (£24,000 per year) | £360,000 |
| Holidays (£10,000 per year) | £150,000 |

| | |
|---|-------------------|
| Transport (£10,000 per year) | £150,000 |
| Equipment (£10,000 per year) | £150,000 |
| Car | £65,000 |
| Court of Protection / Deputy (£10,000 per year) | £150,000 |
| Total future losses | <u>£1,300,000</u> |

20. It will be noted that the figures set out above do not include loss of earnings; Mr Killalea QC accepted for the purposes of this hearing that the claimant might struggle to show that he would ever have returned to meaningful employment even if he had not had his accident. The figures also do not include the costs of care, which would be the main item of loss going forward. This was because it was highly likely that the trial judge would cater for future care costs by means of a PPO.
21. The figures in the Table were based upon a multiplier of 15 and a discount rate of 1%, both of which require explanation. The claimant was 52 years of age. Dr Liu had opined that his life expectancy (actuarially around 34 years) was “significantly” reduced chiefly due to immobility and his requirement for feeding by others. Life expectancy was best ascertained 3 years post-accident (May 2018) because the claimant was still making changes. Mr Killalea QC pointed out that those changes were for the better. For the purposes of the application he said that the multiplier was likely to be in the “high teens” and he was willing to accept 15 as a conservative estimate. This was based upon a discount rate of 1%. The discount rate at present is minus 0.75%. But legislation sometime in the new year is expected to increase it and most observers expect that increase to place it in the range 0% to 1%. Mr Killalea QC accepted that that new rate was likely to govern the multiplier when this claim came to be tried.
22. As to accommodation, Mr Killalea QC accepted that presently a *Roberts v Johnstone* calculation would produce a nil award and that that was, indeed, what William Davis J had decided in the case of *JR v Sheffield Teaching Hospitals Foundation NHS Trust* [2017] EWHC Civ 1245. However, it could confidently be expected that by the time of the trial the courts, or legislation, or both would have addressed this problem. It was not at all likely that claimants would be left in a position where they were routinely under-compensated in respect of accommodation costs. Therefore, assessed conservatively, a *Roberts v Johnstone* type of award of “at least six figures” could be expected. Hence the figure of £100,000 in the Table set out above.
23. On his valuation (and taking into account a maximum 25% reduction for contributory negligence) there was easily enough headroom to make the £500,000 payment sought. He submitted that if I found a real, reasonable and immediate need for the claimant to move to independent living, then I should so order.

The defendant’s case

24. Mr Snowden QC invited me to look at the application dispassionately. The first stage of *Eeles* was to assess the likely awards of general and special damages and accommodation costs. Because the *Roberts v Johnstone* award was likely to be nil, his figure for these heads was just £290,000 and the “very best” the claimant could do was around £340,000 x 75% = £255,000. (He had already had £200,000 of interim payments.) As to stage 2 of *Eeles*, he said that there was no reliable basis for me to assess either the multiplicand or the multiplier for all or most of the awards for future loss. I did not have any reliable evidence of the claimant’s life expectancy. Dr Liu had said it was “significantly reduced” by his injuries and he submitted (not unrealistically) that the claimant’s smoking, drinking and BMI would have to be taken into account in establishing his pre-accident life expectancy. Even though the third anniversary of the accident was not far off, there was no determination of life expectancy before the court and this alone made the application defective and/or premature because this was vital to a proper valuation of the claim. Without it, I could not hazard a multiplier. As to the multiplicands, Mr Snowden QC submitted that the Schedule of Loss did not contain the figures and was, indeed, a confusing and inadequate document. I was not entitled to proceed on the basis of what would amount to no more than “educated guesswork”. For this reason also, the application was premature.

25. If I had had a reliable basis for the valuation of the claim, I still could not order the interim payment because the claimant had not shown a “real need for accommodation now (as opposed to after the trial)”. This was a matter for expert, medical evidence. That evidence was lacking and, to the extent that reliance was placed on Dr Sembi, he had premised his advice upon it being the “opinion of [the claimant’s] treating team that he can be supported well in the community”. That opinion was not before the court. Again, the application was defective or premature. And it had the added objection that it would establish an unfair *status quo*. In this regard, I was referred to the decision of Teare J in *Brown v Emery* [2010] EWHC 388 (QB), familiar in this context.
26. It was submitted that there was no reliable evidence that the claimant’s place at the Gardens Centre was in any immediate jeopardy.
27. Lastly, Mr Snowden QC pointed out that the package which the claimant sought would take him certainly no further than the autumn of 2018 when he would, inevitably, need to come back for another interim payment. At that point, he would be high and dry because the headroom in the likely award, if it existed at all, would certainly have been exhausted by this application.

Discussion

28. For reasons that will become apparent, it is convenient to begin by addressing the question: has the claimant shown a real and present need to fund alternative accommodation?
29. This is a matter that requires consideration of all the evidence. I do not agree that it is exclusively a matter for expert, medical evidence – though such evidence is commonly relied on as a very important part of the picture. Nor do I agree that the evidence (including opinion evidence) of an experienced Case Manager should be given little weight. I have concluded that the claimant has shown a real need. The difficulties he is experiencing at the Gardens Centre are only too apparent from the content and the strongly expressed language of Dr Sembi’s report and Mr Wright’s reports and witness statement. They describe a situation which is wholly unsatisfactory and which requires urgent change. I see no reason to doubt the evidence that the claimant’s continued funding at the Gardens Centre is now in question. No one on the claimant’s side or the defendant’s has proposed some other institution that would be available and which would suit his needs. By contrast, there is a clear plan, overseen by an experienced and reputable Case Manager, to place the claimant appropriately in the community where the multi-disciplinary treatment, which he currently lacks, can move forward.
30. On any fair reading of Dr Sembi’s report, he supports or would support this proposal. His concern was that the proposal had the endorsement of his treating team and included a comprehensive package of therapies and 24 hour care. Mr Wright in practice leads that team and endorses the proposal. That the claimant would receive the support package and care required is not in question. Even if Mr Snowden QC were correct in saying that “real need” requires the specific endorsement of a medical practitioner, I consider that such endorsement has been provided.
31. Although it bears only indirectly on the claimant’s welfare, the benefits that this would offer his family are further support for the proposition that he has a real and present need.
32. The costs of the exercise are large. But they are not significantly out of line with other cases and, as mentioned in paragraph 11 above, they were not subject to any serious challenge. Given the present state of the law on *Roberts v Johnstone* awards, the claimant cannot be criticised for opting to rent. In practical terms, that is his only option. The expenditure will be under the control of the Deputy appointed by the Court of Protection, whose duty it will be to ensure that the money is wisely and appropriately spent.
33. I do not think that such a move will present the defendant with an unfair *status quo* or, to borrow an analogy used in some of the cases, an “uneven playing field”. The evidence for the

move is compelling. The decision of Teare J in the case of *Brown v Emery* was on very different facts. There, the claimant was in a minimally conscious state and the property for which the interim payment was sought was not to be her permanent home, but one suitable for home visits. A move to independent living was, at the time of the application, an aspiration. It was unclear whether the claimant's best interests would ever favour her living outside of an institution such as a hospital or specialist nursing home. It was for these reasons that the judge was wary of establishing a *status quo* which might unfairly fetter or influence the trial judge.

34. The case before me is different. The claimant is not in a minimally conscious state. On present information and subject to the appropriate support package it seems likely that he is capable of living independently. That (unlike *Brown v Emery*) is not merely an aspiration.
35. In the language of *Eeles*, (I quote from the Headnote of the Weekly Law Report), I am satisfied by evidence that there is a "real, reasonable and immediate need" for the interim payment requested and that it will be used for the purpose for which it is requested.
36. It seems to me that this central finding changes the dynamics of the application. Once the court has found that there is a real and present need for the package of measures proposed, that finding alters the footing on which the *Eeles* calculation is made. By the time of the final hearing in this case, the trial of independent living will be (a) a past loss and (b), on the face of it, an expense reasonably incurred. Thus, taking Mr Snowden QC's figures, the 'stage one' *Eeles* calculation is not £290,000; it is £790,000. Even allowing for a maximum 25% reduction for contributory fault and the interim payments of £200,000 already made, the amount available at 'stage one' is £392,500. The claimant only needs to "borrow" around £150,000 from other heads of future loss in accordance with 'stage two' of *Eeles* in order to justify the payment.
37. When I canvassed this approach with counsel, the response from Mr Snowden QC came down to two points, which were (1) that I could not assume that the £500,000 expended on the trial of independent living would be recoverable as special damages and (2) that *Eeles* mandated the court to assess special damages as at the date of the application, not as at the date of the trial.
38. I reject both of these points.
39. Obviously, any application for an interim payment involves the court making an assessment of the "likely amount of the final judgment". This is because CPR r 25.7(4) prohibits the court from ordering more than a "reasonable proportion" of that amount. The defendant provided no evidence that the costs of the trial of independent living were unreasonable. As already noted, there was, in fact, no serious challenge to the figures. The money will be under the control of a Deputy. It will plainly be for the trial judge to decide whether it has been reasonably expended. But given that a court has already sanctioned the purpose of the expenditure and given the controls I have mentioned, I have a high degree of confidence that the trial judge will approve it or the vast bulk of it and will award it as special damages
40. As to the date of the assessment of special damages, it seems to me that Mr Snowden QC's submission relies on too literal a reading of paragraph 43 of the Court of Appeal's judgment in *Eeles*. Notwithstanding the second sentence of that paragraph ("special damages to date"), it is clear that what I must do is assess the special damages that will be included in "the likely amount of the final judgment". This is the wording of the rule which was in turn explicitly adopted by the Court of Appeal in the same paragraph. At the risk of stating the obvious, an assessment of the likely amount of the final judgment can only be made as at the date of that judgment – albeit that that date lies in the future. No other interpretation of *Eeles* would make sense because what the court is trying to assess is those components of the award which the trial judge must award as a lump sum and, on the other hand, those which (s)he may wish to award as a PPO. Self-evidently, losses which are, at the date of the trial, in the past cannot be awarded as a PPO.

Conclusion

41. I will order the interim payment for the reasons set out above. There is almost enough to do so at 'stage one' of *Eeles*. As to 'stage two', I find "real need" and for that reason I have the necessary confidence that the trial judge will capitalise one or more of the future heads of loss in order to realise the fulfilment of that need. That can be done without making heavy inroads into those heads. Indeed, even taking into account Mr Snowden QC's criticisms of the medical evidence on life expectancy and of the Schedule of Loss and taking into account also the doubtful state of the law on *Roberts v Johnstone* awards, there is still a very large amount in terms of items of future loss which the trial judge can opt to capitalise.
42. I will add one short postscript. Had I felt bound to make the 'stage one' *Eeles* calculation as Mr Snowden QC urged me I should, i.e. by confining it to an assessment of general damages and special damages to the present date, then I would not have ordered the interim payment. His criticisms of the Schedule of Loss and of the absence of clear evidence on life expectancy were well made. It is, indeed, surprising and unsatisfactory that the application was not supported by better evidence in both these departments. I would have adjourned the application to allow these matters to be addressed.