IN THE HIGH COURT OF JUSTICE QB-2019-000523

QUEENS BENCH DIVISION
Neiutral citation number [2019] EWHC 1466 (QB)

Thursday, 23 May 2019

Before:

MRS JUSTICE LAMBERT DBE

B E T W E E N :

SPG
(by his mother and litigation friend KSG)

Claimant

- and -

UNIVERSITY HOSPITAL SOUTHAMPTON NHS FOUNDATION TRUST

Defendant

Simon Cridland instructed by Moore Blatch appeared on behalf of the Claimant.

Angus McCullough QC instructed by DAC Beachcroft appeared on behalf of the Defendant.

Hearing Date: 20 May 2019

J U D G M E N T

MRS JUSTICE LAMBERT:

1 The Claimant applies for a further interim payment of £1.8 million, in addition to the £700,000 which the Defendant has already paid by way of three voluntary interim payments. The Claimant was represented by Mr Cridland and the Defendant by Mr McCullough QC. I am grateful to them both for their focussed and helpful submissions.

Background

2 The Claimant was born on the 20th June 2012 and is now approaching his seventh birthday. The claim arises from the circumstances of his birth which led to him sustaining profound and irreversible neurological damage in the form of dyskinetic four limb cerebral palsy with fluctuating tone and involuntary movements. He is unable to sit or stand unaided. He has very limited useful upper limb mobility, and, so far as can be ascertained at present, he has mild to moderate learning difficulties. The Claimant is fully dependent upon others for all aspects of his needs. The Claimant's expert neurologist, Dr Gupta, considers that his life expectation is to around forty-one years. He currently lives in a four-bedroomed house, rented from a local housing authority in Romsey, Hampshire, with his parents and three siblings: two brothers aged four and two, and a sister who was born at the end of April 2019.

3 Before I consider the application for a further interim payment, I must deal with three short procedural matters. First, I order that judgment for the Claimant is entered, with damages to be assessed. The Defendant consents to judgment, having admitted breach of duty and causation at an early stage. Second, the Claimant seeks a stay of the proceedings for a period of two years. The application is not opposed, and I make the order sought: it is clear from the medical reports that I have read for the purposes of the interim payment application that the extent of the Claimant's cognitive deficit is not currently known but that a fuller and more confident picture is likely to emerge following the completion of two years' appropriate schooling. It is anticipated that the Claimant will obtain a suitable school placement later in 2019 and that public funding will be obtained. Both parties agree that the Claimant's cognitive potential is likely to have some effect on the Claimant's function overall and the overall value of the claim. In these circumstances, I am satisfied that it is a proper exercise of my case management powers to grant the stay of proceedings until July 2021. Finally, I grant the Claimant's application for an anonymity order. The relevant legal principles are set out in *JX MX v Dartford & Gravesham NHS Trust* [2015] 1 WLR 364. I apply those principles, recognising that such an order represents some derogation from the principle of open justice but that the anonymity order is necessary to safeguard the Claimant's interests, bearing in mind his right to privacy and the very personal details of his life which will emerge during the proceedings.

The Application

4 It is common ground between the parties that the Claimant's current accommodation is unsuitable and that there is an urgent need for special accommodation. There is a need for a ground floor bedroom for the Claimant, for sufficient circulation space to enable him to be mobilised in a wheelchair, for a suitable bathroom and for space to accommodate professional live in carers.

5 The impetus for this application is that a property has been identified by the Claimant which is said to be suitable. It is a bungalow called "Hawthorns". An offer of £725,000 has been accepted on the property, although contracts have yet to be exchanged. Of the voluntary interim payments there remains around £620,000 unspent. However, the Claimant submits that this residual sum and the further £1.8 million is needed to complete the purchase of

Hawthorns, undertake the necessary adaptations and cover the care, therapy and schooling costs which are likely to be incurred over the next two years. Having listed the outgoings, Mr Cridland accepts that there is likely to be a sum in the order of around £500,000 remaining. This will be needed, he submits, for contingencies.

6 The relevant principles guiding the award of interim payments in damages claims such as this are set out in *Eeles v Cobham Hire Services Limited* [2010] 1 WLR 409. Popplewell J provided a useful summary of the *Eeles* principles in *Smith v Bailey* [2014] EWHC 2569 QB at para.19.

> (1) CPR r. 25.7(4) places a cap on the maximum amount which it is open to the Court to order by way of interim payment, being no more than a reasonable proportion of the likely amount of the final judgment (para 30).
> (2) In determining the likely amount of the final judgment, the Court should make its assessment on a conservative basis; having done so, the reasonable proportion awarded may be a high proportion of that figure (paras 37, 43).
> (3) This reflects the objective of an award of an interim payment, which is to ensure that the claimant is not kept out of money to which he is entitled, whilst avoiding any risk of an overpayment (para 43).
> (4) The likely amount of a final judgment is that which will be awarded as a capital sum, not the capitalised value of a periodical payment order ('PPO') (para 31).
> (5) The Court must be careful not to fetter the discretion of the trial judge to deal with future losses by way of periodical payments rather than a capital award (para 32).
> (6) The Court must also be careful not to establish a status quo in the claimant's way of life which might have the effect of inhibiting the trial judge's freedom of decision, so creating 'an un-level playing field' (paras 4, 39).
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> *Eeles Stage 1*
> (7) Accordingly the first stage is to make the assessment in relation to heads of loss which the trial judge is bound to award as a capital sum (para 36, 43), leaving out of account heads of future loss which the trial judge might wish to deal with by a PPO. These are, strictly speaking (para 43):
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> > (a) general damages for pain, suffering and loss of amenity;
> > (b) past losses (taken at the predicted date of the trial rather than the interim payment hearing);
> > (c) interest on these sums.
>
> (8) For this part of the process, the Court need not normally have regard 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 (para 44). Nevertheless if the use to which the interim payment is to be put would or might have the effect of inhibiting the trial judge's freedom of decision by creating an un-level playing field, that remains a relevant consideration (para 4). It is not, however, a conclusive consideration: it is a factor in the discretion, and may be outweighed by the consideration that the Claimant is free to spend his damages awarded at trial as he wishes, and the amount here being considered is simply payment at the earliest reasonable opportunity of damages to which the Claimant is entitled: *Campbell v Mylchreest* [1999] PIQR Q17.
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> *Eeles Stage 2*
> (9) The Court may include elements of future loss in its assessment of the likely amount of the final judgment but only if (a) it has a high degree of confidence that the

trial judge will award them by way of a capital sum, and (b) there is a real need for the interim payment requested in advance of trial (para 38, 45).

(10) Accommodation costs are 'usually' to be included within the assessment at stage one because it is 'very common indeed' for accommodation costs to be awarded as a lump sum, even including those elements which relate to future running costs (paras 36, 43)."

7 The first question that I address is whether the total interim payment sought, which is £2.5 million, is no more than a conservative assessment of those heads of loss which the trial judge will likely award as a capital sum (general damages, special damages, and the cost of and associated with the provision of special accommodation). If so, then the interim award should be granted without my really undertaking any particular enquiry into the way in which the award is to be spent.

8 I can deal with *Eeles* stage one swiftly as there is no dispute between the parties but that the sums sought cannot be met by way of an advance payment of general damages, special damages with interest, and the costs of and associated with special accommodation. There are differences between the parties as to the final figure produced under stage one, largely due to different approaches being taken to the capital costs of special accommodation. Any calculation of the capital accommodation costs is bedevilled by imponderables, including the discount rate likely to be in force at the date of trial and whether the current orthodox approach to compensating the capital costs of special accommodation will survive the challenge in *Swift v Carpenter* [2018] EWHC 2060. It does not seem to me that I need resolve the differences between the parties. All I need note is that the effect of the analysis, whether undertaken by Mr Cridland or by Mr McCullough, is to engage *Eeles* stage two. I therefore address whether there is evidence before me of a real and urgent need for the money now, and whether the sum claimed is reasonable.

9 I start by reminding myself that the Defendant does not dispute that the current accommodation is wholly unsuitable: there is an urgent need for alternative accommodation for the Claimant and for his family now.

10 However, the Claimant must also demonstrate <u>by evidence</u> that there is a real need for the interim payment sought (see *Eeles*, per Smith LJ at [45], my emphasis). I find that this application falls at this hurdle for the following reasons:

a. The Claimant's accommodation expert, Ms Shek, states that, given the urgent need for suitable accommodation, the most logical first step is for the family to relocate into temporary rental property. Whilst she recognises that the Claimant may encounter practical difficulties in finding suitable accommodation with a landlord willing to permit the necessary limited adaptations, given the urgency of the need to address the risks associated with the Claimant's current accommodation, if those obstacles could be overcome then the rental route would offer the fastest and most efficient interim step. Ms Shek has undertaken a search of the rental market extending modestly beyond the family's chosen geographical area but, having done so, she was able to find seven properties with the average annual rental cost in the order of £42,000. The rental properties were larger than she was recommending for the permanent home, but this was to provide space for carers without the need to adapt or extend the rental property.

b. I recognise that in proposing an interim rented property Ms Shek was addressing the urgent need for special accommodation. I also recognise that the Claimant has now found a property which is, in the Claimant's view, suitable. However, Hawthorns is not the perfect solution to the Claimant's accommodation needs by any stretch. The bungalow is not in the catchment area of the school that the Claimant's parents wish him to attend. More importantly, the feasibility study for the planned adaptations and alterations (which was disclosed during the hearing for the interim payment) indicates the timeframe for the completion of the works is, at the minimum, around one year. The purchase of Hawthorns does not therefore provide an immediate solution to the urgent need for special accommodation.

c. There is insufficient evidence before me that the rental market has been explored. The height of the evidence is to be found in the statement of Mr Paul Kingsley, the Claimant's solicitor, where he remarks that he understands from the Claimant's parents that they have been unable to find any suitable rental properties within the current geographical location where the landlord has been prepared to countenance the necessary adaptations. However, this statement only serves to raise a series of further unanswered queries. What search has been undertaken? What geographical area which has been searched? Have any properties been viewed? If so, how many, and on what basis was a decision made that the properties were not suitable? These issues are simply not addressed.

d. There is around £620,000 remaining from the voluntary interim payments already made by the Defendant. This is a sufficient fund to meet rental costs to trial in two or three years' time (even assuming that they are rather higher than the £42,000 per annum contemplated by Ms Shek), the costs of necessary adaptations to the property, the cost of professional care and therapies over the next two or three years and to include some shortfall in education costs.

11 I find that the Claimant has not demonstrated by evidence that the sum sought is reasonably necessary. I recognise fully that it may be difficult, if not impossible, for the Claimant to find suitable rental property, in which case the Defendant will doubtless face a further application for an interim payment to meet the capital costs of special accommodation in due course, possibly sooner rather than later. I have also pointed out to Mr McCullough that the proposal that the Claimant's accommodation needs are addressed in two phases, first via rental property, and then via the purchase of accommodation, may prove in the final reckoning to be far more expensive for the Defendant than it simply meeting the costs of Hawthorns at this stage of the litigation. This point is not lost on him nor his client. However, I also take into account that one of the difficulties for the Defendant is that it, unlike the Claimant, has not yet investigated the Claimant's reasonable accommodation needs and that there is a danger in providing funds now which may be deployed in a particular way such that at trial the court is faced with an established position. That is a relevant factor, not least because, as Mr McCullough has pointed out, the footprint of Hawthorns is rather larger than that said to be reasonable by Ms Shek in her first report. However, whilst relevant, this factor is not determinative of this application. What determines the application is the lack of evidence that a suitably comprehensive search for rental accommodation has failed to locate suitable interim accommodation.

12 I add the following short points.

a. Given the urgent need for rental accommodation, this may be one of those rare cases in which the services of a property finder is reasonable. Mr McCullough

understandably reserves his position in respect of the need for, and the quantum of, such a service. It will of course have to be looked at trial on its own facts, and nothing I say binds the trial judge in due course. I simply express my view at this stage, recognising as I do the practical problems facing the Claimant in finding suitable rental accommodation as a matter of urgency.

b. I also add that, realistically, any rental property may have to be larger in size than the final purchased property given the need to provide accommodation for live-in carers without substantially extending the construction of the property.

c. Although I have granted a stay on proceedings, I understand from Mr McCullough that the stay will not prevent his client from investigating the Claimant's reasonable accommodation needs such that, if a further application for an interim payment is made, the Defendant will be in a position to meet the application on its merits.

13 This is sufficient to dispose of this application. I express no view on the likely capitalised value of the claims for future losses, setting aside care and case management. To do so is unnecessary. Also, any view would be highly provisional, given the review of the discount rate which is imminent. Also, as Mr McCullough submits, the rate which is implemented may affect advice given by claimants' legal advisers on the particular heads of loss to be included in a periodical payment order. Nor do I express any view on the reasonableness of Hawthorns. Again, to do so is not necessary to my determination of the application.

14 I dismiss the application.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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