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Case No: QB-2020-004301

**IN THE HIGH COURT OF JUSTICE**

**KING'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 12/08/2024

**Before :**

**MASTER STEVENS**

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**Between :**

**XS1 (A Child Proceeding by her Mother and  
Litigation Friend XS2)**

**Claimant**

**- and -**

**West Hertfordshire Hospitals NHS Trust**

**Defendant**

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**Mr William Young** (instructed by **Irwin Mitchell LLP**) for the Claimant  
**Mr Andrew Perfect** (instructed by **Kennedys**) for the Defendant

Hearing date: 15<sup>th</sup> July 2024  
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**Approved Judgment**

## Master Stevens:

### INTRODUCTION

1. The Claimant in this clinical negligence action seeks an urgent interim payment to enable her to purchase suitable alternative accommodation. An offer of £1.65M has been accepted by the vendors of the property, subject to approval of sufficient monies to complete the purchase by order of the Court. The Defendant denies that it is appropriate to make any such order. Due to the urgent need to provide a determination following oral argument this judgment will be particularly focussed on the issues which are dispositive of the application. The relevant law concerning interim payments was not in dispute although the correct interpretation of wording of the threshold test under limb 2 of *Cobham Hire Services v Eeles* [2009] EWCA Civ 204 (“*Eeles*”) was contentious between the parties.

### BRIEF FACTUAL AND PROCEDURAL BACKGROUND

2. The Claimant is now 10 years old and has a diagnosis of dystonic cerebral palsy (GMFCS level V, which is the most severe level), severe developmental delay, gastroesophageal reflux, epilepsy which was in remission but which is under further investigation following recent seizures, and microcephaly. She can only sit with support and spends a lot of time on the floor which increases manual handling issues for carers; transfers are also difficult due to posturing. She cannot stand or walk independently. She has some visual impairment and no speech and has been tube fed for the past 5 years although she takes a little food by mouth for taste and pleasure. She also has incontinence issues, particularly in the daytime. On average she is said to have disturbed sleep 4-5 times a night, with regular hourly (according to information given to the occupational therapist) night-time venting due to build-up of gas. Her paediatric neurology expert, Dr Vadlamani, believes she has a reduced life expectancy which, if she survives to age 15, is likely to be to around age 31. She attends a special school close to her home and paid for privately, and is said by the speech therapy expert to have language comprehension at age equivalent 6 years and is likely to plateau around there. The gap between the Claimant and her peers is likely to widen according to her expert paediatric neurologist (at [3.13]). She uses a switch system for communication and has been trialling eye gaze technology although due to her visual impairment she has been struggling with it somewhat. She says she doesn't like her body, finding it sad and frustrating. Thus she has insight to her condition.
3. The Claimant lives with her 2 younger siblings, her working parents and a carer in a rented 3-storey and 6 bedroomed property. It is accepted that it is unsuitable for current needs without further adaptations; most notably the Claimant has to be carried upstairs to her bedroom by her parents. The carers are not allowed to do so as it is unsafe on manual handling assessment. There are no ceiling hoists, making transfers difficult and heavy. The Claimant now weighs 3 stone (according to the expert care report, at page 5) and is almost as tall as her Mother according to the occupational therapy expert (at [4.3]). The Claimant's accommodation expert also believes that the current accommodation is unsatisfactory as the bedroom, bathroom and therapy room are too small for the Claimant's equipment and care and therapeutic needs. Furthermore, the carer accommodation is on a different floor to the Claimant, who requires carer interventions several times a night due to gas build up in her gastrostomy tube. There are also accessibility issues for parts of the house and garden, as the

Claimant is reliant upon an attendant propelled wheelchair for all functional mobility. If this application is unsuccessful adaptation works will be commenced at the current rental property but the current lease expires shortly after trial in September 2025, and it is impossible to know whether the lease can be extended beyond that date.

4. Liability has been compromised and previously approved at a 70% split in favour of the Claimant. There have already been interim payments totalling £825,000. The latest Schedule of Loss dated 27<sup>th</sup> June 2024 has been prepared with input from the Claimant's disclosed CPR Part 35 expert reports and the Court had available in the hearing bundle those for accommodation, care, physiotherapy and occupational therapy. The claim is fully particularised through to trial and totals £19,288,549.63 before (i) the agreed liability split, (ii) interest credit is given for interim payments and (iii) deductions for CRU.
5. The original application for £2.4M by way of further interim payment to purchase a property was first intimated by the Claimant's solicitors on 30<sup>th</sup> April 2024, although it was not in fact issued until 10<sup>th</sup> June, some 5 weeks' ago and the supporting expert evidence and schedule were served 17 days' pre-hearing in accordance with an agreed extended timetable under the general directions order. Shortly before the hearing a very brief updating witness statement from the Litigation Friend dealing solely with the intended property purchase was served in addition. The Defendant has instructed accommodation and care experts who have visited the Claimants but no reports, even in draft format, have been made available to counsel representing the Defendant at the hearing. This was despite the accommodation expert having conducted a site visit some 9 weeks earlier. No indication was given as to when the care expert visited but the current directions timetable requires all the Defendant's expert evidence to be served by 11<sup>th</sup> October, i.e. in 3 months.
6. The Defendant contended the application should be dismissed or adjourned, to an unspecified date, but I rejected those submissions at the outset of the hearing, as there was significant relevant expert and other evidence before the Court upon which a determination might be possible, as in some other previous cases. I indicated that even if a complete determination could not be reached on the application, I considered progress could be made. There was no authority before the Court that a judge hearing applications of this nature should have expert evidence available from the Defendant before reaching a decision. *Sweeney J in Sellar-Elliott v Howling* [2016] EWHC 443(QB) held the contrary in refusing permission to appeal a decision from a Master to grant an interim payment in those circumstances. The Claimant had served their evidence in accordance with the timescales permitted under CPR 25.6, save for the latest paediatric neurology report, and an extremely brief supplemental witness statement from the Litigation Friend. The Court was also mindful that it should not withhold damages from a Claimant provided the threshold tests for eligibility for such a payment have been satisfied. However the Court should guard against the risk of overpayment.
7. It was confirmed at the hearing that credit was given for a voluntary interim payment of £250,000, paid after the application was first indicated, such that the sum sought at the hearing was the balance of the original request, being £2.15M.
8. There was no indication within the bundle of documents or submissions, as to what the remaining unspent balance is from earlier interim payments and, because the

Schedule of Loss is pleaded through to trial, expenditure to date for some heads of loss could not be readily extracted from the detailed information available in the Schedule.

### THE RELEVANT LEGAL TESTS

9. I will not rehearse the relevant threshold conditions set out in CPR 25.7 which need to be satisfied before an interim payment can be ordered as they were not in contention save for the provision at CPR 25.7(4) which states, “*The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment*”.
10. Both parties relied on the lead case of *Eeles* where the Court of Appeal sought (at [42]) to “*summarise the approach which a judge should take when considering whether to make an interim payment in a case where the trial judge may wish to make a PPO*”.
11. Whipple J, as she then was, in *AC (a minor suing by his litigation friend MC) v St Georges Healthcare NHS Trust* [2015] EWHC 3644(QB), (“AC”), (at [7]) provided a very useful and succinct summary of the essential factors for the Court to have in mind when determining an interim payment application, which she had drawn from various paragraphs of the judgment by Popplewell J in *Smith v Bailey* [2014] EWHC 2569 as follows:
  - (1) CPR rule 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 judgement (at [30]).
  - (2) In determining the likely amount of the final judgement, 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 (at [37], [43]).
  - (3) This reflects the objective on 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 (at[43]).
  - (4) The likely amount of a final judgement is that which will be awarded as a capital sum, not the capitalised value of a periodical payment order (“PPO”) (at [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 (at [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, a danger described in *Campbell v Mylchreest* as creating “*an unlevel playing field*” (at[4],[39]).
  - (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 (at [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 (at [43]):

- (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 (at [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 unlevel playing field, that remains a relevant consideration (at [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.

(9) the Court may in addition include elements of future loss in its assessment of the likely amount of the final judgement if 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 (at [38,45]).

(10) accommodation costs are “usually” to be included within the assessment at stage 1 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 (at [36], [43]).

12. As Whipple J, as she then was, remarked in *AC*, paragraphs (1) –(8) above relate to the test at *Eeles* stage 1 and paragraphs (9) and (10) refer to the *Eeles* stage 2 test.

### **INTRODUCTORY SUBMISSIONS**

13. The Claimant's skeleton argument presented a conservative valuation for heads of claim under *Eeles* 1 of £3,865,000, less interest of £78,411= £3,786,589. This needed to be reduced further for the 30% liability reduction (down to £2,650,612). She contended for a high proportion, i.e. 90% of that sum amounting to £2,385,551. These figures included all past losses pleaded through to trial, and after adjustment for receipt of £825,000 interim payments, would leave a capital lump sum of £1,560,551. This was less than the intended purchase price of the house which the Litigation Friend wishes to purchase for £1.65M (such figure excluding adaptation costs). The Claimant invited me take into account the likely additional lump sums for future heads of loss to be awarded at trial to meet the requested interim payment of £2,150,000.
14. Alternatively, the Claimant sought such sum as the Court considered was appropriate to order by way of further interim payment so that the Claimant's parents could decide whether to “top up” the payment with their own (undisclosed) funds to purchase the desired property. During the course of submissions some of these figures were adjusted a little due to arguments about whether future accommodation

rental costs had been correctly pleaded as pre or post-trial and the value of them, but that does not make a significant difference to the overall position, that for any meaningful interim payment to be awarded a consideration would be necessary under *Eeles 2*.

15. The Defendant on the other hand believed that a conservative valuation under *Eeles 1* was no more than £1,100,557, after allowing for interim payments already received and they did not indicate what they considered to be a “*reasonable proportion*” of their conservative estimate. Thus, they reasoned, the Claimant’s requested interim payment far exceeded what the Claimant might achieve at trial unless I ventured into calculations under *Eeles 2*, for which the threshold was not met in their opinion.

## **ASSESSMENT OF THE CLAIM UNDER EELES ONE**

### **Pain, suffering and loss of amenity (PSLA)**

16. No evidence has been served on behalf of the Defendant but the Claimant relies on expert evidence as follows:
  - (1) Report of Dr Vadlamani, Paediatric Neurology, dated June 2024
  - (2) Report of Maggie Sargeant, Care, dated June 2024
  - (3) Report of Safi Madar, Occupational Therapy, dated June 2024
  - (4) Report of Dr Epps, Physiotherapy, dated June 2024
17. In addition, the Claimant has served two witness statements dated 21<sup>st</sup> June 2024 and 11<sup>th</sup> July 2024.
18. The relevant bracket for this level of injury in the Judicial College Guidelines (“*the Guidelines*”), 17th edition published in October 2023 is a to £493,000. The Claimant contends for an award of £450,000 towards the top of the bracket, which with interest rises to £491,490. No separate case law reports were referenced on this particular topic. However, they concede a conservative estimate of around £425,000 with additional interest since service of the claim form to reach a figure of £465,000. The Defendant argued that £400,000 was more appropriate with £30,000 interest to be added, as a “*conservative*” value.
19. Although it was not argued before me, the introduction to the *Guidelines* clearly states the brackets indicated only reflect RPI increases to August 2023 and that they need therefore to be uprated further for inflation. I am reliably informed that the Hargreaves Lansdown inflation calculator produces an uprating to 10th July 2024 of 2.8 % which I will also apply in my overall determination.
20. There was no dispute between the parties that interest on whatever general damages are allowed should be added from date of service of the claim at 2% per annum, which counsel for the Claimant had calculated as an additional 9.22%.
21. In the absence of specific case authorities in the hearing bundle to aid further consideration of the position within the Guidelines brackets that this case falls into, I will adopt the Defendant’s conservative valuation (plus RPI increase). Accordingly, I

calculate PSLA on a conservative basis as set out in the table below, but in due course will have to reduce the figure further to reflect what I consider to be a reasonable proportion:

PSLA - conservatively	400,000
Inflationary uplift	11,200
Add interest at 2% pa since service i.e. 9.22%	37,924
Overall total	449,124

### **Past losses**

#### **The absence of evidence from the Defendant**

22. Despite the Claimant having served a fully pleaded Schedule of Loss through to known date of trial, calculated with the benefit of CPR Part 35 compliant expert reporting, and unlike previous similar applications which I have heard, and many of the reported authorities, there was no real forensic attempt by the Defendant to persuade me of the invalidity of the numbers contended for. I do not know the reason for this. Certainly Counsel representing the party at the hearing tried to assist within the constraints that had arisen for whatever reason. Overall the Defendant's approach was rather broad brush, contending a conservative valuation of not more than 66% of the claimed past losses, against a backdrop of their submission that the application should be dismissed or adjourned to which I have already alluded.
23. I note that Yip J had little sympathy for a Defendant who complained they had no expert evidence to assist them on an interim payment application and less than 3 weeks to respond in *PAL v Davison* [2021] 1108(QB), ("*PAL*"). She held [at 15] "*it was their right not to seek expert evidence at an early stage but they cannot then complain about being required to respond quickly to an application that was readily foreseeable*".
24. In written submissions Claimant's counsel confirmed that past losses totalled £1,622,416.31 but that the Claimant would accept £1.5M as a conservative estimate which is a little over 92%. The Defendant contended for a 34% reduction on pleaded losses to reach a figure of £1,070,795. This contrasts with the assistance given to the Court in, for example, *TTT v Kingston Hospital NHS Trust* [2011] EWHC 3917 (QB) ("*TTT*") which was in my bundle where Owen J noted (at [6]) that Counsel instructed at short notice had managed to provide a comprehensive analysis heads of heads of loss; in that case the Defendant also did not have a care expert report. Similarly in

*PZC v Gloucestershire Hospitals NHS Trust* [2011] EWHC 1775 (QB) Mr Justice Leighton Williams QC had detailed estimates of all heads of loss by counsel despite the Defendant not having yet served their counter-schedule or being in receipt of their expert care report.

25. In all of these circumstances I would have been reluctant to work from the Defendant's conservative estimates at this stage, if I could confidently but conservatively, reach a different valuation. However, having studied the figures further following the shorter than usual listing (which had an original listing request of just 30 minutes), I came to the conclusion that this was a) not possible and b) undesirable. I will now explain why.

### **Difficulties with making an assessment of past losses**

#### **Past care**

26. The losses for past gratuitous care that have been claimed between the date of hearing and trial total £468,897.31 excluding paid care, but including interest. Paid care did not commence until the end of July 2018 when the Claimant was about 4.5 years' old and even then only on a very minimal basis for a number of years. The Claimant's expert, Maggie Sargent, is a very experienced care expert. The spinal pay points used in her calculations were unremarkable and I did not understand those to be contested per se by the Defendant.
27. It was rather the number of hours, and the lack of discount to reflect the fact that much of the care had been received gratuitously from family members, most notably the Claimant's mother, that seemed to trouble the Defendant. I was referred by the Claimant to the recent decision of Ritchie J in *CCC (suing by her mother and litigation friend MMM) v Sheffield Teaching Hospitals NHS Foundation Trust* [2023] EWHC 1770 (KB), ("*CCC*"), for some helpful pointers. That case concerned a claim for an 8 year old girl suffering from cerebral palsy, with cognition at age equivalent 6-18 months where life expectancy had been agreed to age 29. She like the Claimant had been assessed as having GMFCS level V. Like the Claimant, the early years' of *CCC*'s care had been provided exclusively by her family, and to such a high degree that Ritchie J had no difficulty in awarding an aggregate hourly rate of pay and commented that the care being given "*was equivalent to nursing care for a not insubstantial fraction of the day*" (at [147]) which could have attracted an even higher rate of pay. Having read reports of the care given to this Claimant there is a resonance.
28. In *CCC* Ritchie J was also critical of the Defendant's experts for seeking to discount the hourly rate to reflect that the care was received gratuitously and declined to do so in his final award. I also would consider it is unnecessary to make that discount in my conservative estimate.
29. The Defendant objected that gratuitous care was claimed alongside paid care. I have some sympathy with that argument, given that Ms Sargent's calculations for past gratuitous care were in her opinion to be reduced by the amount of paid care provided, and upon which she had little or no information when compiling her report. For example, she believed Georgina, the paid carer, had commenced working with the Claimant from September 2023, whereas in fact she began on an ad hoc basis in 2018,



but only becoming full-time in September 2023. In addition there is now one waking night carer on duty every night although it is a little unclear from the witness evidence and the Schedule of Loss when precisely this started. The Defendant complains that the number of hours increase significantly from the year 2022-2023 to 2023-2024 without explanation. That may be because the Schedule of Loss appears not to offset the paid hours in the way intended by Ms Sargent and /or due to the introduction of additional waking night care. Either way, in the very brief time available, I did not receive sufficiently detailed submissions from the Claimant to enable me to proceed with confidence in that part of my assessment.

### **Non-care past losses**

30. The Defendant raised queries about some claimed items of equipment which they considered might be part of normal household expenditure; these were items such as IT equipment and a fridge, washing machine and TV. I queried in the hearing whether these items were for carer accommodation but was unable to be assisted on the point.
31. Similarly, the Defendant raised a question mark over trips claimed to the USA for therapy totalling £271,396.81. I agree the sum is large and a significant proportion of past losses, and it would have been helpful if more information was available concerning this. I note the treatment received was multi-disciplinary but copies of all expert reports on which the Schedule of Loss was calculated were not contained in the hearing bundle. Thus I do not know the overall extent to which the Claimant's own experts support the therapies received. The Court is well aware that the Litigation Friend considers the therapies to have been enormously helpful for the Claimant's development and improved management of her difficulties. She documents progress made in detail in her first witness statement. It is certainly not the Court's function on this application to conduct a mini-trial. The simple point is that the amount claimed is high, the Court needs a degree of confidence to reach a conservative estimate, in the face of opposition from the Defendant, and even more confidence to award a "*high proportion*" of the conservative estimate as contended for by the Claimant. I do not forget the remarks of Ritchie J (at[116]) in *CCC* that the Court will not be overly strict in assessing the Claimant's past decisions bearing in mind they are already in a vulnerable and disadvantaged position, but I cannot ignore completely what the Defendant has submitted.

### **Losses from date of application to trial**

32. Within the broad sweep of criticism of the Claimant's figures by the Defendant, there was contention about the way in which the Claimant had claimed past losses through to trial in their Schedule, a principle which has been considered very recently by the High Court in at least 2 other cases to which I was taken by the Claimant. Yip J in *PAL v Davison* [2021] 1108(QB) held (at [26]), ("*PAL*"), that the "*starting point*" is to consider the valuation of damages to the date of the application, but that "*there will be many instances where it is entirely appropriate in making the conservative assessment at the first stage to bring in special damages which have not yet accrued but will do so before trial*". She explained that the decision of the judge hearing the application will be fact sensitive, taking account of the degree of confidence that special damages "*yet to accrue will form part of the likely amount of the lump sum*" (at [27]). Yip J also referenced the length of time to trial as being significant, and the undesirability of forcing a Claimant to make further interim payment applications.

The Claimant argued that as trial is just one year away the same issues do not arise as in *Salwin v Shahed* [2022] EWHC 1440 (QB), where losses were claimed for a duration of 2 years' pre-trial. The Defendant however submitted that this case is markedly dissimilar to the decision in *PAL* because they believe there is no really urgent need for alternative accommodation now, asserting that factually the claim resembles the position more closely in *Eeles*.

33. I note that in *PAL* Yip J proceeded on the basis that she would leave out of account special damages likely to accrue between the time of the application and trial which were unrelated to accommodation, because the purpose of the application was to consider capitalisation of an award for accommodation and she did not want to risk "taking out of the "pot" required to be allocated for those needs in order to fund the accommodation now". She emphasised that this was "not to ignore the guidance at paragraph 44 of *Eeles* that the judge need have no regard to what the claimant intends to do with the money when addressing the first stage of *Eeles*. Rather, it is a case of acknowledging that the same sums cannot be spent twice .If they are brought in at this stage and relied upon to found an interim payment which is then used to fund accommodation they will not later be available to fund care and other needs" (at [31]).
34. I find myself in a similar position to Mrs Justice Yip, although that aspect of *PAL* was not specifically argued before me. As I have set out earlier I was not provided with evidence of the remaining balance of past interim payments with which the Claimant's needs were to be met for the remaining year before trial. There was no indication that a further interim payment application would be made (as in *PAL*). Even if I had been given the remaining Deputyship balance of account, it was not clear to me, due to the time periods adopted in the Schedule of Loss, precisely what the expense rate is likely to be through to trial. There was no witness statement from the Deputy, nor from the conducting solicitor, albeit he had provided evidence of need, as he saw it, on form N244 applying for an interim payment to allow the purchase of an identified property.
35. Another difference to *PAL* is that in the present case liability has been approved at 70%, not 100%, which adds to the level of caution I should have in reaching valuations for interim payment purposes as the Claimant will only ever recover a proportion of their needs leaving a shortfall to be "mopped up" elsewhere.

### **Overall conclusion on past losses**

36. I am confident that care and case management, therapies and other miscellaneous expenses will continue to be incurred through to trial, and for which I would approve a further interim payment under *Eeles* 1. I accept that it is not my task to take account of what the monies will be spent on. However, in the absence of any information about the remaining balance on the Deputy account current balance from past interim payments, and following the line of reasoning in *PAL* (at [31]), I do not currently have a breakdown sufficient to enable me to move with confidence to assess a specific sum for this time period. It became clear during the course of submissions that some sums claimed in the Schedule of Loss require offsetting as well.

### **The accommodation claim**

37. The Claimant acknowledged that even if I took into account losses under *Eeles 1*, she would require a top-up under an *Eeles 2* calculation in order to purchase their intended property. It is not within my jurisdiction to “*authorise*” the purchase of a specific property, but just to be confident that I do not permit more by way of lump sum payment overall than the trial judge, who would need to consider all heads of loss, and which of those should be subject to periodical payment orders.
38. This aspect of the claim was by far the most contentious of all, because whilst *Eeles 1* permits inclusion of the future accommodation claim as a lump sum, the parties differ both as to what is a reasonable value for that aspect, and additionally because the Defendant does not believe the Claimant’s needs are sufficiently urgent to require the Court to venture into a calculation under *Eeles 2*, which I will come to shortly.

### **Reasonable conservative valuation of accommodation claim under *Eeles 1***

39. The submissions for the Claimant’s accommodation claim were that neither the owned property where the Claimant and her family lived until October 2023, nor their current rental property are suitable for her or could reasonably be adapted. I have alluded to some of the difficulties reported by the Claimant in paragraph 3 above. I did not understand there to be any suggestion by the Defendant that the move to the current rental property was criticised.
40. Mr Boakes, the Claimant’s accommodation expert, states that the current rental property is unsuitable in the long term and ideally a single storey property should be chosen as the forever home, but certainly the carers and the Claimant should be on the same floor as each other. The Claimant’s experts who comment on the subject agree with this.
41. Mr Boakes believes that the property needs to be a minimum of 230 square metres to accommodate the Claimant’s additional equipment, therapy and care requirements. He accepts it is unusual to find a property with the exact measurements required, but believes that the final property configuration after any alterations should provide 5 bedrooms and one bedroom for a night sleeping carer (should that type of care be what is recommended by the care expert and approved by the Court in the final award).
42. Mr Boakes has searched for suitable available properties in the target geographical area. He confirmed the Litigation Friend’s view that the Claimant’s previous home, which his colleague visited, was unsuitable for the Claimant’s needs. As referred to above, he also confirmed that the current property, which he has surveyed, is “*unsuitable for her long term housing needs*” (at [3.01]). He originally recommended the purchase of a 4 bedroom house (purchase cost £1.295M -£1.5M with a mid-point of £1,397,500 with adaptation costs of £686,411.06) or bungalow (purchase cost £1.45M with adaptation costs of £653,324.27).
43. Mr Boakes has viewed the property which the Litigation Friend wishes to buy for the Claimant. He notes that the total floor area is 318.9 square metres so there is an element of over provision, particularly on the first floor. However he asserts that when considering suitable properties for a disabled individual requiring ground floor accommodation “*there is always going to be an element of overprovision of space on the first floor*”. He also considers that smaller and less expensive properties in the area

are likely to have higher adaptation costs. He provides a budget for adaptation costs of £627, 926 including VAT.

44. The relative purchase and adaptation costs for accommodation as referred to in the expert's report, compared with his non-compliant Part 35 letter dated 24<sup>th</sup> April 2024, reviewing the intended purchase of the Claimant are :

	<b>House</b>	<b>Bungalow</b>	<b>Property found by Litigation Friend</b>
Purchase	Mid-point £1,397,500  But top of range  £1.5M	£1.45M	£1.65M
Adaptations	£686,411.06	£653,324.27	£627, 926
Total	Up to £2,186,411	£2,103,324	£2,277,926

45. The Schedule of Loss pleads an overall future accommodation claim of £2,235,891.72 including future rental of 2 years until a suitable property is available to move in to, but life expectancy calculations are an integral part of the valuation of the reversionary interest included within the overall sum.
46. The Defendant robustly questioned the value of the accommodation claim as sought. Objection was raised to double-counting of rent, and high running costs, stating that it was difficult to see this accommodation head of loss ever being more than £1,250,000. This was before a liability deduction or assessment of a reasonable proportion. I found the Defendant's suggestion that accommodation running costs should be part of a periodical payment order surprising, given the decision in *Eeles* where it was held that it would usually be appropriate to allow these in the capital award.
47. Counsel for the Claimant accepted that there was an error in the Schedule with regards to rent and contended for a conservative figure of around £1,900,000, for the future accommodation claim being 82% of the pleaded sum. This would naturally be subject to a liability deduction of 30% and then only a reasonable proportion of the remaining balance being awarded.

48. I am distinctly uncomfortable with the figures put to me by both parties. The Claimant's figures contain errors and the Defendant's figures are broad brush. I do not know the range of opinion over life expectancy. The need to be more precise is even more acute as it is a 70% liability claim, rather than a 100% one. I could certainly not allow a figure any higher than that put forward by the Defendant without better information.

**SUMMARY OF CALCULATIONS UNDER EELES ONE**

49. For the purposes of this application the table below summarises the position:

<b>HEAD OF LOSS</b>	<b>Claimant</b>	<b>Defendant</b>	<b>Court</b>
Conservatively			
PSLA inc. interest	465,000	430,000	449,124
PAST LOSS	1,500,000	1,070,795	Unable to assess currently (concern as per <i>PAL</i> (at[31]) but with further information it may be possible to at least reach the Defendant's valuation)
ACCOMMODATION	1,900,000	1,250,000	Better information required
TOTAL	3,865,000	2,750,795	Better information before concluding
LESS 30% LIABILITY =	2,705,500	1,925,557	TBC
LESS INTEREST ON PAST INTERIM	78,411	? Claimant figure accepted	TBC

PAYMENTS			
LESS INTERIM PAYMENTS £825,000	825,000	825,000	825,000
BALANCE	1,802,089	1,100,557 ? interest deducted	TBC
Reasonable Proportion	90% sought	Unknown- not clear if included within numbers above on a global basis	90% is well evidenced in authorities but a final assessment should be made once better information is available

**ASSESSMENT OF THE CLAIM UNDER EELES TWO**

50. I set out the relevant test at paragraph 11 above, namely that I should only include elements of future loss in the calculation of an interim payment award if I have a high degree of confidence that a trial judge will award more by way of lump sum award than simply the pain and suffering award, past losses and future accommodation costs. In addition, there must be a “*real need for accommodation now (as opposed to after the trial) and that the amount of the money requested is reasonable*” as set out in *Eeles* (at [45]). I do not need to consider if the particular house proposed is suitable as that is a matter for the Court of Protection.
51. — One unusual feature of the case is that in fact, prior to this application being made, the Claimant had commissioned plans and contractors to instal a through floor lift (costing approximately £18,000) and some other adaptations considered essential such as ceiling hoist tracking. It appears that the landlord was content for the works to proceed, subject to reinstatement at the end of the tenancy, which currently is just over a year away. Because the Claimant’s Litigation Friend subsequently identified the property in Berkhamsted, upon which an offer has now been accepted, subject to a period of grace to withdraw if insufficient funds are forthcoming, the adaptations have been put on hold pending determination by the Court on this application.
52. Another unusual feature is that the Claimant’s parents, both of whom work full-time, have retained ownership of their previous two homes and are willing to sell those to meet any shortfall between the interim payment and the accepted purchase price. It is not known how much capital could be released, or when, if those properties are sold.

The Claimant's accommodation expert has only provided evidence of the 2015 purchase price of one of the former properties (£450,000) in his report.

53. I have been taken to the authorities regarding when it is appropriate to move to an *Eeles* stage 2 calculation and make the following observations.
- A) It is a recurring theme when interim payment requests are made for accommodation costs under *Eeles 2* that suitable properties are said to be scarce, but that is not determinative that a chosen property at a higher than recommended price should be bought before trial (for example in *Eeles*, and *PZC*).
  - B) I have not found any authority which has taken account of possible increased future activity in housing markets as inflation reduces, as submitted by the Defendant, which is unsurprising given the volatility of such markets which may be totally unforeseen.
  - C) The Court has been swift to recognise the additional burden placed on a family caring for a disabled member and is not insensitive to the disappointment that may be caused by not awarding sufficient funds for a chosen property ahead of trial by way of interim payment. However, the decision to award *interim* funding is made within a fettered discretion. Great care has to be taken to allow the final overall award to be structured to best compensate for the variety of needs which the Claimant presents with, and usually with the benefit of an independent financial adviser report.
  - D) None of the authorities placed before me suggested renting a property long-term would be the correct approach for a child with the type of injury sustained by the Claimant.
  - E) In the cases where funds have been released under *Eeles 2*, to permit a property purchase there has been a real, immediate need to purchase the property now, rather than it being *desirable* to avoid installing suitable adaptations pre-trial, and subsequently reinstating the property upon a subsequent purchase. "*Desirability*" as a suitable reason was remarked upon adversely for example in the decisions in *Eeles* and *PZC*.
  - F) It is widely understood that where a Claimant has less than 100% liability recovery the Court is likely to award less by way of periodical payment for future losses than in some 100% recovery cases. However where it is unknown whether there will be a significant range of expert opinion as to likely life expectancy, and in the absence of any expert evidence from the Defendant it is even more difficult for a Court to complete the assessment not knowing the likely range of opinions for each head of loss.
54. Counsel for the Claimant submitted that the expert evidence supports the Claimant's real need for new housing, that her present property is unsuitable on the evidence, there are limited suitable properties in the area and moving now will enable her to access suitable accommodation faster and will reduce costs overall (saving in rent and partial adaptations). Counsel also pointed out that the current rental property can never be adapted to allow carer accommodation on the same floor as the Claimant which the experts consider necessary.

55. It was also submitted on behalf of the Claimant that in a partial liability case the Court could be confident that the trial judge would award more heads of loss by way of capital sum than in a 100% liability case to allow the Deputy sufficient flexibility to manage funds and meet need. Counsel for the Claimant suggested that it was “*extremely likely*” that the trial judge would award future loss of earnings, including pension and holidays as lump sums. They provided conservative valuations for those heads. In fact, they believed other heads were also likely contenders for a capital award such as equipment and transport but indicated it was not the Claimant’s intention for the purposes of this application to encourage me to take those into account.
56. Overall it was the Claimant’s contention that if the interim payment was awarded as sought, the total amount awarded would not exceed a reasonable proportion of the lump sum likely to be awarded at trial.
57. The Defendant submitted the Court could not be satisfied that the Claimant has a real need for new accommodation now, rather than at trial. They pointed to the fact her own accommodation expert had considered the current property did not meet longer term needs but was not critical of the short to medium term provision after adaptations have been made. They argued that she would have to remain at the current property in any event whilst other adaptations were undertaken at any new property. They could not foresee a situation where conveyancing would be sufficiently well advanced by the time of their current rental break clause to enable it to be exercised in the autumn of this year; thus the Claimant was committed to the current rental until after the trial in any event.
58. They further submitted that “*the desire not to miss what is thought to be a good opportunity is not a need that requires additional indulgence of an interlocutory court*”. They went further to suggest that the delay in progressing planned adaptations may have created a false sense of need which could be averted by getting those works back on track.
59. On the question of the likely confidence that I could have regarding a trial judge’s wish to award more by capital lump sum than PSLA, past losses and accommodation costs alone, they submitted this Court could not make any such prediction, let alone with any confidence.

#### **SUMMARY OF MY DECISION UNDER EELES TWO**

60. On the question of whether there is a “*real need*” for alternative accommodation now I am not satisfied that the well-established test is currently satisfied.
61. I do not have enough information about the reasonableness of the intended property itself, but having reached my decision above on one of the essential threshold tests, there is no need to consider the other relevant thresholds under *Eeles 2*. I will however state that I accept in a partial liability case a trial judge is much more likely to award more heads of loss by way of capital sum than in a 100% liability case.
62. I have sympathy for the Litigation Friend wishing to progress a move to a long term suitable home for the Claimant’s family and recognise the Claimant’s experts pay tribute to the extraordinary levels of family care that have been provided to date to



support the Claimant. It is regrettable that on the current position, a deferral of the decision on true accommodation needs may result in some additional expenses being sought, as set out in the Schedule of Loss, for longer rental periods, extra adaptation and re-instatement costs, property search fees etc as claimed, if the intended purchase is lost. However, the appropriate assessment for the baseline accommodation cost of the alternative property is incomplete and cannot be progressed immediately due to the difficulties already set out in this judgment. Therefore I cannot currently assess whether the accommodation costs overall are reasonable on a conservative valuation.

## **CONCLUSIONS**

63. Whilst the hearing and materials produced for it have produced much helpful material, this judgment has identified several crucial gaps before a final determination can be made. It is regrettable that this will cause some further delay but the Court's discretion is considerably fettered by authorities as to the thresholds which must be met.
64. If the Claimant still wishes to proceed with the application, after taking account of the missing information which the Court has identified as relevant, an early return date will be provided during vacation.
65. I do not consider it necessary to await the Defendant's service deadline for their expert reports and Counter-Schedule before they could be in a position to respond to the application in less of a broad brush manner. I have already made it plain that I consider it curious given the reporting already in train from experts in care and accommodation that more meaningful figures could not have been produced on 15<sup>th</sup> July.
66. The Court would be greatly assisted if those instructed by the parties' could liaise further as to suitable consequential directions for my consideration. If the application is to proceed further at this time, the Court would be greatly assisted if a joint schedule, in Word format, could be compiled, comparing their respective positions on each head of loss claimed with a column left for completion by the Court.