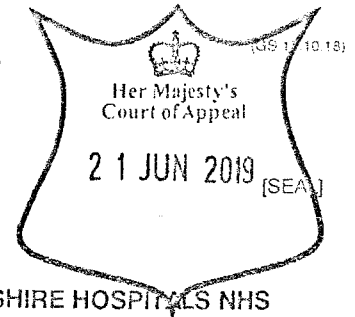




IN THE COURT OF APPEAL, CIVIL DIVISION
APPLICATION FOR A SECOND APPEAL

REF: A2/2019/0760/PTA



–v– HULL & EAST YORKSHIRE HOSPITALS NHS
TRUST

Decision on an application for a second appeal. The Judge will not give permission unless he or she considers that (a) the appeal would i) have a real prospect of success; and ii) raise an important point of principle or practice; or (b) there is some other compelling reason for the Court of Appeal to hear it.

ORDER made by the Rt. Hon. Lord Justice Irwin

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal and stay of execution

Decision: Permission to appeal refused

Reasons

1. Jurisdiction: I reject this ground. The argument as to jurisdiction is unsustainable. CPR 44.2(2)(a) stipulates a "general rule ... that the unsuccessful party will pay the costs...". It is obvious that there are two ingredients to this provision. Firstly, it is a general rule, and secondly the meaning of "successful party". The first means, in my view, that the jurisdictional argument must fail, since it means that in a suitable case a judge may award costs to an unsuccessful party as do the terms of CPR 44.2(2)(b). In any event, the terms "unsuccessful" or "successful" parties cannot be confined to a binary outcome of the whole case. Here the term may readily be refined to mean "will succeed sufficient to justify the further costs sought".

2. "Such jurisdiction is rarely, if ever, to be exercised in ordinary litigation such as the present". I see no basis for an "exceptionality" test CPR 44.2. Indeed, the Applicant's skeleton argument barely attempts to present any such submissions.

3. "There were no exceptional circumstances on the facts of this case". In reality this ground submits the award here should not have been made on these facts, rather than depending on an exceptionality requirement that is not present or deducible from the CPR or authority. The critical facts here are: (1) there is an acknowledged 90% liability (2) the claim is very large and will far exceed the interim payments awarded (3) there will be an exceptionally long period before quantum can be finalised, for the reasons set out by the judge (4) there has been no Part 36 offer and (5) the judge has assessed there is effectively no risk that the costs now sought will prevent future set-off of costs to be paid to the Defendant, whether against costs due, or damages due, to the Plaintiff.

I reject the notion that the Part 36 offer should not have been brought to the judge's notice, or that it was irrelevant. A Part 36 offer is to be treated as "without prejudice except as to costs" (CPR 36.16(1)) and the terms "must not be communicated to the trial judge until the case has been decided" (CPR 36.16(2)).

The Part 36 offer (or its absence) was brought before the Court on a question of costs, and HHJ Robinson was not the trial judge. It seems to me a highly relevant circumstance in adjudging the key point: was there a risk of an overpayment of costs by the Appellant?

Turning to whether this was a proper case for an order such as this, in my view it clearly was, for the reasons formulated by the judge. It must be right that in such a case a key consideration is to preserve security for a Defendant, so that there is no appreciable risk of a need to repay costs paid on an interim basis. Subject to that principle, it seems entirely proper to me to order interim costs payments with a view to the cashflow of solicitors in very long-lasting litigation, where very significant liability has been conceded. That must particularly be so in the case of specialist solicitors who may be facing such problems in a range of cases.



Information for or directions to the parties

Mediation: Where permission has been granted or the application adjourned:

Does the case fall within the Court of Appeal Mediation Scheme (CAMS) automatic pilot categories (see below)?

Yes/No (delete as appropriate)

Pilot categories:

- | | |
|--|--|
| <ul style="list-style-type: none">• All cases involving a litigant in person (other than immigration and family appeals)• Personal injury and clinical negligence cases;• All other professional negligence cases;• Small contract cases below £500,000 in judgment (or claim) value, but not where principal issue is non-contractual; | <ul style="list-style-type: none">• Boundary disputes;• Inheritance disputes.• EAT Appeals• Residential landlord and tenant appeals |
|--|--|

If yes, is there any reason not to refer to CAMS mediation under the pilot?

Yes/No (delete as appropriate)

If yes, please give reason:

Non-pilot cases: Do you wish to make a recommendation for mediation?

Yes/No (delete as appropriate)

Where permission has been granted, or the application adjourned

- a) time estimate (excluding judgment)
- b) any expedition

Signed:

Date: 21 June 2019

Notes

- (1) Permission to appeal will only be granted in respect of second appeals if the court considers that:
 - (a) the proposed appeal would have a real prospect of success and would raise some important point of principle or practice, or
 - (b) there is some other compelling reason for the relevant appellate court to hear the appeal.In respect of second appeals from the county court or High Court, see CPR 52.7.
In respect of appeals from the Upper Tribunal, see Article 2 of the Appeals from the Upper Tribunal Order 2008 (SI 2008/2834).
- (2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.
- (3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).

Case Number: **A2/2019/0760/PTA**

DATED 21ST JUNE 2019
IN THE COURT OF APPEAL

HULL UNIVERSITY TEACHING HOSPITALS NHS
TRUST

- and -

ORDER

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