Neutral Citation Number: [2021] EWHC 1761 (QB)

Case No: F36YJ546

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY

Manchester Civil Justice Centre
Date: 28/06/2021

Before :

THE HON MR JUSTICE ROBIN KNOWLES CBE

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Between:

AL **(by her Mother and Litigation Friend, S)**	**Claimant**
- and -	
(1) A **(2) T** **(3) Collingwood Insurance Company Ltd**	**Defendants**

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Anthony T Goff (instructed by **Irvings Law**) for the Claimant
Winston Hunter QC (instructed by **Keoghs LLP**) for the Third Defendant
The First and Second Defendants did not appear and were not represented

Hearing dates: 15 April 2021

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Approved Judgment

I direct that pursuant to CPR PD39A 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

MR JUSTICE ROBIN KNOWLES CBE

Mr Justice Robin Knowles CBE:

1. The Claimant, AL, was born on the 27 September 2013. She is now 7 years old. The Third Defendants, Collingwood, are insurers.

2. Three years ago, on 17 March 2018, AL was a passenger in a car which was involved in a road traffic accident. She sustained severe brain injury.

3. AL has been left with enduring behavioural and cognitive difficulties, among others. She has been able to attend school, where she has a support plan although not, at least at present, an Education Health and Care Plan. AL remains under the care of the paediatric team at Preston Royal Infirmary. A team of therapists, organised by a case manager, provides support including occupational therapy, education psychology, clinical psychology and positive behaviour support therapy. AL has required repeated admissions to hospital.

4. In this litigation AL's mother is her litigation friend. Judgment in AL's favour was entered against the First and Second Defendants on 13 June 2019. Collingwood accept they are liable in respect of any judgment obtained by AL against the First and Second Defendants.

5. Over the last 3 years, five interim payments have been made to AL's benefit to date, in a total sum of £400,000. The first two were made on 29 May 2018 (£20,000) and 10 October 2018 (£30,000). After the issue of proceedings in March 2019, interim payments were ordered following contested hearings on 13 June 2019 (£220,000) and 10 March 2020 (£50,000). The fifth interim payment (£80,000) was conceded by Collingwood on 8 September 2020 on the day scheduled for a further contested hearing.

6. The five interim payments have now been exhausted. AL now applies for an interim payment of £500,000. This divides as to £150,000 to provide for the costs of her care and rehabilitation regime for the next 12 months, and as to £350,000 to enable the house that is her current home to be purchased and additional safety and security measures to be undertaken to it.

7. The house is currently rented. The landlord now proposes to sell it rather than continue to rent it out. Prior to her accident AL lived with her mother in smaller rented accommodation. That did not meet AL's accommodation needs resulting from the accident. She moved with her mother to the house, which does.

8. The house provides space and security in the context of her behavioural difficulties and overnight accommodation for carers. As mentioned above it has proved possible for AL to return to school, and the house is close to the school and a suitable future school when she is older. AL's mother has not been able to find anything comparable in the area at a lower price.

9. Although there was uncertainty between the parties ahead of the hearing, it transpires that a Deputy has recently been appointed. I allowed time after the hearing for the Deputy to make any representations or express any views.

10. Much of the expert evidence that has been served is not recent. However shortly before the hearing, a report of Dr Audrey Oppenheim, a Consultant Child and Adolescent Psychiatrist, was served by Collingwood. This was prepared following a video conference with AL and her mother on 14 February 2021 and is dated 9 April 2021. Dr Oppenheim does not criticise the suitability of the house for AL and in fact suggests ways that AL's care regime could be augmented, It is to be assumed that some of the suggestions will add to costs.

11. Dr Oppenheim writes of AL's struggle to comply with instructions, and that she can easily become over excited. Dr Oppenheim records that "[w]ithout very clear structure, routines and predictable boundaries, [AL] can easily become overstimulated, again as observed at my interview", adding that "in general [AL] is more able to attend and concentrate in school where she benefits from the imposed structure and routine". Dr Oppenheim writes that AL's ability to control her appetite has been damaged, and that she struggles to sleep and has limited awareness of safety. She "is emotionally immature as compared to her peers and the gaps in academic and social functioning are likely to widen with the passage of time", writes Dr Oppenheim.

12. In addition, on 16 March 2021 Dr Richard Appleton, a Consultant Paediatric Neurologist and Honorary Professor in Paediatric Neurology instructed for AL, writes:

> "It is highly likely that [AL] will continue to demonstrate … behavioural difficulties throughout, and for the remainder of her childhood. This is likely to occur even with the input of appropriate clinical psychological support at home and at school.
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> In addition [AL] is likely to demonstrate learning difficulties over the course of the next few years and particularly as the school work increases in both quantity and complexity. This will particularly affect her attention, short and working memory and organisational skills. This will increase her frustration and will consequently exacerbate her behavioural difficulties. …
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> It is well recognised that children who have experienced a severe brain injury and who demonstrate the behavioural and emotional sequelae shown by [AL] require stability and routine in their lives. This will reduce the impact of these sequelae and also maximise [AL's] mental well-being. Conversely the lack of stability will exacerbate her difficulties and will materially impair her rehabilitation and potential for recovery.
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> …

> [The house and its purchase] would provide [AL] with the routine and stability she urgently requires at this important stage of her rehabilitation after her severe brain injury and will optimise her recovery".

13. CPR 25.7(4) provides:

> "The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment."

14. Collingwood, appearing by Mr Winston Hunter QC, rely on this rule to oppose the application for a further interim payment in the sum sought. Mr Hunter QC argued first that there was no jurisdiction to order the interim payment sought and second that the evidence was insufficient to justify it.

15. Counsel for each party referred to the decision of the Court of Appeal in Eeles v Cobham Hire Services Ltd [2010] 1 WLR 409 for applicable principles.

16. Of particular importance to the present case are these passages from the judgment of the Court of Appeal, given by Smith LJ:

> "30. … [A]lthough the power to order an interim payment is a discretionary power, there is not an unfettered discretion. The discretion is limited at the upper end by CPR 25.7(4). The court has no power to make an order for more than a reasonable proportion of the likely amount of the final judgment. …
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> 31. In a case in which a [periodical payment order:] PPO is made, the amount of the final judgment is the actual capital sum awarded. It does not include the notional capitalised value of the PPO, which sum is irrelevant for the purposes of determining an interim payment in a case of this kind. …
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> 32. … The fact that the capital sum ordered might be invested wisely and might be realised later misses the point about the importance of the trial judge's freedom to make an appropriate PPO. A PPO has the potential to provide real security for a claimant for the whole of his life. Of course, there will be a tension between the claimant's need for an immediate capital sum and the desirability of the security of a substantial PPO. That tension cannot usually be properly resolved until the trial judge knows what sums are actually to be awarded under each head of damage and has financial advice available to him. At the interim payment stage, the judge does not have those materials. If the judge makes too large an interim payment, that sum is lost for all time for the purposes of founding a PPO. It cannot be put back into the pot from which the trial judge will allocate the damages.
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> …

> 42. Before leaving this case, we wish to summarise the approach which a judge should take when considering whether to make an interim payment in a case in which the trial judge may wish to make a PPO.
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> 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 over-payment.
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> 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.
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> 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 *Braithwaite.* 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."

17. For present purposes, it is material to note two things in particular. First, that "accommodation costs (including future running costs)" can be taken into account as part of the judge's "first task". Second, that whether there is "a

real need for accommodation now (as opposed to after trial)" is relevant to the question whether the judge will be entitled to include "additional elements of future loss" in her or his assessment (for the purpose of arriving at an interim payment) of the likely amount of the final judgment.

18. Although cited for statements of principle, it is also relevant to note how different were the facts in Eeles to the present case. In Eeles the application, which was refused, was directed to the acquisition of a substantial new property ahead of a trial the timing of which could be identified and when the claimant "was well housed at present and has a therapy room provided by past interim payments".

19. Mr Hunter QC acknowledged that all expert opinion in the present case accepted that there had been traumatic brain injury, but he emphasised that the case is unusual in the absence of physical sequelae. He recognised that there was "some cognitive impact" but described this as "moderate". He recognised that it was "said that some behavioural problems developed". The behavioural problems are, noted Mr Hunter QC, to be witnessed primarily in the home setting (rather than at school).

20. Contemporaneous records that have been prepared by support staff assisting in the home on a daily basis, identify aspects of AL's behaviour that suggest, as it is put for Collingwood, occasional truculence, reluctance to comply with instructions, and a need for guidance about boundaries.

21. In my assessment, what I have summarised in the last two paragraphs understates the seriousness of AL's position on the evidence.

22. Mr Hunter QC was however fully justified in drawing attention to the difficulties with prognosis. He argued that behavioural problems in children present significant difficulties in prognosis and may significantly ameliorate, and he argued that the precise extent, cause or contributory factors relating to the same are controversial, and likely to be multifactorial. Mr Hunter QC noted that both Dr Oppenheim and a paediatric neuropsychologist instructed on behalf of AL suggest further assessment in about 12 months. He identified a more recent possibility to try medication to address behavioural issues and suggested that it was crucially important to review the effect of that in 12 months' time.

23. In the circumstances, Mr Hunter QC argued, the Court was effectively limited to ordering an interim payment for a further 12 months, or should limit itself to that period. If the Court wished to consider a different course it might direct preliminary issues that expert evidence be prepared to address prognosis to a particular age. But as things stand no expert gave, in his submission, sufficient opinion to enable the Court to assess what the losses might be when AL became an adult.

24. In my assessment, although the courses indicated by Mr Hunter QC are available, the Court is not confined to them in the present case. I do not consider the wisdom of proposing a further assessment in 12 months affects

the ability to form a sufficient view on prognosis especially for the decade of childhood still ahead.

25. Mr Hunter QC identifies the following points, drawing on a witness statement of Mr James Fisher of Keoghs LLP, solicitors to Collingwood. It was suggested that there is no evidence to suggest that the continued occupation of the house is uncertain, and the nature of the certainty sought is not explained. With respect, I was left perfectly clear that the certainty sought was of continuity of home and school and that this could no longer be achieved by renting. It was suggested that there is no "good evidence" that AL's accommodation needs are any greater than they would have been in any event (i.e. absent the accident). However, I note that there is evidence that this home was chosen and rented to meet AL's post accident needs, and that other pre-accident plans were not pursued.

26. A further suggestion made by Mr Fisher was summarised as being "that the desire to purchase is that of [AL's] mother (and perhaps her new partner) based on their future plans for a larger home to accommodate their extended family". I do not regard this speculative characterisation as well founded on the evidence I have. I add that there is ample evidence that AL's mother, as a single parent, has striven to cope with the challenges the accident has caused, to the point that there are references to concern by others, including experts, for her own wellbeing. What is clear is that there will likely be adverse consequences for AL and her rehabilitation if the matter is left for 12 months. Mr Hunter QC again drew attention to the absence of physical disability, but I note AL's accommodation needs are driven by enduring behavioural problems.

27. On the application, I am reaching a decision on whether an amount of money should be paid by way of interim payment, rather than deciding whether the particular house is suitable. It is the fact that those professionals instructed on behalf of AL or engaged in her rehabilitation support the purchase of this house. However, for the purposes of my decision the relevance of the house, and the consequences (including for rehabilitation) if AL and her mother leave the house, are to show why an interim payment is sought now, and in this sum, and why it is important to get this decision right.

28. What is 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?

29. In my judgment it is first appropriate in the present case to accept, and accept as a conservative assessment, the figure of £125,000 advanced on behalf of AL for pain, suffering and loss of amenity.

30. To this should be added a figure for special damages to date, which for present purposes can be taken as £375,000. This is a little below the figure provided on behalf of AL. Collingwood proposed £264,857 but in doing so made assumptions that paid support and a car (equipped with a specialist car seat to ensure AL can be safely transported to and from school) were not needed by reason of the accident, but I am not prepared to make those assumptions on the evidence I have.

31. In the present case I propose to include a figure in respect of accommodation costs (including future running costs) in the expected capital award. This is based upon the "sufficiently well established" practice referred to by the Court of Appeal. Mr Hunter QC emphasised again that there was no settled prognosis of AL's need, that she would reach adulthood in just over a decade, and evidence from AL's mother in 2018 as to her plans before the accident. On the other hand in the present case AL is till just 7, she has an extended need for rehabilitation, the house is her current home and was selected to meet her needs as a result of the accident, her mother's plans (including her ability to earn) have had to change following the accident, the use of this house has been already been supported from interim payments, and there is evidence that AL's rehabilitation will be harmed by moving from it.

32. Mr Hunter QC argued that it is not the total but the additional capital cost to purchase a property that should be taken into account in the present case. However, even if one takes that point, the additional capital cost would amount to a major proportion comparing what is now needed with what was needed pre-accident, and future running costs also come into the calculation. Having been offered a number of calculations, I am prepared to conclude that £350,000 should be treated as part of the expected capital award in respect of accommodation costs, not alone but taken with future running costs.

33. The result is a conservative total of £850,000. As Eeles makes clear, a reasonable proportion may well be a high proportion, provided that the assessment has been conservative. In my view a reasonable proportion in the present case is £800,000. This stage alone would readily produce a further interim payment of or of about £400,000.

34. But over and above that, and even if the figure I have taken was to be regarded as too high, the Court of Appeal in Eeles recognised that there are 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" (at paragraph [45]). That can be done, said the Court of Appeal, "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." (at paragraph [45]). There must be a "real need for the interim payment requested" (at [45]). I must be satisfied "to a high degree of confidence" that expenditure of approximately the amount proposed to be awarded is reasonably necessary.

35. In an earlier passage in Eeles the Court of Appeal said, at [38]:

> "… there will be cases (the *Braithwaite* case [2008] LS Law Medical 261 was one such) in which the judge at the interim payment stage will be able confidently to predict that the trial judge will capitalise additional elements of the future loss so as to produce a greater lump sum award. In such a case, a larger interim payment can be justified. Those will be cases in which the claimant can clearly demonstrate a need for an immediate capital sum, probably to fund the purchase of

> accommodation. In our view, before a judge at the interim payment stage encroaches on the trial judge's freedom to allocate, he should have a high degree of confidence that such a course is appropriate and that the trial judge will endorse the capitalisation undertaken."

36. I am satisfied on the evidence that there is a real need for the interim payment requested, that there is a real need for accommodation now (as opposed to after the trial) and that the amount of money requested is reasonable.

37. Although the Court of Appeal made clear I do "not need to decide whether the particular house proposed is suitable; that is a matter for the Court of Protection" I am still required to "decid[e] whether expenditure of approximately the amount" proposed to be awarded "is reasonably necessary". I am so satisfied, to a high degree of confidence. This is because it enables AL to have the continuity, stability and security of her existing home and school and carer arrangements and these are central to her rehabilitation, development and to any chance of a good prognosis. There are serious potential adverse consequences involved in the alternative of requiring AL to leave her home. I recognise that I am "encroach[ing] on the trial judge's freed to allocate" between an immediate capital sum and a PPO but I am prepared to predict that the trial judge would take or endorse this course. Again, I do so with a high degree of confidence.

38. I add that the interim award is modest when, as here, future loss may run into many millions of pounds. Mr Hunter QC criticised the fact that the Schedule of Loss provided with the Particulars of Claim has not been revised. However, Mr Goff has provided calculations within his written submissions, for the purposes of this application. Leaving accommodation costs aside, these calculations estimated future loss of earnings (assuming qualifications and employment but disability), future professional care costs (assuming lifetime continuation of current arrangements comprising a support worker, psychology, occupational therapy and case manager costs) and sums for gratuitous care.

39. In the circumstances of the present case, I will order a further interim payment in the amount sought of £500,000.

40. As stated above, Mr Hunter QC's first argument was that there was no jurisdiction to order the interim payment sought. I consider the jurisdictional limit is that set by CPR 25.7(4) ("a reasonable proportion of the likely amount of the final judgment"). This does not say that future losses cannot in any circumstance be considered, and despite the terms of paragraph [31] of its judgment, when read as a whole the Court of Appeal in Eeles does not suggest as much: see especially paragraphs [38], [43] and [45].

41. The Court of Appeal's guidance goes instead to the exercise of discretion in accordance with principle. The distinction is important. If future losses were to be placed outside the jurisdictional limit then in vital early years after an accident, but at a time during which litigation is not being taken to a conclusion in the interests of allowing a more informed prognosis, less may

be available to achieve important rehabilitation ends than is desirable, always ensuring fairness to both parties.

42. I respectfully add that the full potential working of CPR 25.8(1), which allows the court to make a later order to adjust an interim payment, was not discussed in the judgment in Eeles when the Court said what it did at paragraph [32] of its judgment. In some, perhaps limited, cases, where an interim payment is ordered and is used to acquire an asset that could be sold should that became necessary, then that fact may add to the flexibility that is available.

43. Of course, it is to be hoped that both claimant and insurers would work to a sensible conclusion on these points in each case. Regrettably, the present case is one where the parties are very opposed to each other. This reached the point where, on the evidence of Ms Houghton of AL's solicitors, a proposal of mediation to address the interim position did not attract a response from Collingwood's solicitors. I trust this will not happen again.