



Neutral Citation Number: [2024] EWHC 2652 (KB)

Case No: KB-2023-001372

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25/10/2024

**Before :**

**MASTER STEVENS**

-----  
**Between :**

**DBH (a child proceeding by his mother and  
Litigation Friend TE )  
- and -  
North Lincolnshire And Goole NHS Foundation  
Trust**

**First Claimant**

**Defendant**

-----  
**Richard Cartwright** (instructed by **Irwin Mitchell LLP**) for the **Claimant**  
**Philip Havers KC** (instructed by **Capsticks LLP**) for the **Defendant**

Hearing date: 17<sup>th</sup> September 2024 and further documentation on 19<sup>th</sup> September 2024  
-----

**Approved Judgment**

This judgment was handed down remotely at 4.30pm on 25<sup>th</sup> October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....  
MASTER STEVENS

**Master Stevens :**

**INTRODUCTION**

1. This claim arises from a tragic set of circumstances surrounding the birth of the claimant in July 2020. Due to admitted negligence he was not born fit and healthy, but has the lifelong disability consequent upon his cerebral palsy diagnosis with Grade III GMFCS. Judgment was entered in August 2023 and the claim is currently stayed until July 2027 but will be proceeding by way of quantum only to a trial which is unlikely to be before July 2029.
2. The claimant has numerous requirements to support his care and well-being and so far 2 interim payments have been made voluntarily by the defendant to assist with meeting some of those needs. Those payments together totalled £200,000. The court was appraised that approximately £97,000 remains unspent of those monies.
3. In April 2023 the claimant's mother and litigation friend indicated to the defendant, via her solicitors, that she had identified a house suitable to meet the claimant's lifelong requirements. That property is close to her established support network of her parents in law, family doctor, the nursery which is said to cater well for her son's needs, and is within what she considers an acceptable commute to her son's likely future supported mainstream, or special educational needs, schools. The property is part built, having been commenced for another disabled individual, who no longer requires it, and has spacious wheelchair access. The builder has been in productive discussion with the claimant's parents, such that he is agreeable to incorporating adaptations recommended by the claimant's team of expert witnesses, within the final build schedule, which is almost complete. A price has been agreed for the fully completed adapted home of £2,000,000. This is a negotiated reduced price, as originally it was for sale at £2,500,000. An application was issued in June 2024, seeking £2,200,000 to buy the property and fund further therapies, but not to cater for an increase to the professional care regime which will follow, it is understood, following rehousing.
4. Unlike most of the cases regularly before me, there is no dispute between the parties' experts that the claimant's present living accommodation is totally unsuitable and that he should be rehoused without delay. Nor was there disagreement, by the time of the hearing, that the purchase of a new home would be preferable to moving into a rental property. The defendant's expert had initially suggested a temporary rental property until conclusion of the claim, to be the most appropriate way forward. However, she had been unable to identify any suitable properties in the target north Lincolnshire area. The defendant has not yet had the opportunity to examine the claimant, but the parties have agreed that the claimant's life expectancy can reasonably be considered as living to age 51, at least for the purposes of this application, as the range of variability that might be argued at quantum trial is so small.

5. There is further agreement between the parties as to the legal principles which underpin the granting, and quantification, of interim payment awards. The issues which I am left to address are as follows:
  - a) The correct calculation of the award under limb one of the test set out in *Eeles v Cobham Hire Services Limited* [2009] EWCA Civ 204 (“*Eeles*”).
  - b) Whether the award under *Eeles* 1 should include all losses that will be incurred to date of trial in five years’ time, on the facts of this particular case.
  - c) Whether it is appropriate to make an award under *Eeles* 2.
  - d) If the answer to question (c) is affirmative, what that award should be.
6. The matter came before me urgently for a decision on the claimant’s intended property purchase. Due to the high level of agreement between the parties about the relevant legal principles, and the pressing nature of the decision sought, I will limit the scope of this written judgment, to what I consider to be the bare essentials in order to understand my reasons for the determination; further interim payments will need to be approved by the court, given the timescales to trial, so the basis of my calculations now needs to be clearly set out.
7. Following the hearing, counsel for both parties helpfully completed a Scott Schedule. A copy is appended to this judgment with my decisions recorded in the final column.

## **RELEVANT LEGAL TESTS**

8. The principles underpinning interim payment awards have been fully summarised in my recent judgment in *XSI v West Hertfordshire Hospitals NHS Trust* [2024] EWHC 1865(KB), which was included in the authorities bundle.
9. The main points of relevance, pertinent to my determination are:
  - i) The court should assess heads of loss which a trial judge is bound to award as a capital sum. These are usually restricted to the pain, suffering and loss of amenity award, past losses and interest thereon. It may also include accommodation costs, including future running costs.
  - ii) The court should only consider additional heads of future loss which might be awarded by a trial judge on a lump sum basis, if there is a real need (as opposed to a desire) for accommodation now, and the sum requested is reasonable.
  - iii) The court must make its assessment on a conservative basis for each head of loss, and then only award a reasonable proportion, although it may be a high proportion, of that figure.
  - iv) The court should not keep the claimant out of money to which he is entitled, but should also avoid any risk of an overpayment.

- v) The court is entitled to form a view, based on the evidence then available, if it considers that is possible, rather than awaiting further reporting, even if the defendant has not put forward any evidence.
- vi) Generally, the court will not be concerned with how the claimant intends to use the interim payment. However, it is a relevant, but not conclusive, factor for the court to consider whether the payment could serve to establish a status quo in the claimant's way of life, which might inhibit the trial judge's freedom of decision in structuring the final award.
- vii) The court should exercise caution if allowing an interim payment in respect of any likely costs to be incurred in the interim between the hearing and trial. Particular care is needed to ensure any such sums are not allowed against the cost of an intended property purchase, if the effect is to starve the claimant of funds that will otherwise be required to meet ongoing therapeutic needs during that period.

## **ASSESSMENT OF THE CLAIM UNDER EELES 1**

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

#### Argument

- 10. The claimant's application notice sought a figure of £493,000, taken from the top of the bracket for very severe brain damage in the *Judicial College Guidelines for the Assessment of General Damages in Personal Injury*, 17th edition ("the JC guidelines"). Submissions at the hearing were for a more cautious figure of £400,000 together with inflationary uplift and interest, to reach a global sum of £415,000.
- 11. The defendant contended in their skeleton argument that the injuries were not sufficient to achieve a figure at the very top end of the bracket of the JC Guidelines, but that a figure of £430,000 inclusive of interest would be appropriate. By the time of the hearing this had reduced to £415,000.
- 12. No cases were relied upon in submissions from either party.

#### Decision

- 13. I have considered the various factors cited in the JC Guidelines as relevant for determining the level of award within the published brackets. These are summarised in the table below. The claimant's evidence derives from their expert paediatric neurologist, Dr Neil Thomas, and other disclosed witness evidence and reports.

<b>JC Guidelines</b>	<b>Claimant's condition</b>
Responses to the environment	Appears to be "switched on" to his environment and enjoys play/exploring his environment

Double incontinence	Doubly incontinent at present
Need for full-time nursing care	Will be unable to live independently and will require 24 hour assistance with nearly all activities of daily living, but not necessarily from a nurse and unclear what level of support will be required at night
Degree of insight	Too young developmentally to assess but suspected IQ level of less than 50 is relevant (severe learning disability range)
Life expectancy, and awareness of any such loss	Reduced to 51 but too young developmentally to assess awareness
Physical limitations	Can crawl and bunny hop but not walk or sit unaided. Fingers lack pincer grip. Assessed as GMFCS 3. He may in time be able to walk short distances indoors only, but is unlikely to be independently ambulant without support
Gastrostomy feeding	Can finger feed – will need to be fed by others by age 20 -no gastrostomy mentioned
Sensory impairment	Hearing unimpaired  Has hypermetropia and wears glasses
Communication ability	No expert speech therapy opinion – has some words but unclear if he says them with meaning. Paediatric neurologist suspects he will have no functional speech.
Behavioural problems	Well behaved

Presence of epilepsy and level of control	No epilepsy diagnosis but has myoclonic jerks, and seizures when unwell. EEG suggests predisposition to epilepsy
---	--

14. Overall, I am guided by the claimant's GMFCS score of 3 out of 5 for gross motor function (where 5 is maximum severity). Although I was not provided with a score for the grading of his communication abilities within the cohort of people affected by cerebral palsy, the descriptions in the reports currently suggest, at best, this would be mid-range i.e. he can/will be able to demonstrate effective sending and receiving of communications (whether through gesture, expressions, words or otherwise) with familiar people most of the time. It therefore seems that, conservatively, I should value damages in the middle of the JC Guidelines bracket. That would equate to a sum of £418,575.
15. The claimant's Preliminary Schedule of Special Damage prepared on 9th September 2024 for this hearing, ("the Schedule"), calculated that RPI, since the JC Guidelines were published, has increased by 2.9%, which would result in a figure of £12,138 being added.
16. The Schedule also confirms that the claim form was served on 11th July 2023 so approximately 1 year and 2 months of interest at 2% per annum is also payable on £430,713= £9346. This brings the overall total to £440,059.
17. Thus, the overall figure which I am content to allow on a conservative basis is £430,000, as originally indicated in the defendant's submissions, which in due course I must reduce further to a reasonable proportion of that figure, albeit it can be a high one.

### **Past losses to date**

#### **i) Past Family care**

##### Argument

- a) The claimant initially sought £150,000 through to trial as set out in global terms in the Schedule. The breakdown relied upon in the Schedule was not explained further, and within the Schedule the hourly rate that has been utilised within the calculations is not explicit, nor who has provided the care. The cumulative total for care to date was also not readily apparent as the claim was calculated through to July 2029. The defendant contended that the only relevant period for this interim award comprises the first 4 years of the claimant's life, when he would have required a very considerable amount of family care in any event.
- b) There was no discount in the Schedule for the fact that it has been provided gratuitously although the claimant relied upon the decision of Mr Justice Ritchie in *CCC (suing by her mother and litigation friend*

*MMM) v Sheffield Teaching Hospitals NHS Foundation Trust* [2023] EWHC 1770 (KB), (“CCC”), to contend that no such discount is appropriate. The defendant sought to persuade me that the authority cited was not binding and reflected the particular facts in that case.

- c) There is no expert care report from either party within the bundle.
- d) The defendant offered £50,000 for care to date at the hearing and the claimant agreed to that figure for the purposes of the interim payment application.

### Decision

- e) Despite the agreement of the parties at the hearing, I still need to be satisfied that the sum I factor into the interim award is appropriate. I noted that there was no paid care for the first 2.5 years of the claimant’s life, and even in the following 12 months paid care did not average out at more than 15 hours per month. The claimant has been attending a play nursery for 3 full days a week since he was 14 months old (naturally missing days when sick) and also has numerous therapy attendances, requiring his family to transport him. His mother has not returned to work since his birth, and has spent time being resourceful sourcing therapies for him, as statutory services are patchy.
- f) Witness evidence describe how the claimant's mother is woken most nights and needs to get out of bed to attend the claimant 2 or 3 times a night. It can take an hour during each disturbance to settle the claimant.
- g) All the evidence available to me indicates that the claimant is incredibly well supported by his family, whose commitment to ensuring he reaches his full potential is described as “*unquestionable*”. His grandparents regularly assist, and his father, who works overseas much of the time, is also very “hands-on” when he is home on leave, and provides administrative and emotional support the rest of the time. His father has also reduced his level of working to assist more with the claimant.
- h) Since around the start of 2024 there have been about 20 hours per week paid care from each of 2 support workers.
- i) I am content that the £50,000 agreed figure for gratuitous care to date, is acceptable on a conservative basis.

### ii) **Paid care**

Past paid care has been relatively minimal, not commenced until January 2023 and even in the following 12 months paid care did not average out at more than 15 hours per month. The itemised amount in the Schedule, supported by invoices, totals just £30,978 which the defendant is prepared to accept and I see no reason not to allow that sum. The claimant did not seek additional paid care costs to trial within this application, to avoid any suggestion that monies allowed

now, for accommodation, could somehow deplete the available pot that could be allowed for, in a final award for necessary care.

iii) **Case management**

The incurred costs to date of £26,735 are agreed between the parties, and having read the case manager reports I have no reason to reduce the amount to reach a more conservative valuation.

**Therapies**

The incurred costs for physiotherapy are £17,215.31 for occupational therapy are £6,392.62 and for speech and language therapy are £6507.53. These sums together total £30,116 which is agreed by the defendant and again I have no reason to reduce the amount to reach a more conservative valuation.

iv) **Additional therapies**

Initially the claim for additional therapies was non-specific seeking £32,881.66 to 1st January 2024 (shown at exhibit 9 to the the witness statement filed in support). In the Schedule prepared immediately prior to the hearing, these therapies were set out in detail, totalling £37,405 excluding interest. On that basis the defendant indicated they were prepared to add that sum to the conservative valuation. I too am happy to adopt that figure; multiple receipts have been provided.

v) **Aids/equipment**

The items claimed under this head of loss have now been identified in minute detail, totalling incurred costs date of £35,152, which the defendant is prepared to agree on a conservative valuation and so am I.

vi) **Court of Protection**

Incurred costs to date total £18,754. These costs are carefully controlled by the Court of Protection and assessed at least annually. In the circumstances, the defendant is prepared to accept the incurred costs on a conservative basis and so am I.

vii) **Travel**

The travel costs are itemised in great detail over 8 pages of the current Schedule. The defendant is prepared to accept the figure for the purposes of this application. Having looked at the figures briefly I see no reason to exclude any items at the present time and therefore allow the figure of £63,681.

viii) **Interest**

I was informed after the hearing that interest, at the usual rate for special damages of 1/2 the court special account rate, on the sums identified above, results in a compound rate of 4.43%, adding an extra £12,972 to the conservative valuation. I am content to include this within my valuation.



**Additional (past) losses from now until trial**

18. The application sought all losses (except paid care) to trial, using a notional trial date of 12th July 2029. Full quantum investigations have not yet been undertaken, so the numbers in the Schedule produced for the hearing included broad estimates. They expressly exclude the cost of buying a wheelchair accessible vehicle which it is thought will be incurred by the time of trial.
19. The losses claimed, excluding interest, are shown below:

Item	Amount projected for the next year in £	Total amount claimed to trial including preceding column in £
Past Services	2310	14,407.42
Case management	18,955	95,343.65
Physiotherapy	12,875.50	64,763.77
Occupational therapy	12,198.60	60,383.07
SALT	20,706.40	104,556.37
Additional therapies	13,110.87	65,554.35
Travel	25,237.33	127,196.14
Court of Protection	15,107.81	74,504.27
Assistive technology	10,000	11,444
TOTAL	130,501.51	618,153

Argument

20. The claimant relied on the principle that it is not the function of the court to keep a claimant out of his money, and the fact that proper estimates have been obtained from experts and/or treating therapists and the case manager, such that a conservative valuation is possible. Furthermore, that the calculation under *Eeles* 1 is designed to ensure that the court awards no more, by way of interim payment, than a trial judge will allow for the lump sum part of the final award, and that it is not the function of the court to examine how the claimant will spend an interim award. They contended that it was inevitable that the trial judge would award such ongoing past losses to trial as a lump sum.
21. The defendant resisted any suggestion that further expenses to the notional trial date should be allowed for at this stage. They accepted that if this was a case where there would only be a short time frame before the trial it might be appropriate to make an award. They relied upon the ruling of Mrs Justice Yip in *PAL v Davison* [2021] EWHC 1108 (“*PAL*”) at [31-32], such that if special damages are used effectively to subsidise an accommodation expense, the claimant will be left out of pocket. They also contended that it would be contrary to the decision of Smith LJ in *Eeles* which provided that “*Strictly speaking, the assessment should comprise only special damages to date*” at [43] . In respect of the claim for gratuitous care, they argued it was not possible to value it for the interim to trial in any event, as a full professional care regime is contemplated, so the interplay with gratuitous care is unknown.

### Decision

22. I remind myself first of all, about the factual context of the decision in *PAL*, bearing in mind that Mrs Justice Yip expressly stated at [24] that relevant legal principles must be applied to the particular facts of the case. At [26] she had recognised 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 accepted it was not the court’s function to keep a claimant out of their money, nor to require them to make frequent applications to court for interim payments (at [29]).
23. In *PAL* a correct valuation, for many parts of the case before the court, was difficult to determine as the claimant was at an early stage in rehabilitation and proceedings. Life expectancy was unclear, and the claimant had already received £1,025,000 by way of voluntary interim awards in the 2 years since the accident; it was expected that such voluntary payments would continue to meet care and therapy needs. The claimant was seeking payment of all other special damages through to a trial at least 4 years’ hence, but it was plain that the application was purely for the cost of accommodation.
24. In this case, the witness statement served by the claimant’s solicitor in support of the application notice expressly provides that the interim payment “*is required urgently to allow the first claimant to fund the purchase of a property and meet his immediate and ongoing needs in respect of care and therapy. The alternative is crowded accommodation for the next 5 years, during what will be an important period for his motor development.*” Whilst the purpose of the interim award is slightly nuanced by that statement, the claimant’s legal team have indicated that further interim requests will be made for a professional care regime to be instituted in due course, whilst their main focus in submissions on this application, was the cost of the accommodation.

They have however also submitted careful calculations of estimated costs of therapies/equipment from their experts and treating therapists. It would appear that type of material was not put before Mrs Justice Yip.

25. The case is dissimilar from *PAL* in other respects, for example, there has been very little by way of interims so far, so the danger of committing too much by way of lump sum interim award and fettering the trial judge's hands is unrealistic. Furthermore, having studied the Schedule and supporting receipts, it would appear that the remaining balance from the last interim payment is illusory, as costs incurred already exceed the previous interim payments provided by the defendant. In *PAL* there was a remaining balance of £500,000 on account which was likely to last at least 6 months, and further voluntary funding of therapies was assured.
26. In all the circumstances, I have no hesitation in allowing an interim payment now under Eeles 1 for some special damages which will be incurred before trial. By the time of trial they will be considered "past losses" and therefore cannot form the subject of a periodical payments order, such that they would always feature within a lump sum award. The witness statement in support of the application refers to meeting ongoing therapeutic needs, not just accommodation. The claimant has a Deputy which is a safeguard on the use of the money and all the evidence, both lay and expert opinion reflects how the claimant's Litigation Friend is seeking to pursue the best possible therapeutic outcome for her son. In any event, it is not my responsibility under Eeles 1 to consider how the money will be spent. However, in my judgment, projecting forward 5 years is too long, and no authorities were cited to support such a claim. I will now consider the various individual items claimed, but just for a 12 month period which reduces the uncertainty about what those costs will be, without unnecessarily keeping the claimant out of his money. I understand that he is due to start school in September 2025, so rehabilitation schedules and fatigue levels could easily alter around that time, such that a conservative valuation now beyond that time is more difficult.
27. I have used the sums claimed in the previous 12 months as comparators, considering whether there are any material changes indicated in the valuations for the next year.

#### Past family care

28. The claimant sought £100,000 from now until trial. Due to the uncertainties in the globalised calculation of the Schedule, and the fact that in *CCC*, relied upon by the claimant, the claimant was much more severely injured, I would not wish to add anything further now for the value of family care. The issue can be revisited by the court, if considered necessary, when further and better information is to hand, such as on a future interim payment application for costs of care generally.

#### Past services

29. These were claimed for window cleaning and gardening but no supporting documents were available so I decline to make an award at this time. It is unclear whether they relate to the current accommodation (for which no previous claim has been made) or for a future putative property.

#### Case management

30. The claimant sought an additional sum based on projected case management costs to trial of £95,343.65. Within the calculations, the projected costs for the next 12 months were itemised. I considered those, and the previous run rate for such costs and am content to allow £18,955 on a conservative basis, being the figure for the next year. I note that costs incurred from September 2023 to June 2024 were £26,735.26.

#### Physiotherapy

31. This was projected as £12,875.50 for the next year. The previous 12 months had accrued at approximately £10,000 so I am content, given the key stage in the claimant's development for his motor skills, to allow the figure sought on a conservative basis.

#### Occupational therapy

32. This was projected as £12,198.60 for the next year. This is significantly more than the previous year (for which only 9 months of costings were claimed). However, although the rates used have not increased, given the focus on motor skill development set out in the various reports, I am prepared to allow this sum conservatively.

#### SALT

33. There has been little involvement to date and weekly cost were projected which seemed unrealistic as the family intend to travel overseas for various therapies and the claimant suffers periods of ill health. Conservatively I allow 40 weeks x the sum claimed of £398.20 amounting to £15,928.

#### Additional therapies

34. The projected costs are for £13,110.87 per annum for 2 visits to the NAPA treatment centres. I have no difficulty allowing that figure within the overall conservative amount for ongoing "past" losses. The witness evidence is clear about the intentions of the claimant's family and the treating therapists have been complimentary about the programmes undergone to date.

#### Travel

35. £25,237.33 is claimed annually, of which the vast majority of the expense is attributable to the NAPA programmes. I allow this sum within my conservative valuation.

#### Court of Protection

36. This is claimed at £15,107.81 annually. Whilst I would not necessarily expect such an even fee spread across all years, in the earlier stages of setting up therapeutic regimes, and when dealing with a potential property purchase, there does not appear to be anything exceptional about this figure warranting me to depart from it conservatively.

#### Assistive technology

37. This is sought at £10,000 relying upon an initial needs assessment report. As the claimant has received no such technology to date, I do not consider this projection to be an over provision and will allow it conservatively.

Total additional (past) losses from now until trial

38. The sum to be added to the Scott Schedule from preceding paragraphs totals £123,413.11, although I emphasise that this figure is calculated only for the next 12 months. It does not include the costs of paid care as the claimant did not submit for them and they will form the basis of a separate application in due course I was informed.

**The accommodation claim**

39. I set out some brief background details about the accommodation claim at paragraph 3. The chosen property has 4 bedrooms, sits in a large plot, and measures 452.9 square metres (4874 square feet). It is just 3.9 miles from the family's current home. The ground floor accommodation would provide for all the claimant's primary needs but there is space for him to access the family bedrooms on the upper floor through a lift. It is in a small Lincolnshire village near important transport links. I was advised that the claimant's parents had searched for some considerable time before locating this property, as the only one that could be suitable for the claimant's needs.
40. The claimant's accommodation expert sent a colleague to view the property, and on that basis has been able to draw plans showing how it can be adapted to provide a larger bedroom and more appropriate ensuite bathroom facilities on the ground floor for the claimant. Alongside that is space for a ground floor bedroom and ensuite for the carers and there is room for therapy and storage of equipment, as well as easy flat access into the property from the carport adjacent to the main entrance. The claimant's treating occupational therapist has reviewed those plans and made further recommendations such that a ceiling hoist could be installed alongside a specialist bath, toilet and drop-down changing bench, but is otherwise content with the property. The claimant's expert agrees with the defendant's expert about the range of rooms required but has not specified their ideal size.
41. The claimant's expert has not produced a list of alternative suitable properties, but the defendant's expert, Ms Twentyman, has. Her target range is a size between 182 and 210 square metres (1959-2260 square feet), single storey and with 4 bedrooms. She has identified 5 properties but not visited them, and describe them as just a "snapshot" of what was available when she produced her report in September 2024. 2 of the properties are houses within 4.3 miles of the current home valued at between £580,000-£950,000 and 3 are bungalows nearer to the claimant's grandparents (but outside the claimant's target area) and cheaper ranging from £495,000-£650,000. 3 of the properties exceeded the floor area regarded as optimal by the defendant's expert, although none were quite as large, in their unadapted form, as the claimant's desired purchase. All the properties would require adaptation. The claimant has significant objections to each. In the event, for the purposes of the application, the defendant adopted a suitable purchase price at the mid-point between the cost of the 2 houses in the target area, namely £672,500.

42. On the subject of running costs, the claimant's expert noted (in a non-Part 35 compliant letter format only) that the chosen property has been constructed to modern methods with high insulation and green technology which he estimates will reduce heating costs by one-third. The property is connected to all mains services. The expert has also reflected on likely maintenance costs noting that they generally increase with the age of the building but has used a high construction cost of £1,962 per square metre due to the one-off nature of the construction. House insurance has been calculated by reference to postcode, area, building age and number of bedrooms. The council tax band is for a fixed amount for all properties valued at more than £320,000 in April 1991, but with a one band deduction to band G.
43. The defendant's accommodation expert has produced different, lower calculations for the running costs. The claimant was willing to accept these pragmatically, for the purpose of this application alone, to reduce the risk of overpayment of the lump sum element, and fettering a trial judge's structure for the final award, in the event that the trial judge preferred the defendant's expert opinion. This was to address some of the concerns raised in the *PAL* judgment.
44. Both parties have applied the calculation derived from the decision in *Swift v Carpenter* [2020] EWCA Civ 12 1295, which is focussed on ensuring that, in awarding a capital lump sum for the additional accommodation costs caused by the disability, there is no windfall to the claimant's estate when he dies. The formula provided for by the Court of Appeal takes the additional capital cost less the value of the reversionary interest based on a discount rate of +5% (to allow for the claimant's life expectancy). Credit was given in the calculations for the claimant purchasing a property anyway, if uninjured, and sharing the costs equally with a partner. There was a difference between income projections used by each party to support the cost of the uninjured house purchase, and the timing of buying that first time property. As the parties decided, at the hearing, to adopt the defendant's most conservative estimate I will not elaborate further upon this.
45. As a result of the claimant's pragmatic approach I was simply asked to determine a suitable amount to allow for the purchase price, as the rest of the calculations used in argument were based on the defendant's figures.

### Argument

46. Counsel for the claimant stressed the importance of moving quickly, to avoid losing a window of opportunity to enhance the claimant's potential for motor development, as supported by occupational therapy evidence. It was also submitted that it is extremely rare to find suitable properties not requiring alterations, and 18 months could easily be lost in adaptation works. The effect of further stress on the claimant's mother with a prolonged search and adaptations, without respite night carer accommodation in the current home was emphasised, particularly as she is already diagnosed as suffering from PTSD and a generalised anxiety disorder as a result of the negligence.
47. The claimant's legal team was disparaging about the 2 particular houses selected as potentially suitable for purchase and adaptation by the defendant. The cheaper option is a former garden centre, with a collection of outbuildings recommended by the estate agent as of appeal to a builder. Its suitability for the claimant's family was

denied. The more expensive property was said to be long and thin, on a busy road serving a former landfill site and a haulage depot. However, it was accepted at the hearing that the price of this property could be utilised as a cautious estimate for the purposes of this application and the Eeles calculation I was asked to conduct.

48. The claimant asserted that the larger dimensions of the chosen property do not render it unreasonable, and it is often the case that larger properties selected as suitable for disabled housing, have additional features which are not strictly required. There is frequently a paucity of suitable bungalow accommodation, and with the need for ground floor level access for the claimant, this can routinely lead to some overprovision on the 1st floor. Regardless of that, the high earning status of the claimant's family, should, it was submitted, lead to a conclusion that the number of rooms could not reasonably be said to be excessive, unless the parents were to be deprived of ensuite facilities and a guest bedroom.
49. It was further submitted there could be no suggestion that a purchase of the chosen property would create an unfair status quo. Relying upon HHJ Robinson in *Grainger v Cooper* [2015] EWHC 1132(QB), where he held at [36], "*if the claimant bought the property she knows she is doing so in the teeth of fierce opposition by the defendant on the issue whether this is an appropriate property. There will be no scope to argue that she bought the property in ignorance of any dispute on that issue.*"
50. Finally, for the claimant, the court was reminded that a primary function of the compensation award is to provide lifelong accommodation for the claimant, in which appropriate professional care and support can be afforded to him. The property chosen by the family had sufficient flexibility both inside and outside to respond to the claimant's evolving accommodation requirements into adulthood.
51. The defendant contended that the claimant's chosen property is far larger than he reasonably requires, which would involve higher than necessary running costs going forwards. They also appeared to take exception to the somewhat luxurious description of the property contained in the estate agents particulars; for example, that it has a bespoke fitted bar and entertainment room, a wrap around balcony, views over the River Humber and that it is said to be one of the "finest homes" that has come to the market in recent years.
52. The defendant criticised the claimant for not obtaining a similar assessment to that of their expert, Ms Twentyman, from their own accommodation expert, and drew an adverse inference from the lack of such evidence. They asserted that there was no evidence that the claimant has to pay £950,000 to get a suitable property to adapt, even though that was one of the properties put forward by their expert.
53. The defendant's additional objection concerning the cost of further adaptations to the property, was withdrawn upon receipt of assurances from the claimant's representatives that the purchase cost of £2,000,000 would indeed include all such works.

## Decision

54. I take account of the view expressed in *PAL* by Mrs Justice Yip that if there was “*relatively little dispute between the parties as to the need for accommodation and the likely cost, it may not be too difficult to make a conservative assessment of the capitalised accommodation costs and bring that into the calculation at the first stage*” at [24]. The question of need is not in dispute. Put simply, the claimant cannot remain in his current property; it contains two flights of stairs and no lift, so that manual handling is becoming an ever increasing problem as he gains weight and grows. There is no space for a professional carer, and important equipment for the claimant's development has to be stored at his grandparents, such that half a day is taken up with making the arrangements to visit and use the equipment for a short period before travelling back home.
55. On the question of cost, the concern expressed by Mrs Justice Yip, that she might allow a greater sum under Eeles 1 for accommodation, than the defendant's expert whose evidence could be preferred at trial, has been mostly avoided in this application by the claimant's pragmatic utilisation of the defendant's figures, for everything but the purchase price.
56. I also remind myself that it is not my role to approve any specific chosen property, but simply to assess a reasonable cost for accommodation meeting the claimant's reasonable needs.
57. I give little if any weight to the estate agent's particulars for the claimant's chosen property which contain superlative comments that are applied to many properties that are being marketed. “Desirability” is not a relevant test and is in any event coloured by personal tastes. The real issue is the size and price of the accommodation.
58. I have already commented that the 2 houses suggested by the defendant's expert as guidelines for the sort of price that a suitable property would command are both larger than her target range. The most expensive is 325 metres squared. I agree with submissions made on behalf of the claimant that the cheaper house appears to be wholly unsuitable as any sort of guide. The main house has just 2 relatively small reception rooms, a kitchen and utility room on the ground floor. The area described as an “*extended living space/annex*” in the property particulars is a long thin extension in the garden with a split level room, such that the claimant would be forced to live rather separately from his parents in the main house, even assuming that the split level could somehow be overcome to manage his mobility needs. I do not believe the cost of this property is a reliable basis for an accommodation claim calculation.
59. The larger house identified by the defendant's expert measures 325 metres squared (i.e. about one-third larger than her top of range size) and would appear from the photographs and property description, to have a very large games room on the ground floor which might have potential for conversion into suitable accommodation for the claimant. The price of this property just *might* be indicative of what needs to be spent on a house that would require adaptations.
60. Although accommodation experts may often use the average of all the property prices they have selected, to form the basis of the amount to be awarded, as suggested by the defendant, I wholly reject that this is appropriate when the sample size is just



2 properties. The use of the arithmetic mean simply produces a meaningless number; there are no properties available at that price.

61. In all the circumstances, I consider that the best I can do, accepting that the claimant's target area for accommodation is reasonable, and that there are very few properties available in the area, but that I have been given 3 to consider, only 2 of which have been supported by expert evidence on price, is to adopt the higher priced house indicated by the defendant's expert at £950,000 for my calculation. I have reached this view independently, but it was adopted in submissions for the claimant on their most cautious valuation. All other accommodation costs are taken from those set out by the defendant in their skeleton argument and accepted pragmatically by the claimant for the purpose of this application. The total sum is therefore comprised of £1,325,203, being the defendant's suggested arithmetical average purchase price of £672,500 plus associated adaptations, relocation and running costs etc, together with a balancing sum of £253,158 reflecting the "top up" purchase price to a house valued at £950,000.

### **SUMMARY OF MY DECISION UNDER EELES 1**

62. The Schedule attached totals £2,437,567.10, being my conservative valuation. Having considered the numbers thoroughly I have no difficulty whatsoever in accepting the claimant's submission that a suitable proportion of that figure, as no more than reasonable, should be 90%. This brings the value of the interim payment award down to £2,193,810.39. From this sum the previous interim payment needs to be deducted. The Schedule contains all the relevant numbers.

### **ASSESSMENT OF THE CLAIM UNDER EELES 2**

#### Argument

63. Whilst maintaining that the claimant's accommodation needs can amply be met in an award under Eeles 1, the secondary position submitted for the claimant was that the threshold set by Eeles 2 is also easily satisfied. Relying on the accepted real and present need for alternative accommodation, it was asserted that it would be unjust not to permit funding for a move now. Further, that it would be wasteful to move into rented accommodation pending trial, even if such accommodation could be located and adapted which was not conceded. Counsel submitted that I could have a high degree of confidence a trial judge would award large enough capital sum to allow the purchase of the chosen property to take place.
64. The nub of the defendant's issue on accommodation, having accepted a real need to rehouse now, was the reasonableness of the cost of the proposed alternative accommodation to be purchased. On that basis they maintained the test in Eeles 2 could not be satisfied.

#### Decision

65. I accept the defendant submissions that I cannot, on the basis of present evidence, assess the cost of the claimant's chosen property as reasonable. Quite simply the claimant has not put forward the evidence from their expert that would support such a view. In contrast to this, the judge deciding *PAL* and allowing an award under

Eeles 2, was assisted by expert opinion from both parties on range of price and reasonableness of price. In this case the test in Eeles 2 cannot be satisfied.

## CONCLUSIONS

66. Although I have confidently being able to approve a higher interim payment than the defendant was offering, and indeed of a sizeable figure, £2,193,810.39 (prior to credit being given for previous interim payments), it is disappointing that the paucity of evidence before me, has necessitated that I decline to approve some of the additional sums sought, at this stage. I fully acknowledge that it is essential for the claimant to be rehoused imminently, to promote his rehabilitation, and to minimise the manual handling risks associated with caring for him in the current property. However, the court requires information to satisfy itself that the amount of money requested is reasonable. Being presented by the claimant with the details of 1 property alone, in a vacuum of expert reporting as to the reasonableness of the size and cost of that option, is simply not enough. Similarly, the defendant's presentation of just 2 properties in the target area, on the basis of desktop evidence alone, is insufficient for me to accept that a reasonable price for the accommodation is the midpoint between the 2 values. It is open to the claimant to seek a further top up interim payment, as and when better evidence is available.
67. More generally, bearing in mind the fundamental importance of securing appropriate accommodation at the earliest opportunity, to minimise wasted costs, lost opportunities for therapy and the stress and disruption to the family caring for the injured party living with the uncertainty of how/when they will move home, it would seem preferable for parties to try to exchange information about target areas and reasonable property sizes, much more quickly after liability has been determined or agreed. Recent changes to the Civil Procedure Rules enabling the court to require the parties to explore options for narrowing issues through alternative dispute resolution, pursuant to the overriding objective, may facilitate this, where it does not occur voluntarily.

	Claimant	Defendant	Court
General damages	415,000	430,000 revised to 415,000	430,000
Past incurred losses			
Family care	50,000	50,000	50,000
Paid care	30,978	30,978	30,978
CM	26,735	26,735	26,735
Therapies	30,116	30,116	30,116
Additional therapies	37,405	37,405	37,405
A&E	35,152	35,152	35,152
COP	18,754	18,754	18,754
Travel	63,681	63,681	63,681
	292,821	292,821	292,821
Interest at 4.43%	12,972	12,972	12,972
Further family care	100,000	Nil	Nil
Past projected losses	618,152	Nil	123,413.11
Accommodation	1,325,203	1,325,203	1,325,203
Additional purchase price	253,158	Nil	253,158
Total	3,017,306	2,045,996	2,437,567.10
“no more than reasonable”	90%	80%/75%	90%
Eeles Stage 1 value	2,715,575	1,636,797 Or 1,534,497	2,193,810.39
Interim payments to date	200,000	200,000	200,000
Available on this Application	2,515,575	1,436,797 Or 1,334,497	1,993,810.39
Sought/offer	2,200,000	1,250,000	
Eeles Stage 1 Satisfied on this Application?	YES	NO	YES