In the Supreme Court of St. Helena

Citation: SHSC 551/2015, 511/2016 & 524/2016

Civil

Ruling on Conditional Fee Arrangements

IN THE MATTER OF

Sabrina Bakos v Attorney General of St Helena

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IN THE MATTER OF

Ann-Marie Clarke v Attorney General of St Helena

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IN THE MATTER OF

KL (Adult M) v Attorney General of St Helena

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IN THE MATTER OF

Christopher Wade v Attorney General of St Helena

Ruling dated 28th September 2016

The Chief Justice Charles Ekins

1. This is an application on behalf of the Plaintiffs in each of the above cases. By the application the Plaintiffs seek guidance on how the Court will approach the issue of costs at the conclusion of their respective proceedings in particular and more generally for the future. In part, at least, this application was prompted by the observations I made in the case of Attorney General v Chapman (Costs) 2014 SHSC 551/2015, 511/2016 & 524/2016 although the issues that fall for determination are broader than the issues there dealt with.

2. By each of the three cases claims for damages for personal injuries are made against the Defendant. In very brief terms and acknowledging that each of the claims are potentially complex the claims may be summarised as follows: Ms Bakos claims damages for a non-consensual sterilisation procedure performed upon her in March 2013. Ms Clarke claims damages for the negligent pre-term caesarean delivery of her daughter which allegedly resulted in the death of her child and a non-consensual sterilisation performed upon her in November 2012. Mr Wade is Ms Clarke's partner and claims damages as a secondary victim of the breaches in relation to Ms Clarke. So far as his claim is concerned there is

additionally a Limitation issue to be determined. KL (now to be known as Adult M) claims damages for the Defendant's failure adequately to care for her. The Defendant does not deny primary liability in any of the cases but the quantum of damages in each case remains a live issue.

3. Ms Bakos, Ms Clarke and Mr Wade are all represented by Ms Charlotte Collier, a Solicitor, who until recently was Public Solicitor (Family and Civil) on St Helena. She has now returned to the UK and is in Local Authority employment. She has instructed Mr Marc Willems QC to represent Ms Bakos, Ms Clarke and Mr Wade. Adult M is represented by Mr Michael Trueman, a Solicitor practicing in the UK but who has appeared extensively before the Supreme Court in other cases. More pertinently, Mr Trueman was appointed by the Court to act for Adult M in proceedings under the inherent jurisdiction of the Court, proceedings which are still ongoing. He too has instructed Mr Willems QC to represent Adult M.

4. In AG v Chapman, and for the reasons given in my judgement there, I stated that the general principle that costs should follow the event in civil litigation was not a model that, for St Helena, would necessarily be appropriate in every type of case. It is understandable, in the circumstances, that the Plaintiffs seek clarification. Each of the cases the subject of this application, are, as I have indicated, complex. They require the instruction of medical experts to deal with a whole range of issues. The Public Solicitor's office on the one hand and Mr Trueman on the other have additionally sought the assistance of Mr Willems QC, a specialist personal injury Counsel. If the general observations I made in AG v Chapman were to be applied in each of these cases, then any damages recovered would be substantially diminished or even extinguished by the Plaintiffs' liability to meet their own costs.

5. On behalf of the Plaintiffs, Mr Willems submits that it would not be appropriate to apply the guidance I gave in Chapman to any of these cases. I agree. Mr Willems submits that the issue of costs in these and future cases ought to be determined in accordance with the approach now taken in England and Wales in personal injury cases under the system known as Qualified One-Way Costs Shifting (QOCS). Under the system, claimants in personal injury cases are protected from defendant costs in the event that the claim fails subject to a number of safeguards. Thus, for example, a claimant who pursues a fraudulent or frivolous claim may lose the protection of QOCS. Equally, a claimant who fails to beat a payment into court or an offer made by a defendant would be liable to pay at least a proportion of the defendant's costs. Where a costs order against a claimant is made, the defendant is entitled in some circumstances to enforce the order as of right, in others only with the permission of the Court. I do not intend to rehearse here the detail of the QOCS system. It is sufficient to say that Mr Willems has provided me with the relevant extract from Costs and Funding, Civil Justice Reforms 2nd Edition which sets the system out minutely.

6. Mr Willems further submits that claimants in St Helena should also be entitled to enter into conditional fee agreements (CFAs) with a solicitor of their choice. He submits that Conditional Fee Agreements were introduced by the Courts and Legal Services Act 1990

(Section 58); that by virtue of St Helena's English Law (Application) Ordinance adopted English Law applies in St Helena " in so far as it is applicable and suitable to local circumstances and subject to such, modifications, adaptions, qualifications and exceptions as local circumstances render necessary"; and that there is nothing incompatible with Conditional Fee Agreements per se so far as local circumstances are concerned. Indeed, he submits that CFAs are ideally suited to St Helena for cases of the complexity of the ones currently before the Court. In the absence of CFAs potential litigants would either have to fund any litigation up front, which few people on St Helena would be able to afford, or would have to proceed through the Public Solicitor's Office. Even if they qualified for legal assistance, the Public Solicitor would be obliged to seek funding from the Legal Assistance Fund, with no guarantee that the sort of funding necessary to conduct litigation of this type would in fact be made available. If they did not qualify for legal assistance then the putative litigant would again have no option but to fund the litigation up front. In appropriate cases, CFAs would liberate the Public Solicitor from having to obtain the necessary funding because the Solicitor engaged under the CFA would bear the costs of funding the litigation which would only be recoverable in the event that the claim succeeds. Mr Willems submits finally that unless a regime of the sort he contends for is introduced, the reality is that a significant proportion of the population on St Helena would be denied access to justice in serious but complex civil claims such as these, which in itself raises the prospect that those thus affected would have had their rights under Section 10(10) of St Helena's Constitution breached.

7. The Attorney General has instructed Mr Ben Channer, a Barrister in private practice in the UK, to represent the Defendant in each of these cases. Mr Channer, correctly in my view, does not seek to argue that the Defendant should not be liable to an order for costs in the event that any given claim is successful. He submits, however, that what is reasonable is likely to be very much in issue.

8. Mr Channer submits that CFAs are neither applicable nor suitable to St Helena and the Court therefore has no jurisdiction to import them into St Helena law. He submits that the circumstances which gave rise to the introduction of CFAs in England - primarily the restrictions increasingly imposed in the availability of legal aid - do not exist on St Helena. He points to Section 11 of the Lay Advocates Ordinance which provides that the objectives of the LAF are "to ensure (so far as practicable) that legal advice and assistance is available to members of the public by whom it is sought." He indicates that the Public Solicitor's Office website itself states that "Legal Aid will always be available for medical negligence claims, subject to the approval of the Legal Assistance Fund." In the circumstances, submits Mr Channer, CFAs are neither applicable nor suitable to local circumstances on St Helena.

9. Mr Channer submits that there is a further principle engaged by the issues in this case. Legal aid funding arrangements on St Helena have been introduced under primary legislation passed by Legislative Council. The level of legal assistance is also a matter which has been determined by Legislative Council. Whilst he acknowledges that Section 20(1) of the Civil Procedure Ordinance grants the Court a wide discretion on the question of costs, in determining what is reasonable the Court's discretion is circumscribed by the

Legislature's determination of the appropriate rates and by which the trustees of the LAF must be guided. Those rates may be significantly lower than those deemed appropriate for example in England for the very reason that local circumstances - in other words St Helena's economy - is very different from England's. That, submits Mr Channer, is a matter properly within the purview of the St Helena Government and its Legislature. Mr Channer submits that if the Court were to accede to Mr Willems's submissions, the Court would be usurping the function of the Legislature, which is no function of the Court.

10. The issues raised by this application are of fundamental importance to the question of access to justice on St Helena. It may well be that there have never before been civil claims before the Supreme Court of the sort that are now before the Court which is why these issues have not previously been addressed.

11. I am very mindful that it is not for the Court to usurp the function of Legislative Council. However, Section 20(1) of the Civil Procedure Ordinance is very clear: "the costs of and incidental to all causes and matters and issues shall be in the discretion of the Court and the Court shall have full power to determine by whom and out of what property and to what extent such costs are to be paid…" The Civil Procedure Ordinance is also an instrument of Legislative Council and unequivocally the power to award and determine costs is within the Court's "full" power. The Section does not seek to limit the Court's power by reference to any other enactment. In determining what may or may not be appropriate in terms of the regime adopted by the Court of how costs are to be awarded and what is reasonable in terms of the costs awarded, I do not consider that the Court would be usurping the function of Legislative Council. Indeed, if the Court were to be circumscribed in the way contended for by Mr Channer, there would be the potential for serious injustice. The Attorney General's Chambers are not circumscribed in the level of expertise sought on any given matter, nor, so far as I am aware, reliant upon the LAF for funding decisions or rates of funding in any given case. The prospect arises therefore, of a considerable inequality of arms where litigation is pursued against the Attorney General. Of itself, this might be sufficient to engage Section 10(10) of the Constitution irrespective of the additional submissions made by Mr Willems in this respect which I am satisfied are also valid. The Public Solicitor and litigants must have the same ability as the Attorney General to seek relevant expertise of a similar quality in appropriate cases irrespective of the rates by which the LAF may from time to time be guided by.

12. In the circumstances, I am satisfied that the QOCS system is the system by which the Courts should be guided in any claim for personal injury where the instruction of an expert or experts is necessary for the pursuit of a claim and where either the defendant is protected by indemnity insurance or where the Attorney General is the defendant to the proceedings. As Mr Willems points out the QOCS system has safeguards against the pursuit of fraudulent or frivolous claims or the continued pursuit of a claim in the face of an offer which is reasonable. Furthermore, the Courts will be vigilant to ensure that any costs incurred are reasonable and in determining what is reasonable the Courts will consider both whether expert evidence is in fact necessary and whether adequate expertise could have been obtained more cheaply given the nature and seriousness of the claim.

13. I consider next the question of CFAs and whether they have been imported into St Helenian law by virtue of Section 58 of the Courts and Legal Services Act 1990. I have found this question more difficult. The 1990 Act permitted, inter alia, a success fee which have since been abolished under legislation which post-dates 1st January 2006 and which has not therefore been incorporated into St Helenian law. Success fees were abolished for good reason and would not be appropriate in any event to local circumstances on St Helena. However, it seems to me that there are circumstances, albeit very limited, in which CFAs, absent any provision for a success fee, could be both suitable and applicable to St Helena. Those circumstances would arise where a litigant had a reasonable claim but where for example the LAF was unwilling or unable to provide the necessary funding to pursue the claim. In those circumstances the Public Solicitor would be of limited assistance unless the litigant had sufficient funds to pay the costs up front. The litigant in those circumstances would be able nevertheless to pursue the claim under a CFA.

14. In the circumstances I am satisfied that CFAs are suitable and applicable to St Helena but only to a very limited extent. The English Law Application Ordinance provides that the English law will apply where suitable and applicable to local circumstances "subject to such modifications, adaptations, qualifications and exceptions as local circumstances render necessary." A CFA, as introduced by the 1990 Act is, I am satisfied, suitable and applicable to St Helena but modified and adapted in the following ways: that it makes no provision for a success fee and is limited to personal injury cases where the instruction of an expert or experts is necessary for the pursuit of the claim and where the defendant is either protected by indemnity insurance or where the Attorney General is the Defendant to the proceedings.

15. In reality the use of CFAs will be very limited. The Public Solicitor should almost always be the first port of call in cases such as these. A CFA should only subsequently become necessary if there is difficulty in funding through the LAF. If a litigant nevertheless chooses as a first option to instruct an offshore lawyer under a CFA then whether it is reasonable or not to have done so will be the subject of rigid scrutiny under the QOCS system.

16. I believe my Ruling covers all matters ventilated by the parties. I think it right, however, that I make observations on the cases before the Court in the light of the Ruling I have given. Ms Bakos, Ms Clarke and Mr Wade all instructed Ms Collier in her capacity as Public Solicitor, Civil and Family. She has continued to represent them albeit that she has now left St Helena. I can understand why, given the nature of the cases and the vulnerability of Ms Bakos why it might be thought desirable to maintain continuity. Mr Trueman represents Adult M. Given his involvement in the other proceedings involving Adult M, his intimate knowledge of the circumstances and background of the claim and above all her total vulnerability, I might take some persuading that it is unreasonable that Adult M is thus represented. However, these cases are all now listed for trial on St Helena in February. Mr Willems, whose enormous experience is self-evident, represents all these Plaintiffs as Counsel. Ms Collier and Mr Trueman, therefore, will have to consider

carefully the extent to which their presence on St Helena in February is reasonably necessary in the circumstances. It may of course be that this they have considered already.

Charles Ekins, The Chief Justice
28th September 2016