Neutral Citation Number: [2019] EWHC 2751 (QB)

Case No: HQ16C03773

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/10/2019

Before :

MASTER COOK

- -

Between :

RXK **(A child proceeding by her mother and litigation friend GXK)**	**Claimant**
- and -	
Hampshire Hospitals NHS Foundation Trust	**Defendant**

- -
- -

Robert Marven QC (instructed by **Irwin Mitchell**) for the **Claimant**
Richard Booth QC (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing date: 3 October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER COOK

MASTER COOK:

1. On 3 October 2019 the Claimant's application for further interim payments on account of damages and costs was listed before me. By the time of the hearing the only live issue was the application for a further interim payment on account of costs.

2. It quickly became apparent that the application had not been presented in the most helpful way and that much of the material essential to determining the application was missing. It also became clear the Claimant was seeking an interim payment on account of quantum costs in circumstances where the only previous order for costs in existence related to liability costs. Rather than simply dismiss the application I adjourned it to enable the claimant's advisers to put their house in order.

3. Following the publicity given to the decision of His Honour Judge Robinson in the County Court case of *X v Hull & East Yorkshire Hospitals NHS Trust* and the subsequent refusal of permission to appeal by Irwin LJ this sort of application has become common in high value clinical negligence and personal injury claims where there is likely to be substantial delay before quantum can be determined by the court. I am aware that there is no decision of the High Court on the principle of whether such applications are well founded and have an adequate juridical basis in the rules and/or authorities. I therefore indicated to the parties I would give a short written judgement in the hope that such applications would be better prepared in future.

The background to this case

4. The Claimant suffered neurological injury as a result of a profound asphyxial insult at the time of her birth on 9 November 2013 as a result of negligent delay in her delivery. A neonatal MRI performed five days after birth showed evidence of ischaemic changes in the basal ganglia and thalami. It is the opinion of the Claimant's consultant paediatrician that she suffers from dyskinetic cerebral palsy GMFCS II, she is cognitively spared (although there is uncertainty about the extent of any learning difficulties), she has bilateral metaphyseal hip dysplasia, frequent difficult behaviour, disturbed sleep and associated dependency.

5. Proceedings were issued on 2 November 2016. Judgment was entered for damages to be assessed by way of order dated 25 July 2017, which also awarded the Claimant her liability costs to be subject of a detailed assessment if not agreed. This order also provided for interim payments on account of damages in the sum of £100,000 and of costs in the sum of £50,000.

6. The first CMC in the assessment of damages took place before me on 29 March 2019. I made orders for disclosure and for the parties to obtain reports from experts in paediatric neurology, neuropsychology and care. The primary purpose of these reports was to enable the parties and court to form a view about when it would be possible to assess damages on the basis of a settled prognosis. It is the court's experience that in the majority of such cases the Claimant will be between the ages of 12 and 22 before a final prognosis can be given.

7. The application for a further interim payment on account of costs was supported by one paragraph in the witness statement of Ms Bean, the Claimant's solicitor;

> "59. The Claimant also seeks an interim payment on account of her costs in the sum of £150,000 pursuant to the Court's discretion in CPR rule 44.2. A schedule of costs is exhibited to this statement as exhibit "AB-13 and totals £410,136.88. Interim payments of £100,000 have previously been received (£50,000 in January 2017 and £50,000 in August 2017), and therefore this payment would mean that the total interim payments on account of costs would be £250,000 (just over 60% of the total costs in the costs schedule). I submit that it is likely there will be significant delay before quantum is resolved in this matter (at least 3-4 years, but possibly much longer in uncertain future), by which time costs are likely to be significantly higher, and therefore I respectfully request that an interim payment on account of costs is made at this stage pursuant to the judge's discretion."

8. The schedule of costs exhibited to Ms Bean's witness statement was a short summary of all profit costs incurred down to the 17 June 2019. No attempt had been made to apportion the figures between liability and quantum costs.

9. It also became apparent, in answer to a question asked by me, the Claimant had the benefit of a public funding certificate and that some payments on account had been made by the Legal Services Commission.

The law

10. The relevant provisions of CPR 44.2 provide;

> **"Court's discretion as to costs**
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> 44.2 - (1) The court has discretion as to—
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs—
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> (3) …
>
> (4) In deciding what order (if any) to make about costs, the court will have
>
> regard to all the circumstances, including—

> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes—
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction—Pre-Action Conduct or any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) …
>
> (6) The orders which the court may make under this rule include an order
>
> that a party must pay—
>
> (a) a proportion of another party's costs;
>
> (b) a stated amount in respect of another party's costs;
>
> (c) …
>
> (7) …
>
> (8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

11. At paragraphs 30 and 31 of his judgment in *X v Hull & East Yorkshire Hospitals NHS Trust* HHJ Robinson said;

> "30. In my judgment, rules 44.2(1) and 44.2(2) are wide enough to allow the Court to make an order for costs of the kind sought by the Claimant:
>
> (1) The discretion conferred by rule 44.2(1) relates to the questions whether costs are payable, the amount and when the costs are to be paid.

> (2) Rule 44.2(2) sets out the general rule that the unsuccessful party pays the costs of the successful party.
>
> 31. Rule 44.6(c) gives the court power to order payment of costs "from or until a certain date only".

12. I agree with these observations. The discretion conferred by section 51 of Senior Courts Act 1981 and expressed in CPR 44 (2) is a very wide one. As Irwin LJ commented when refusing permission to appeal the meaning of "successful party" or "unsuccessful party" cannot be confined to a binary outcome of the whole case. But it in my view it is important to realise that what HHJ Robinson actually did when allowing the appeal from DJ Batchelor was to make a costs order down to the date of the hearing of the application for an interim payment on account before the District Judge, see paragraphs 23 and 43 of his judgment. This must be right as the wording of CPR 44.2 (8) provides that the court will make an interim payment on account of costs only where it has made a costs order which could be subject to detailed assessment. This is sometimes described as a "prospective" or "anticipatory" costs order, because it has been made before the conclusion of the proceedings, see the commentary in the White Book at 44.2.11.

13. The application which should be made in these circumstances is for a costs order down to a specific date and an interim payment on account of those costs.

14. Putting the matter this way makes it clear that the court will wish to take into account the factors listed in CPR 44.2 (4) and (5) and will normally expect to be presented with sufficient information to enable it to carry out that exercise. I do not consider there is a basis for asserting any kind of exceptionality test. The court will consider such applications on the basis of established principles.

15. A relevant consideration will be to preserve security for a Defendant and to ensure that there is a limited risk of such costs having to be repaid although I accept, as did HHJ Robinson, that a defendant who has overpaid costs to a claimant's solicitor may seek to set off such costs against damages. Without being prescriptive relevant considerations may include:

    i) the type of funding agreement and details of any payments made under that agreement,

    ii) whether any Part 36 or other admissible offer has been made, and if so, full details of the offer,

    iii) details of any payments on account of damages made to date,

    iv) a realistic valuation of the likely damages to be awarded at trial,

    v) a realistic estimate of the quantum costs incurred to the date of the application,

    vi) any other factor relevant to the final incidence of costs, such as the possibility of an issue-based costs order, arguments over rates or relevant conduct.

    vii) the likely date of trial or trial window.

16. It is clear that Ms Bean's witness statement failed to adequately address any of the above issues and amounted to no more than a *cri de coeur* for more money. The need for solicitors engaged in heavy and protracted litigation to expect adequate cash flow is now well understood and enshrined in the rules, see the note at 44.2.12 of the White Book. The parties may serve one further witness statement each and apply to re-list the application for hearing before me. I hope that those who make such applications in future will ensure that all relevant material is put before the court in support of the application.