

IN THE HIGH COURT OF JUSTICE
SHEFFIELD DISTRICT REGISTRY

Claim No. 6LS54735

The Law Courts
West Bar
Sheffield

Friday, 22nd May 2009

Before:

HIS HONOUR JUDGE BULLIMORE
(Sitting as a Judge of the High Court)

Between:

MOLLIE JOHNSON
(By Her Father & Litigation Friend, Mark Johnson)

Claimant

-v-

CHESTERFIELD & DERBYSHIRE
ROYAL HOSPITALS NHS TRUST

Defendants

Counsel for the Claimant:

MR. C. WALKER

Counsel for the Defendants:

MR. B. MARTIN

JUDGMENT APPROVED BY THE COURT

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Telephone: 01204 693645 - Fax 01204 693669

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APPROVED JUDGMENT

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1. THE JUDGE: This is an application, dated 20th April this year, for a further interim payment in the sum of £200,000 and supported by a statement of that date from Mr Richard Starkie, the claimant's solicitor. The application is made on behalf of Mollie Johnson who is a little girl who was born in the early days of March 2002 and who is severely disabled in the way which is set out in the documentation before me.

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2. The liability of the defendants has been compromised on a 70/30 basis, 70% going to the claimant. Back in the early part of last year an application was made for a first interim payment. That was granted in the sum of £700,000. Of that sum, some £625,000 has been spent on a property at 22 Park Avenue, Dronfield in Derbyshire. It is a large dormer bungalow. A further sum was spent on stamp duty and there were professional fees in addition. The end result is that, of the amount that was paid over at that stage, there is perhaps £30,000 or £40,000 left. The property itself needs to be adapted so that there is proper accommodation for Mollie with her particular needs and also a room for a carer to provide professional care for Mollie. At the moment her mother is providing that care, obviously with the help of the father. There is a second child in the family now: Alice, born, I think, in April 2006. There can be no doubt that the continuing care that Mollie requires is extremely demanding and I am not surprised to have my attention directed to part of a report (which is in the bundle before me at pages 42 and 43) which indicates that Mrs Johnson has been suffering from depression since Mollie's birth, but the medication she has been prescribed she is reluctant to take because she feels that it renders her less than properly alert in dealing with the many responsibilities that she has.

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3. The extra money that is now sought is intended to allow the adaptations to take place, in the sum of around £100,000, but it is said also that there is need for equipment in the sum of just under £32,000 and for case manager input and care - I think that is important - at a cost of approximately £125,000. There is also reference to a vehicle, at what seems to me, without knowing much about it, very high, at £37,000. Also as part of the adaptations, looking at the plans which have been put in front of me, it is proposed that what is a study at the moment is going to be turned into a therapy room which can be used to assist with the care of Mollie.

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4. The £700,000 that was either agreed or ordered in the early part of last year I have to say must have been based on a view of the overall value of this case being several million pounds. As I recall from the documents I have seen, it is said that the ongoing professional cost of care that Mollie requires is in the order of over £230,000 a year. It is therefore not surprising that, looked at as an overall figure, Mr Starkie was able to say that the value of the claim (and I am referring to what he said in his earlier statement when the first payment was in contemplation) was that this was a five to seven million pound claim. Against that background, £700,000 is not a substantial proportion. It is of course the case that, when the court is asked to consider an interim payment or a further interim payment, it is regulated by the provision in CPR 25.7(4) that the court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment. In a general way, I think solicitors, counsel and judges approached the amount of the final judgment as an overall figure of what the value of the case was. However, since that earlier interim payment was authorised, we have the decision of the Court of Appeal, given on 13th March 2009, in *Cobham Hire Services Limited* (who were the appellants) and a little boy called *Benjamin Eeles*. In that case, which resulted

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A in a decision of Mr Justice Foskett’s being overturned, the Court of Appeal gave substantial guidance to courts who were faced with applications for interim payments. The latter part of the judgment, in particular, deals with the general approach. It seems to me to be made very clear that those figures which can be considered as part of the judgment are essentially the general damages, special damages, any interest that is to be awarded on those, the capitalised value of accommodation and also anything else which could properly be capitalised. There are strong warnings against fettering the decision of the trial judge in relation to sums where he might wish to make a periodical payments order. On analysing the facts in *Cobham*, the court was of the view that there was very little room for a further interim payment and certainly not the very large sum of £1,200,000 million which was being asked for in that case.

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- C 5. The court’s first job is to assess the likely amount of the final judgment, leaving out of account the heads of future loss which the trial judge might wish to deal with by way of a periodical payments order. That is what the court says at paragraph 43:

D “Strictly speaking, the assessment should compromise only special damages to date and damages for pain, suffering and loss of amenity, with interest on both. However, we consider that the practice of awarding accommodation costs (including future running costs) as a lump sum is sufficiently well established that it will usually be appropriate to include accommodation costs in the expected capital award. The assessment should be carried out on a conservative basis. Save in the circumstances discussed below, the interim payment will be a reasonable proportion of that assessment. A ‘reasonable proportion’ may well be a higher proportion, provided the assessment has been conservative. The objective is not to keep the claimant out of his monies, but to avoid any risk of over-payment. For this part of the process the judge need have no regard as to what the claimant intends to do with the money. If he is of full age and capacity, he may spend it as he will. If not, expenditure will be controlled by the Court of Protection.”

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F Then the court goes on to consider what may well be regarded as something of an exception to these general principles, and it is an exception into which Mr Christopher Walker urges me to go on behalf of Mollie. Paragraph 45 reads like this:

G “We turn to the circumstance in which the judge will be entitled to include in his assessment of the likely amount of the final judgment additional elements of future loss. That can be done when the judge can confidently predict that the trial judge will wish to award a larger capital sum than that covered by general and special damages, interest and accommodation costs alone.”

H They then endorse the approach of Mr Justice Stanley Burnton in a case called *Braithwaite*:

“Before taking such a course, the judge must be satisfied by evidence that there is a real need for the interim payment requested. For example, where the request is for money to buy a house, he must be satisfied that there is a real need for accommodation now (as opposed to after the trial) and that the amount of money requested is reasonable.” *[I will leave out the next sentence]* “But the judge must not make an interim payment order without first deciding whether expenditure of approximately the amount he proposes to award is reasonably necessary. If the judge is satisfied of that, to a high degree of

confidence, he will be justified in predicting that the trial judge would take that course and he will be justified in assessing the likely amount of the final award at such a level as will permit the making of the necessary interim award.”

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6. Mr Bernard Martin, who has appeared on behalf of the defendants here, argues that, essentially, once you have brought everything into account, then the amount that has been awarded, when one applies the principles in *Cobham*, simply do not allow for any further sum, over and above what has already been awarded. What he has done is to provide a schedule, annexed to his skeleton argument, setting out the rival contentions of the parties about the value of what one might call the “potential lump sum elements” of the claim and, having done that, to apply the 70% recovery. He points out to me that, when you do the arithmetic in that way, there really is no room for an additional sum. The £700,000 already awarded is, to all intents and purposes, not merely a reasonable proportion of what those elements add up to, but is essentially the maximum.
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7. The parties, happily, are agreed that general damages in this case are in the region of £220,000. As far as special damages are concerned, the claimant suggests £307,000; the defendants £276,000. Before I turn to future losses, I will deal with accommodation. There is a dispute here. On the *Robertson/Johnson* approach, the claimant puts her case at £400,000; the defendants at £300,000. As far as future loss is concerned, and this obviously is an area where a periodical payments order could be made, there is a substantial difference between the parties. The claimant puts it at a little over £552,000; the defendants at £170,000. Part of that difference relates to the multiplier that is being applied: the defendants say 9; the claimant says 13.81 although, in argument and for the purposes of this hearing, Mr Walker has accepted the 9 as being an appropriate approach. The multiplicand, however, is also something about which the parties are deeply divided. The claimant says it should be £55,000 a year; the defendants £19,000 a year. I accept what I have been told: that Mollie comes from a high-achieving family and, in general terms, I think she would have gone on to reasonably well-remunerated work. It may be that £19,000 is very much on the conservative side. The matter, to a degree, is limited because it is anticipated that Mollie is unlikely to live beyond 40 (the defendants put it slightly lower) but that is why the multiplier is perhaps a good deal lower than one might otherwise have thought. However, it seems to me that the figure of £55,000 a year that is being put forward by the claimant, to be considered between, say, the age of 22 (after university education) to 40 really is very much on the high side. I think that Mr Walker’s concession in argument, that perhaps £25,000 is a more realistic figure, is appropriate, but if I take that the arithmetic then works out at 225,000, together with the generals of £220,000, the specials of around £275,000 (possibly a little bit more) and the accommodation of about £350,000 (and I split the figures put before me by the parties) we come to a figure which is around £1,100,000. On a recovery of 70%, £700,000 is really right up against the wire, in my judgment, and there is simply no room there to put in another £200,000. One has to accept that, in doing that arithmetic, one has brought into the account not only the generals and the special damages, but also the accommodation and also the loss of earnings figure, which goes further, I think, than *Cobham* itself really anticipated.
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8. What Mr Walker is driven to is really saying to me, and I understand the force of this, that here we have got a house. The family cannot move into it, it cannot be adapted, without more money being made available. The whole purpose of the earlier order is being frustrated because there is not that extra money which would enable the adaptations to be made and so that the family can move and Mollie can begin to get the

A care which it is obvious that she needs. He has taken me to various passages in the *Braithwaite* decision, which was given on 22nd January 2008, and obviously, therefore, pre-dates the *Cobham* decision which, nonetheless, approved the approach taken by the judge in *Braithwaite*. At paragraph 15 the judge, Mr Justice Stanley Burnton, said that he was able confidently to predict that, at trial, the judge would make an order for a capital payment, significantly in excess of the amount being asked for (which was £850,000). He went on to say,

B “I say that because, unless such an award is made, the claimant’s needs simply cannot adequately be satisfied, as I have already indicated, if accommodation is unsuitable and she cannot access professional care.”

C Mr Walker maintains that those words really apply to the situation which obtains here: that Mollie cannot access professional care. I am not so sure that the accommodation that there is at the moment is unsuitable in some absolute sense, but rather it is unsuitable, certainly, because she cannot access professional care in the way that she needs, unless the adaptations to the property at Park Avenue, Dronfield, are carried out. As a result of his view in *Braithwaite*, the trial judge came to the view that, at the end of the day, the trial judge would be forced into a situation where there would have to be some discount to, or postponement of, periodical payments and so, as a result of that, the judge would be bound to order a figure which would enable whatever the claimant in that case needed. Therefore, because he could be sure that the trial judge would do that, he was prepared to do it himself.

D 9. Mr Martin has raised with me the question of need. He has made his submissions in a very properly muted manner, but he suggested that the situation is not as acute as Mr Walker would have it. This is a case where it is suggested that any trial would take place in only about 15 months’ time, around August 2010. He says that, as far as adaptations are concerned, the contractors could go in tomorrow, they would be finished in time for the family to move in August of this year and, when the adaptations are made, professional care can begin for Mollie.

E 10. I think this is a peculiarly difficult decision. I think the difficulty that has arisen (and this is not a criticism; it is merely my perception of what has happened here) is because, prior to *Cobham*, there was not that careful analysis of what the final judgment sum would be and what that meant that we now have from the *Cobham* decision. There was a general perception that, if the pot could be measured in millions, quite frankly a claimant could have out of it almost anything. Now, of course, with the more restricted landscape that we have as a result of the *Cobham* decision, that is no longer the situation. I think Mr Martin is probably correct that, if what I have now before me was the initial application for £700,000, then it is unlikely that I would have been prepared to go even as high as that. However, the situation we are in is really a desperate one as far as the Johnson family is concerned. They are really now caught. This property, I am told, has been bought. It cannot be used by them until the adaptations are made. Until the adaptations are made, the family cannot move in and, more importantly, a carer cannot be provided because there is not the accommodation for that individual within the property. What is to be done? Are things simply to remain as they are until the trial in 15 months’ time? Hopefully, of course, and realistically, this may well be a case where the parties are able to come to terms, but there will still have to be some court approval and I do not see any likely resolution of this matter by agreement, probably until the end of this year at the earliest. That is simply my perception of what I have

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seen of the case. At the end of the day, if this matter comes to trial, what is the judge going to do? There is this property which, if there is no further interim payment, will be there, standing unused in Dronfield, not adapted for Mollie's needs. What is the judge going to do? I accept that, because of the liabilities split, the whole question of periodical payments is going to be a very difficult matter to manage, both for the judge and, financially, for those who have responsibility for managing this fund on Mollie's behalf. There will be, at the notional trial date, the pressing need for Mollie to have professional care. I do not think that anything I have been told or read undermines that at all. The judge will be faced with that situation in August 2010. What is he going to do? Is he, in effect, going to take a course which says, "These adaptations cannot be made; I am not prepared to allow monies, which over a period of time will be paid for Mollie's benefit, to be diverted in this way"? I do not think he will take that view. I think he will say, "Well, we should not be in this position, but the fact is we are. We now know more about how things ought to operate than we did back in the early part of 2008." He may feel that decisions made at that time were mistaken, but they were made and, as a result of that, this property has been purchased and it needs to be adapted because the whole purpose behind the interim payment and the purchase of this property will otherwise be frustrated. It is a hugely difficult situation for the Johnsons and it seems to me (and I come to this view after quite considerable hesitation) that the judge will order a further sum to be paid as a lump sum when the matter comes to trial. It therefore seems to me that the view taken by Mr Justice Stanley Burnton in paragraph 15 of his judgment is one which applies in this case. The Court of Appeal recognised that there were these exceptional cases and I suspect there will be fewer exceptional cases as people begin to understand more fully what the *Cobham* judgment really spells out, but I think it just falls into that narrow category and, on that basis, I am minded to grant the application. There will be a further interim payment of £200,000 to be paid within 28 days.

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