

Case No. TLQ/07/0135

Neutral Citation Number: [2008] EWHC 2423 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice,
STRAND,
London, WC2A 2LL.

31st July, 2008

B e f o r e :

THE HONOURABLE MR JUSTICE MACKAY

RH (by his mother and litigation friend LW)

And Others

Claimant

- and -

UNITED BRISTOL HEALTHCARE NHS TRUST

And Others

Defendants

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Mr. R. Oppenheim Q.C. (instructed by **Barcan Woodward**) for the **Claimant**
Mr. P. Rees QC and Mr. D. Manknell (instructed by **Kennedys**) for the **Defendant**

J U D G M E N T

(Re: Indexing)

J U D G M E N T

MR JUSTICE MACKAY:

1. In these three cases, one of which was tried at first instance by me, the Court of Appeal heard and rejected appeals by the defendants against the indexation of future care costs by reference to a particular measure. The defendants successfully petitioned the House of Lords for leave to appeal, but before that appeal was heard the parties compromised on terms that the defendants discontinue all appeals to the House of Lords, and that the three orders made at first instance should be remitted for approval by either myself or Mrs Justice Swift, who was the first instance judge in Thompstone. The significant area where approval was sought was the alteration to the indexation mechanism expressed in a schedule to the proposed new order. At first instance, all the orders were different from each other in material respects. Now, allowing for individual features of each case, they are identical so far as the mechanics of indexation are concerned thanks to the efforts of counsel, Mr Robin Oppenheim, Q.C. for all claimants, he having previously represented the claimant RH, and Mr Paul Rees, Q.C. for the defendants, he having previously represented defendants in the RH and Corbett cases. Only a very small number of issues remain for me to resolve. I should stress that I have not been asked to re-write the entirety of the first instance orders but only the indexation mechanism.

2. First, in each case the name of the defendant requires amendment. There is no issue as to that and that shall be done. Secondly, there is a small addition to Part 1 of Schedule 3, paragraph 6, after the words, "This schedule", and again that is not controversial or difficult in any way. In the operative section of each proposed order appear three controversial provisions, and I will take the RH order as an example of this problem. Numbered 4, 5 and 6, they read:

"4. All further proceedings in this action be stayed except for the purpose of implementing the terms of this order and the terms set out in the schedule to this order, for which purpose there be permission to apply to the claimant, the defendant and to the NHSLA and, if necessary, to add the NHSLA as a party to enforce the terms of this order and its schedule.

5. The defendant shall pay the claimant's costs of and occasioned by any consequential orders and applications to the court, unless otherwise ordered by the court.

6. There be permission to restore."

The point made as to 4 and 6 in this the operative part of the order is that they are provisions which are to be found in the original order at first instance which remains standing, and Mr Rees's argument is that they are therefore an unnecessary and superfluous provision. In so arguing, he is right, in my judgment, but I consider that the new order would be more difficult for a reader to understand if they did not appear in this part of the order as well. I do not see that any damage is done to the order by their inclusion and my decision is that I will approve the order with their inclusion in the place I have indicated in the RH order and their equivalent positions in the other two.

3. Clause 5 in the RH and Thompstone orders are now agreed by Mr Oppenheim to be inappropriate in those cases and should therefore be omitted. The position in Corbett is different as Part 3 of the Schedule in Corbett's case contains a reverse indemnity in the form of a state funding protocol. The other two cases have no such provision. This provision, were I to allow it, would require amendment to make it clear that it does relate only to applications under that protocol. The protocol is in a fairly familiar form and contains provisions, among others, empowering the defendant to require the claimant to pursue a claim for state funding, to give credit for the proceeds if successful and to do so under the protection of an indemnity from the defendant as to costs. There is also a provision at paragraph 7 of Part 3 to refer disputes on the meaning and implementation of this Part to a High Court judge for determination.

4. I shall turn to the Corbett order to deal with problems that arise under it. Mr Oppenheim at the hearing was inclined to agree with Mr Rees's argument that, as Corbett was, unlike the other cases, a case where the incident occurred before April 1995, it was therefore an "existing liability scheme" case and there was no need for clause 4. He has had further thoughts about it but, unfortunately, since the conclusion of the submissions last night, is unable to attend to articulate those submissions and his reasons today, but has communicated them to Mr Rees. He has re-drawn a new clause 4, which reads as follows:

"The recitals relating to whether the periodical payments to be made under this order are reasonably secure within the meaning of s.2(3) and/or s.2(4)(c) of the Damages Act 1996 (as amended) set out in the appendix to this order shall stand unless application is made in writing to the court by agreement or otherwise for a variation of this order in that regard by 3rd October 2008, which application shall be determined on paper unless the court asks for oral submissions."

The provisions of Judge Bullimore's order appear as the third recital on the first page of his order as the first matter on which the court expressed itself satisfied and, read together, those make it plain that Judge Bullimore was satisfied and the parties were satisfied that security for these periodical payments was in place. I am not asked, as I have said, to re-visit the whole of Judge Bullimore's order, and Mr Rees is entitled to take that point, although in other respects he has relaxed his opposition in a pragmatic way in other areas which we will come to.

5. In my judgment, I should hold Mr Oppenheim to his original position that clause 4 is not needed in the Corbett case. I understand the excess of caution which drives him to seek its reintroduction in the form I have read out. Mr Barcan, his instructing solicitor, helpfully tells me today that there are difficulties for both of them in representing all three of these claimants, where before they only represented RH, and it does seem to me to be right to say that it is an excess of caution by Mr Oppenheim that causes him to make this suggestion. However, more to the point, if it proves to be the case that the security provisions in Judge Bullimore's order are for any reason illusory and misplaced, then I see no circumstances in which the claimant, Mr Corbett, could be prevented from coming back to the court and requiring the order to be reopened to that extent, since the court itself is under an independent duty to satisfy itself that these particular payments are reasonably secure. I would therefore not make the alteration proposed in the form of new subclause (4).

6. That leaves, for my consideration subclause (6) in the Corbett order only, which reads:

"The defendant shall pay the claimant's costs of and occasioned by any consequential orders and applications to the court unless otherwise ordered by the court."

So expressed, it is apt to cover all applications to the court, including under the permission to restore. Plainly, that is not what is intended. If I allow this, it needs amendment to confine its application to applications under paragraph 7 of Part 3, namely the state funding protocol. However, the point behind it is this. Mr Oppenheim calls this a "presumptive" costs order and it is designed to cover circumstances where issues arise as to the meaning or interpretation of Part 3, the state funding protocol, and it is right that that is something that might happen, and might happen in a number of different ways.

7. The instance I imagined in argument yesterday was where the defendant required the claimant, albeit under an indemnity, to pursue a particular claim for funding which the claimant was advised was entirely unarguable. Mr Oppenheim's argument is founded on this proposition, that the whole intention of this part of the order is to give a benefit to the defendant, to recoup from other public purses part of its outlay, and it is not for the benefit of the claimant, and the approach therefore should be that all litigious activity, to use a neutral term, necessitated by that Part should be at the defendant's expense unless, of course, the claimant's recourse to court for a decision was held to be unreasonable, frivolous or unjustifiable, when the court would be free to mark that by a different costs order. It is really designed, he says, as a comfort to the claimant that the application of Part 3 of the Schedule to his order will not be at his expense.

8. The defendant's answer to this is that this is an impermissible attempt to fetter the discretion of a future judge who has to rule on such disputes and, as such, it is therefore wrong in principle. The court on those occasions can surely be trusted to exercise its costs discretion in the context of this order and have in mind the form of the order and the reasonableness of the claimant's application.

9. I have to say that I prefer Mr Rees's position on this point. While Part 3 is indeed for the benefit of the defendant if looked at in isolation, it is part of an overall compensation scheme which gives the claimant very considerable protection, delivered much more precisely and accurately than previous generations of claimants enjoyed. In reaching such an overall settlement there is give and take, and this is part of that process. My conclusion is that there is no injustice being done to say that if applications to the court are needed and reasonably needed, the costs of them should be best dealt with by the judge who hears them and who may be addressed on arguments to the contrary.

10. Therefore, I think that that means that all of clauses 4, 5 and 6 of the Corbett order - and I will be grateful if my numeration can be checked - should come out.

11. These issues apart, I have no hesitation in approving the forms of order in these three cases. The key provisions of the Schedule, dealing with those items of future loss to be the subject of periodical payments indexed by reference to RPI and particularly ASHE Standard Occupational Category 6115 respectively, were explained to me in

considerable detail by Mr Oppenheim, and my conclusion is that they cope with the problems posed by such orders effectively. Specifically, the problems in ASHE are these. First, that the data collected appear as figures in two stages; the first series in the October/November following the collection of the raw data, and the revised figures about a year later. Secondly, there is a possibility of discontinuity in this data due to changes in methodology of its collection, of which has been one example in the past. Thirdly, there is the future possibility of reclassification of the Survey which may result in home carers, who are the comparators in these cases, leaving or being ejected from 6115 and migrating to another SOC.

12. Expert advice has been taken on the form of the Schedule. The formulae, though complex, are expressed and explained in a more approachable and user-friendly way than other examples I have seen which are purely algebraic and repel the innumerate reader. Workability, which the Court of Appeal agreed was an essential requirement of such indexation schemes, has, in my view, been achieved, and I therefore approve the orders made, with the alterations that I have endeavoured to set out above.