Case No: 3SE90091
Appeal Reference No:59/2017

IN THE COUNTY COURT AT SHEFFIELD
On Appeal from District Judge Batchelor

Sheffield Appeals Hearing Centre
The Law Courts
50 West Bar
Sheffield

Date: 25 February 2019

Before:

HIS HONOUR JUDGE ROBINSON

- -

Between :

HI (by his Litigation Friend)	**Appellant/Claimant**
- and -	
Hull & East Yorkshire Hospitals NHS Trust	**Respondent/Defendant**

- -
- -

Michael Mylonas QC (instructed by **Switalskis Solicitors Ltd**) for

Dan Stacey (instructed by **DAC Beachcroft LLP**) for **[Party]**

Hearing date: 29 November 2018

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Approved Judgment

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His Honour Judge Robinson:

Introduction

1. I shall refer to the parties as Claimant and Defendant respectively. This is an appeal by the Claimant against an order concerning costs made by District Judge Batchelor on 22 September 2017. The appeal proceeds following the grant of permission by me. Mr Michael Mylonas QC appeared for the Claimant both here and below. Mr Dan Stacey appeared for the Defendant in this appeal. He did not appear in the court below. Both Counsel prepared helpful skeleton arguments. Mr Mylonas gave me permission to copy and paste into this judgment extracts from the CPR contained within his skeleton argument.

2. The issues in this appeal are first whether there is power to make an interim order as to costs in the circumstance of this case and secondly, if the court does have such power, whether the court should exercise that power.

3. This is a clinical negligence case concerning a birth injury. The Claimant's injuries are catastrophic. He is now aged 11, having been born on 13 October 2007.

4. On 10 December 2012 Griffiths-Williams J approved a liability settlement giving judgment on liability for 90% of the value of the claim. He also made an order for costs:

> "The Defendant shall pay the Claimant's reasonable costs to date, to be subject to detailed assessment in default of agreement and such costs to be paid within 28 days of the agreement or assessment."

There was permission to dispense with Legal Aid assessment in the event of agreement as to costs on condition that the Claimant's solicitors waived any right to further costs. An interim payment on account of costs was made in the sum of £100,000.

5. At the time of the 2012 order, the Claimant was aged 5 years. It was clear that it would be some time before the value of the claim could be quantified. It has been said of him that he is profoundly neurologically damaged. It appears

now to be agreed that assessment of quantum cannot be accomplished until 2022. This is much later than the original trial window of 31 October 2016 to 27 January 2017 set by order made on 30 July 2015.

6. The solicitor with conduct of his case was and still is Suzanne Munroe (Miss Munroe). She was originally employed by a firm called Raleys. She then moved to Irwin Mitchell where she stayed until 1 March 2013. Since 12 March 2013 she has been with Switalskis. As is obvious, on the occasion of each move she took the Claimant's file with her.

7. From 10 March 2008 until 6 March 2017 the Claimant was legally aided. Following the discharge of the relevant certificate, the Claimant's Litigation Friend entered into a CFA, notice of which was served on 23 March 2017.

The Hearing Before District Judge Batchelor

8. It was a telephone hearing to determine applications by the Claimant for an interim payment on account of damages of £200,000 and an interim payment on account of costs in the sum of £150,000. The day before the hearing, Miss Munroe sent an email to the Court asking the court also to deal with a request pursuant to CPR 31 for inspection of the first care report prepared for the Defendant.

9. On 20 September 2017 the application for a further interim payment on account of damages was agreed in the sum of £200,000 subject to approval, which was given. The Judge then dealt with the application for an interim payment on account of costs.

10. The Judge was made aware that in addition to the £100,000 on account of costs ordered to be paid under the 2012 order, there had been a further voluntary payment of £115,000, making a total of £215,000. Of that sum, £165,000 had been paid to Irwin Mitchell and £50,000 to Switalskis.[1]

[1] The transcript records the Judge saying "£155,000 to Irwin Mitchell", which is either a transcription error or an irrelevant slip of the tongue by the Judge.

11. The argument advanced on behalf of the Defendant (see the transcript of hearing at page 301 of the appeal bundle) was that: "… there is no entitlement under the [Civil Procedure] Rules or under any case law that has been provided for the Claimant to be entitled to what effectively are quantum costs before quantum has been resolved and before there is any order of the court." It was acknowledged by the Defendant that "… there has been a change of solicitors, so a lot of the money has been paid to Irwin Mitchell, but that is not a reason why the normal rules should be overlooked and the Defendant should be paying quantum costs before quantum has been resolved" (transcript at page 303 of the appeal bundle).

12. The Judge was taken to exhibit SZM 19 of the witness statement of Miss Munroe which set out the costs incurred to date. The costs of Irwin Mitchell were said to total £167,405, broken down as to profit costs of £142,335 and disbursements of £25,070. VAT took the total to just over £200,000.

13. Switalskis' profit costs down to 21 August 2017 were said to be just short of £400,000 before VAT. The disbursements were said to be over £77,000 before VAT, of which £17,757 ex VAT are Counsel's fees. Mr Mylonas explained that these arose from the interim payment applications and (perhaps) from the drafting of the Particulars of Claim. The VAT inclusive total of costs said to have been incurred exceeds £500,000.

14. There was argument as to whether the court had power to make an order of the type sought by the Claimant. Mr Mylonas submitted that in a case where it was agreed that quantum could not be assessed until 2022 it cannot be right that the Claimant, if a private paying client, or otherwise the Claimant's solicitors should have to foot the costs of "… his own legal advice and experts for that entire period where the Defendant has admitted liability". The Judge said (appeal bundle page 308):

> "Well, Mr Mylonas, I think I agree with you in the point in law, that is not my concern really. In a case where the Claimant has judgment on liability … it is inevitable if the Claimant is going to succeed, the question of how much. I am not troubled by the point in law, what

> troubles me far more is that there is provision, and has been since 2012, for a detailed … assessment of the costs on liability which would include not only profit costs but the disbursements, and Counsel fees and expert fees, everything, that they could have been assessed and still can be assessed. In my view, that is what should come first because the court can have certainty about the level of those costs. If at the end of all that, having assessed those costs, it transpires that the Claimant still is, you know, dreadfully out of pocket, then that would be the time to consider, on a proper application, whether there should be a further interim on costs. But I think it is putting the cart before the horse to ask me to make a further Order in relation to quantum costs when the Claimant has not chosen, for reasons I fail to understand, to take advantage of the Order they have already got."

15. Mr Mylonas then submitted that the order in respect of liability costs entitled the Claimant to costs down to January 2013 (when the order was sealed), whilst the further costs incurred since then totalled a further £500,000. Mr Mylonas effectively submitted that this satisfied the "dreadfully out of pocket" test.

16. An unsuccessful application for permission to appeal was made at the conclusion of the hearing. The Judge gave her reasons for such refusal in Form N460 (I have expanded abbreviations):

> "There have been interim payments on account of costs already in the sum of £215,000. The Claimant has the benefit of an order dated 10.12.12 made on the determination of liability in his favour which entitles him to liability costs to be assessed if not agreed. He has chosen not to pursue that Detailed Assessment procedure in respect of those costs. Claimant now seeks a further £150,000 on account of costs. I am not satisfied that would not exceed a reasonable proportion of the costs to which the Claimant is entitled. I expressed the view the proper course is for the Claimant to follow Detailed Assessment of his liability costs in line with the order already made. I refused to exercise my discretion to make an order allowing the Claimant's quantum costs in the absence of any order determining quantum."

The Appeal

17. There is no Respondent's Notice, although a consent order permitting an extension of time for filing such was submitted to me and subsequently made by me. However, Mr Stacey, who did not appear below, submits that absent a relevant order for costs, there is no power to make an interim payment on account of such costs, and that a court should not make such an order for costs

in respect of an aspect of a trial, in this case quantum, which has yet to be determined.

18. Although the Judge said she agreed with the Claimant's submissions on this issue, it is fair to say that objection to the principle of such making such an order had not been flagged up in advance of the hearing before the Judge, and the Judge, understandably, concentrated on the merits of the application. Furthermore, the Judge did not have the benefit of the more detailed argument advanced before me on appeal. The costs issue was but one issue she had to deal with in the course of a telephone hearing. In contrast, it is the sole issue with which I have been concerned in the course of longer hearing. I consider it proper to examine afresh the issue whether the court has power to make:
(1) an order for the payment of costs (a "costs order") in the circumstances of this case and, if it does;
(2) an order for a payment on account of such costs.

19. The relevant provisions of the CPR are set out below:

Court's discretion as to costs
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.

20. There are three factual issues which need to be stated:

(1) Interim payments on account of damages totalling £1.2m have been paid. These have all been made without recourse to stage 2 of Eeles (see *Cobham Hire Services Limited v Benjamin Eeles* [2009] EWCA Civ 204).

(2) It is a near certainty that the Claimant will receive a great deal more money than that at trial or earlier settlement (subject to judicial approval);

(3) There is, as yet, no Defendant's part 36 offer.

21. Mr Mylonas submits that, where a court makes an order for costs in favour of the receiving party, it is not necessary for the court also to order a detailed assessment of those costs before it can order a payment on account of those costs. I accept that submission. Rule 47.1 provides that the general rule is that costs are not to be assessed by the detailed procedure until the conclusion of the proceedings, but the court may order them to be assessed immediately. It seems to me that even if assessment is not ordered immediately, the court can still order a payment on account of costs. In other words, an order for detailed

assessment is not a pre-requisite of the making of an order for a payment on account of costs.

22. However, that does not address the issue whether there is power to make an order for payment of costs to date in respect of an issue which is still proceeding. That is different from the making of an order for costs in respect of an issue which has concluded. An obvious example is provided by this case. Liability was ordered to be tried as a preliminary issue. Upon its determination, by consent which was approved, an order for costs was made. Another example would be an order made in favour of a party who has been successful at the conclusion of a discrete application.

23. However, what is sought here is a costs order in respect of costs to date in respect of an on-going dispute which will not be determined for many years.

24. Mr Stacey submitted forcefully that such an approach is novel and not supported by any case law. He referred to *McDonald v Horn* [1995] 1 All ER 961 (CA) as an example of a rare instance where costs were ordered in advance. In that case, as the head note explains, the Plaintiffs were members of an occupational pension scheme. They sought a pre-emptive costs order requiring that their costs, and any costs which they might be ordered to pay to the Defendants should, win or lose, be paid on an indemnity basis out of the pension fund. The Judge made such an order. The Court of Appeal held that he had power to make such an order and that he had been right to do so. Mr Stacey also relied upon a dictum of Hoffman LJ (as he then was) which was applied in the later cases of *R v Lord Chancellor, Ex P Child poverty Action Group* and *R v DPP Ex P Bull* [1999] I WLR 347. In those cases, Dyson J (as he then was) declined to make interlocutory orders in Judicial Review proceedings that, whatever the outcome of the proceedings, no order for costs should be made against the applicants. The dictum of Hoffman LJ relied upon was cited early in the Judgment of Dyson J at page 349F. Having stated that the general rule was that costs follow the event, he continued that this was:

> "… a formidable obstacle to any pre-emptive costs order as between adverse parties in ordinary litigation. It is difficult to imagine a case

> falling within the general principle in which it would be possible for a court properly to exercise its discretion in advance of the substantive decision."

25. I have no difficulty in accepting that proposition. But the order sought by the Claimant is very different from the orders sought in those cases. The Claimant's argument is that the Claimant is virtually certain to recover costs to date. However, the date of a final costs order is still some three or so years away, and that will be 10 years after liability has been conceded. The estimate of costs expended so far by Switalskis alone exceeds £500,000. An additional £150,000, on top of the £50,000 already paid, is only a very modest payment on account of costs which are almost certain to be recovered. To that extent it seems to me that the Judge plainly fell into error in stating within Form 460 that she was not satisfied that an additional £150,000 "would not exceed a reasonable proportion of the costs to which the Claimant is entitled", but that does not seem to me to have been the main reason for her refusal to make the order sought.

26. In support of the proposition that the court has power to make an order for the payment of a sum on account of costs, Mr Mylonas relies upon the group litigation case of *Giambrone v JMC Holidays Ltd* (unreported, 20 December 2002). In that case, numerous Claimants had fallen ill on holiday. Liability was admitted by the Defendant. In April 2000 there was a consent order for interlocutory Judgement with damages to be assessed together with "costs incurred up to the date of this Order be forthwith subject to detailed assessment if not agreed." In February 2000 there had been a voluntary payment on account of costs in the sum of £200,000. The matter came before Moreland J (as he then was) in relation to issues arising out of the detailed assessment proceedings. By the time it came before Morland J, it was nearly three years since the original order for costs yet there still had been no detailed assessment of what was described as the Claimant's first tranche of costs. As Morland J observed in paragraph 9 of his judgment;

> "It had been envisaged that the claimants would be seeking second and third interim tranches of costs and then a final assessment of costs at the conclusion of the group litigation."

27. He said this at paragraphs 10 to 12:

> "10. In my judgment in almost all group litigation cases there should be no need for any detailed assessment of costs until the conclusion of the group litigation. Solicitors engaged in group litigation will be specialists and experienced in the field. Solicitors for claimants are fully entitled to an adequate cash flow from the defendants once the general issue of liability has been admitted or determined in the claimants' favour, similarly on determination of generic issues in the claimants' favour and on the assessment or settlement of awards of damages to individual or batches of claimants.
>
> 11. It is to be hoped that in most cases defendants' Solicitors would agree to pay at various stages in the group litigation a realistic interim amount on account of a final detailed assessment of costs if necessary.
>
> 12. If agreement cannot be reached as to an interim payment of costs, it should be dealt with cheaply and shortly by the nominated trial Judge who will be familiar with the general issues in the case and the realistic overall size of the claim under his powers under CPR 44.3(8). The Costs Judge's or District Judge's powers are more limited although he may issue an interim costs certificate pending a detailed assessment (See CPR 47. 15)."

28. As I understand those passages, Morland J recognised that solicitors engaged in heavy and protracted litigation are entitled to expect "an adequate cash flow". It is clear from paragraph 11 of his Judgment that voluntary interim payments are anticipated. However, in default of agreement, Moreland J anticipated that the Judge could exercise his powers under what was then CPR 44.3(8), which is the forerunner of what is now CPR 44.2 (8). The old rule read:

> "Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed."

It is thus very similar to the current rule; the reference is to assessment rather than detailed assessment.

29. It is also clear that Morland J anticipated there being various costs tranches. The examples he gave concentrated on determination of generic issues and upon assessment or settlement of awards of damages to individual or batches of Claimants.

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".

32. In this case, dealing only with quantum, the Claimant has, down to the date of the hearing before the Judge, been successful to the extent of securing payments on account of damages in the sum of £1.2m. Although there is much work still to be done, those experienced in cases of this nature can anticipate in broad outline what the shape of the final monetary award is likely to be, whether it be by judicial determination or, as is more likely, settlement at or following a Joint Settlement Meeting subject to judicial approval. There is likely to be a Periodical Payments Order in respect of care, case management and, probably, Court of Protection costs. All other heads of future loss will almost certainly be capitalised. There will be substantial past losses, not least care. Allowing for a 90% valuation, the final shape of the award is very likely to be in the region of a lump sum in excess of £3m with a PPO of in excess of £150,000 per annum at present day values.

33. Since there is not yet any Part 36 offer from the Defendant, it is a virtual certainty that the Claimant will be entitled to his costs to date. It seems to me that the orders for interim payments in respect of damages represent an example of the sort of triggering events anticipated by Moreland J to give rise to a right to receive a tranche of costs.

34. That being so, was District Judge Batchelor wrong to refuse to exercise her discretion to make an interim order for costs in favour of the Claimant? In my judgment she was, but in fairness to the Judge, she was being asked to

determine, in summary fashion, an issue which is exquisitely fact sensitive, without the benefit of the far more detailed submissions made before me. In my judgment the Judge was swayed by the superficially attractive argument that there was currently in place an order for costs down to December 2012 in respect of which no detailed assessment proceedings had by then been commenced. It seems to me that, in the course of the busy telephone hearing, the Judge gave insufficient or any weight to the fact that Switalskis would obtain no benefit at all from the December 2012 order. The costs in excess of £500,000 incurred by Switalskis have all been incurred since that order.

35. During the course of what, I repeat, was a busy telephone hearing it does not seem to me that the Judge fully appreciated that point. Had she done so, she would have been bound to go on to consider other relevant matters, all of which have been argued before me in much greater detail than they were before the Judge. As such, in my judgment, the exercise of her discretion was flawed in that it gave no consideration to the point that Switalskis would not benefit from the December 2012 costs order. She was also plainly wrong to rule that a total of £200,000 by way of an interim payment on account of costs to date might exceed a reasonable proportion of the costs to which the claimant's solicitors would be entitled, a matter to which I will return below. In the circumstances it seems to me that I should exercise my discretion afresh.

36. Returning to rule 44.2:

(1) There have been three applications for interim payments which have been contested either down to or shortly before the hearing:

(a) Contested hearing on 18 December 2014 where DJ Oldham ordered payment of £500,000;

(b) Contested hearing on 16 March 2016 where DJ Kirkham ordered payment of £321,000;

(c) Hearing before DJ Batchelor on 22 September 2017 was compromised on 20 September in the sum of £200,000.

I agree with Mr Mylonas that failure to make sensible voluntary interim payments without the necessity of compelling the Claimant to "go to the wire" sounds in conduct within rule 44.2(5).

(2) As already mentioned, the Claimant has been successful in obtaining orders for payment totalling £1.2m. In my judgment that constitutes partial success within rule 44.2(4)(b).

37. In addition, another very significant fact is the likely delay between determination of liability and determination of quantum. Failure to ensure adequate cash flow during the period of inevitable delay may lead to the perverse and undesirable consequence that solicitors are unwilling to take on case such as this at an early stage. It is everyone's interests to determine liability as early as possible. But if the consequence is that solicitors must then fund the quantum investigation for 10 years or more, they may not be anxious to take the case on early. The delay is also an answer to the otherwise superficially attractive point made by Mr Stacey at paragraph 32 of his skeleton argument. He submits that Switalskis must have willingly undertaken the delay in payment until quantum and quantum costs were determined. There is some force in that point on the basis that quantum was expected to be determined in 2017, a delay of five years. But in 2012, no-one anticipated a delay of double that, namely10 years.

38. What of the point that a payment of £150,000 on account of costs, in addition to the £50,000 already paid, risks overpaying the Claimant's solicitors? In my judgment there is absolutely nothing in that point. Litigation such as this is expensive to conduct. In my judgment there is no danger that the costs incurred by Switalskis down to September 2017 will be assessed at less than £200,000 inclusive of VAT. The worst-case scenario is that there will, in due course, be a Part 36 offer which the Claimant fails to beat following a contested trial. In such a case there is a risk that, following a costs set off exercise, the Claimant will still end up owing costs to the Defendant.

39. There are two answers to that point. The first is that it will never happen. A degree of caution is essential in cases such as these. There must always be sensible give and take. Cases at this level are conducted by extremely experienced Solicitors and Counsel. Undue risks are not taken. On the contrary, there is a danger of being too risk averse, but if the Claimant's advisors are too cautious and seek to under-settle the case, the Judicial approval process acts as a check.

40. The second answer is that the primary remedy of the Defendant who has overpaid costs to the Claimant's Solicitors is to deduct such overpayment from the Claimant's damages. That is unattractive from the Claimant's point of view, but provides the required protection in favour of the Defendant.

41. I must stress again the point that the hearing before me has been conducted very differently from the telephone hearing in the court below. Had District Judge Batchelor had the benefit of the arguments and analysis deployed before me, I have no doubt that she would have appreciated the point that detailed assessment of the liability costs was no answer to this application.

42. In the event I am satisfied that the Judge fell into error. I allow the appeal.

43. I will hear any submission as to the form of order. At present, and without the benefit of argument, I envisage making an order that the Defendant pay the Claimant's costs to 22 September 2017 to be assessed on a basis to be determined at the conclusion of these proceedings or further order, with an order that £150,000 be paid on account of such costs.