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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **24/06/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

KD (A MINOR) BY HIS MOTHER AND NEXT FRIEND

Plaintiff;

and

BELFAST SOCIAL HEALTH AND CARE TRUST

Defendant.

GILLEN J

Background

[1] In this case the minor plaintiff is a severely disabled child with, inter alia:-

- Spastic quadriplegic cerebral palsy
- Epilepsy
- Learning difficulties
- Developmental delay with the right side being more severely affected than the left
- Inability to verbally communicate. He is dependent on others for everyday functional needs

as a result of sustaining two episodes of coliform meningitis in the early neo natal period.

[2] Liability has been admitted and counsel has agreed substantial areas of the quantum subject to approval. I have also given judgment on certain discrete areas of quantum. Prima facie this is a case suitable for a Periodical Payments Order (PPO). Conventionally counsel, with the benefit of advice from financial experts, draw up a PPO for approval by the court. It is in the course of that exercise that the issue now before the court has arisen.

The issue before the Court

[3] Under the provisions of the proposed PPO, periodical payments are to be made for care into the future for this plaintiff. The proposed order would assume that attendance at school or an adult learning centre would preclude the necessity for such care. However, as I indicated in the course of my judgment handed down on 20 December 2013 (unreported GIL9084) non-school/day centre days when care would have to be paid by the defendant would include those days when for good reason, two examples of which would be the illness of the plaintiff or the school/AEC being closed due to inclement weather, the plaintiff was unable to attend. On such days the Trust would be responsible for the cost of two carers etc when the boy would be at home. To that extent and within those limitations, the PPO was to make provision for such costs (hereinafter called "the payments in question"). Merely as a suggestion to counsel, but not intended to be prescriptive, I suggested that the parties might wish to include a clause along the following lines:

> "Where the plaintiff for good and verifiable cause such as illness or inclement weather is unable to attend school or AEC or other facilities (whether operated by the defendant or some other similar organisation) where he would be in receipt of such free care as would normally be available to him at an AEC or school the defendant shall pay for the cost of normal care provided such costs are incurred".

[4] It is the concern of the plaintiff, through the evidence of Ms Hagan an accountant and partner at Goldblatt McGuigan, that such additional payments would not fall within Section 2 of the Damages Act 1996 ("the 1996 Act") since they are not known by date or amount. Such payments for the plaintiff would not therefore be within the provisions of Section 731(2)(a) of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA 2005" or "the 2005 legislation") or of the other relieving sections of Section 731 ITTOIA 2005 and accordingly would be subject to income tax.

[5] A contrary view was put forward by the plaintiff's expert accountant from Price Waterhouse Cooper LLP Mr Fleetwood who contended that in his view such payments would likely be within Section 2 of the Damages Act 1996. Consequently under Section 731(2)(a)-(e) of the 2005 legislation payments made pursuant to an order of the court so far as it is made in reliance on Section 2 of the Damages Act 1996 (Periodical Payments) (including an order as varied) would cause such payments to be exempt from income tax.

[6] The two parties have put before me proposed final drafts of the PPO. My understanding is that these are simply drafts. I do not propose to place my imprimatur on either of them at this stage. I conceive my role in this judgment as

being simply to deal with the discrete issue of the potential tax implications arising out of such a PPO in the context of Section 2 of the Damages Act 1996 ("the 1996 legislation"), Section 731 of the ITTOIA 2005 and Order 37 Rules 14 and 15 of the Rules of the Court of Judicature (Northern Ireland) 1980(the Rules). I perceive therefore that the parties will take into account my ruling on this discrete issue and thereafter return to me hopefully with an agreed PPO which I assume will be based on the conventional Model Order/Schedules appropriately amended (see RH v University Hospitals Bristol NHS Foundation Trust (2008) EWHC 2424, Thompstone v Tameside Hospital NHS Foundation Trust (2009) PIQR 9, RH v University Hospitals Bristol NHS Foundation Trust (2013) EWHC 299 and Bullen, Leake and Jacob's – Precedents of Pleadings from Sweet and Maxwell).

The relevant legislation

The 1996 Act as amended

[7] Section 2(1) provides:

> "A court awarding damages in an action for personal injury may, with the consent of the parties, make an order under which the damages are wholly or partly to take the form of periodical payments."

[8] The Courts Act 2003 which amended the 1996 legislation provides where relevant as follows:

> "**Periodical Payments**
>
> (1) For Section 2 of the Damages Act 1996 .. substitute–
>
> 2. **Periodical Payments**
>
> (1) A court awarding damages for future pecuniary loss in respect of personal injury –
>
> (a) may order that the damages are wholly or partly to take the form of periodical payments; and
>
> (b) shall consider whether to make that order.
>
> ….

2A Periodical Payments: supplementary

(1) Civil Procedure Rules may require a court to take specified matters into account in considering:

(a) whether to order periodical payments;

(b) the security of the continuity of payments;

(c) whether to approve an assignment or charge."

The Rules of the Court of Judicature (Northern Ireland) 1980

[9] Where relevant Order 37 rule 15 provides:

"15.-(1) Where the court awards damages in the form of periodical payments, the order must specify;

(a) the annual amount awarded, how each payment is to be made during the year and at what intervals;

(b) the amount awarded for the future –

(i) loss of earnings and other income; and

(ii) care and medical costs and other recurring or capital costs;

(c) that the plaintiff's annual future pecuniary losses, as assessed by the court, are to be paid for the duration of the plaintiff's life, or for such other period as the court orders; and

(d) that the amount of the payments shall vary annually by reference to the Retail Prices Index, unless the court orders otherwise under Section 2(9) of the 1996 Act.

……..

(4) Where the amount awarded under paragraph (1)(b) is to increase or decrease on a certain date, the order must also specify –

(a) the date on which the increase or decrease will take effect; and

(b) the amount of the increase or decrease at current value."

Income (Trading and Other Income) Act 2005

[10] Where relevant, paragraph 731 provides as follows:

"**731** Periodical Payments of Personal Injury Damages

(1) No liability to income tax arises for persons specified in Section 733 in respect of periodical payments to which sub-section (2) applies or annuity payments to which sub-section (3) applies.

(2) This sub-section applies to periodical payments made pursuant to –

(a) an order of the court so far as it is made in reliance on Section 2 of the Damages Act 1996 (c.48) (Periodical Payments) (including an order as varied).

733 Persons Entitled to Exemptions for Personal Injury Payments etc

The persons entitled to exemptions given by Section 731(1) and 732(2) for payments are –

(a) the person entitled to the damages under an order, agreement, undertaking or to the compensation under the award in question."

Evidence

[11] Ms Hagan of Goldblatt McGuigan expressed the view that since the payments in question are not known by date or amount such payments to the plaintiff would not fall within Order 15, Section 731(2)(a) ITTIOA 2005 or within any of the other relieving sections of the 2005 legislation and accordingly would be subject to income tax. She claimed as a possibility that a clause which so offended against the 2005 legislation could risk the tax free status of the PPO because the PPO has to be made pursuant to the court's powers under Section 2 of the Damages Act 1996.

[12] Her preferred solution was for the defendant to consent to increase the amount of its annual periodical payment to include the full cost of the daytime care anticipated by the court (whether it was anticipated that it would be provided in the home or in school or at an adult education centre) and the defendant could then recoup the care costs not required because the plaintiff was able to attend school or an AEC from the following year's payment.

[13] Alternatively Ms Hagan suggested that the court could gross up the figures awarded in the periodical payments to include tax payments due and remove the declaration at paragraph 4 of the proposed draft order which states:

> "The periodical payments are to be paid free of taxation under Section 731-734 of the Income Tax (Trading and Other Income) Act 2005. "

Alternatively the court could make a lump sum award.

[14] Similar issues would arise with the provisions that at some uncertain time in the future (about 12 months after the plaintiff moves into his new home which is estimated as being November 2014) the court might decide that the plaintiff was entitled to annual periodical payments in respect of Assisted Adaptive Technology and Assisted Technology("AAT/AT") therapists.

[15] Ms Hagan did add however "my expectation is that Her Majesty's Revenue and Customs (HMRC) will try to interpret the legislation with victims in mind in the context of legislation that is clearly for the benefit of victims".

[16] Ms Hagan (and indeed Mr Fleetwood) had not come across any case where HMRC had defined the words "amount" or "date".

[17] Mr Fleetwood, a similarly qualified accountant from PWC, gave evidence on behalf of the defendant. He made the following points:

- The phrase "so far as is made" in the 2005 legislation allowed, in his view, a court order to be divided into elements i.e. those which came within the 1996 legislation and those that came without.

- If the defendant was obliged to gross up the various sums to make allowance for income tax deduction, it would involve a 66% uplift on the figures presently contemplated.

- In interpreting the phrase "amount" in Order 37 Rule 15, he considered that a figure arrived at by a stated calculation and methodology would likely come within the terms of the legislation. A figure could be predetermined by virtue of one or more identified characteristics. A strong argument can be made that the phrase "amount" is wider than a defined sum of money and could be interpreted to be that sum produced from a formula or set of rules. The indexation provisions are another example of this. Mr Fleetwood's experience of the HMRC led him to believe that on the basis of a formula or method set out to determine a sum, the HMRC would accept this as being within the legislation. If the result of the formula is a monetary amount that should be sufficient.

- It was the witness' view that the HMRC would simply ask if the payments were being made under Section 2 of the Damages Act 1996 and if there was a court order to this effect it will not look further albeit of course the Revenue need not blindly accept the terms of the court order without looking at its implications. In short it was his belief that if payments under a PPO are made by a court order purporting to act under Section 2 of the 1996 Act, it is very unlikely that the HMRC will seek to argue that they are not.

- Similarly, "date" can be fixed by a reference in time.

- One option was for the parties to go to the HMRC for clearance on the issue.

[18] I pause to observe that I found no substance in Ms Higgins' criticism of Mr Fleetwood that he had belatedly come in to the case or that he had given less consideration to the issues than Ms Hagan. I was satisfied that both witnesses were distinguished in their field and had invested appropriate thought and expertise into this case despite offering different interpretations.

Relevant Principles of Statutory Interpretation

[19] This discrete issue is essentially a matter of statutory interpretation.

[20] Ms Higgins properly referred me to a number of principles extracted from Bennion on Statutory Interpretation 7th Edition, e.g.:

- An Act or other legislative instrument is to be read as a whole, so that an enactment within it is not treated as standing alone but is interpreted in its context as part of the instrument.

- The doctrine of construction as a whole looks primarily to the case where the wording and arrangement of the entire instrument were affected by one drafter who used consistency throughout. It pre-supposes precision drafting, rather than disorganised composition.

- The starting point in statutory interpretation must always be the ordinary linguistic meaning of the words used.

- A strained construction of the law arises only in circumstances where e.g. a consequence of a literal construction is so undesirable that Parliament cannot have intended it.

[21] I find an excellent summary of the type of approach to be adopted in this case in the recent United States Supreme Court case of Abramski v United States, US Supreme Court No: 12-1493 where the court was construing a statute concerning licensed dealers' gun sales in the context of ascertaining who the actual buyer was.

[22] Kagan J, handing down the majority opinion, said in the course of her judgment:

> "Contrary to the dissent's view, our analysis does not rest on mere 'purpose-based arguments'. We simply recognise that a court should not interpret each word in a statute with blinders on, refusing to look at the word's function within the broader statutory context. As we have previously put the point, a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme … because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law … We must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history and purpose' (Maracich v Spears, 570 US [2013])."

[23] In approaching the instant case with these words in mind, I am acutely conscious of what Lord Neuberger recently said in Williams v Central Bank of Nigeria [2014] UKSC 10 at [72] in a case concerning the definition of a Trustee within the context of the Limitation Acts 1939 and 1980 which incorporated the definition of "trustee "set out in the Trustee Act 1925:

> "Given the unambiguous way in which the 1939 and 1980 Acts incorporate the definition in the 1925 Act, the definition of 'trustee' in the 1925 Act simply cannot have a different meaning in the later Acts from that which it has in the 1925 Act itself, simply because any wording is 'subject to context' or because of 'the mischief being addressed' in the later Acts or because of 'Parliament's evident intention when enacting' the later Acts. When interpreting a statute, the court's function is to determine the meaning of words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that when performing its interpretative role the court can take a freewheeling view of the intention of Parliament looking at all admissible material and treating the words of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament used. As Lord Reid said in Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 at 613:
>
> > 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used'."

Discussion

[24] I commence by considering the history and purpose of the 1996 Act and subsequent legislation dealing with PPOs. The legislation reflected the growing awareness that the concept of lump sum awards of damages at the date of trial in some instances represented a flawed approach in high value cases especially where there was a need for substantial care provisions in the future.

[25] The legislation was calculated to grapple with a number of manifest difficulties which had arisen in instances where:

- Life expectancy of the plaintiff was uncertain.
- There was a risk of money being inappropriately applied to the plaintiff's needs.

- There was a risk of insufficient return on investment to meet life-long needs.

- The concept of taxation advantages had not properly been addressed.

- Premature death could produce a windfall for relatives in a detriment to defendants.

[26] A key component of the legislation was to ensure that a court could not make such an Order where continuity of payment was uncertain. This is stated in uncompromising injunctive terms in Section 2(3) of the 1996 Act. Continuity of payment would only be secure where it was protected by a guarantee given under the Damages Act 1996, where it was protected by a scheme under Section 213 of the Financial Services and Markets Act 2000 or where the source of payment was a government or health service body.

[27] The combination of statute and rules made thereunder now oblige the court when deciding between lump sum payments or PPOs to consider:

- All the circumstances of the case.

- In particular the form of award which best meets the plaintiff's needs.

- The scale of the periodical payments taking into account any contributory negligence.

- The form of award preferred by the plaintiff including the reasons for the plaintiff's preference and the nature of any financial advice received by the plaintiff when considering the form of award.

- The form of award preferred by the defendant including the reason for the defendant's preferences.

[28] What is clear is that the test for the court is an objective one (Tameside and Glossop Acute Services NAS Trust v Thompstone [2008] 1 WLR 2207 at [108]. In the end it is for the judge to decide what order best meets the plaintiff's needs.

[29] Section 2(8) of the Amended Legislation provides that an Order for periodical payments is to be treated as providing for the amounts to vary with the Retail Prices Index, although by Section 2(9) this provision may be dis-applied or modified. In Thompstone's case, the Court of Appeal emphatically rejected the defendant's arguments in favour of RPI. A different indexation measure, so the court held, was a permissible modification within the meaning of Section 2(9) of the Act. Giving the judgment of the court Waller LJ formulated the desired approach in the following way:

> "The court is seeking to provide an answer which, on the information that it has at the trial, will, through the use of a PPO, best provide the claimant with 100% compensation. If, in the context of future care, where the main element is the wages of the carers, the RPI is not suitable for the purpose of tracking wage inflation, the question is whether a more suitable index or measure is available."

[30] This all illustrates quite clearly that not only the history and purpose of this legislation but its very structure is deliberately calculated to ensure that a secure and certain award free of tax can be made in the best interests of the plaintiff with appropriate adjustments where this is necessary. All these tools of divining meaning in this context include therefore common sense in order to serve the objective of the legislation. Thus where the text may provide some ambiguity in legislation, the context, structure and purpose will serve to resolve it. Nothing is gained by staring myopically and pedantically at individual words and giving them a strict interpretation which would undermine the core intent of the legislation and which is so unrealistic that Parliament cannot have intended it.

[31] In my view the interpretation on the words "amount" and "date" suggested by the plaintiff's advisers in this case could be scarcely less consonant with a statutory scheme created to best meet the needs of the plaintiff and where in the final analysis the court, having heard the preferences of both plaintiff and defendant, must objectively determine what order best suits the plaintiff's needs. Parliament never intended that the legislation would create a group of hurdles set up to trap the unwary and take such agreements as in the instant case outside the ambit of the 1996 legislation as amended where the parties are properly attempting to ensure the absence of a shortfall and the certainty of care costs remaining payable tax free in obvious but rare circumstances such as those properly anticipated when, for whatever reason, the school or AEC centres become unavailable for attendance. It seems to me inconceivable that the draftsman when penning the words "amount "and "date" did not envisage the need for safety nets for care provision in the very kind of circumstances contemplated in this case.

[32] I find no reason why the definition of "amount" each time it is used in Order 15 should not embrace a formula or set of rules which sets out the clear and certain means of determining the sum to be paid in any particular circumstances for care in the future thus ensuring the taxation advantages of a PPO are not lost and that the risk of the plaintiff suffering an insufficient return on an investment to meet life-long needs is effectively removed. The formulaic approach not only courses through the provisions for indexation and for increasing and decreasing the sums, but must be a necessary adjunct to ensure common sense prevails in the very circumstances that are contemplated in this case. I therefore fully share the optimism of Mr Fleetwood

that with some careful thought such a formula or method for determining the sum in the future can be easily effected on the basis of a net/top-up approach. Clearly Mr Fleetwood had not yet applied his mind to any specific formula in the instant case along the lines he had suggested was possible and this is something that needs to be addressed before any PPO comes before me for approval.

[33] To adopt this approach is not to adopt a freewheeling view of the intention of Parliament. On the contrary had it been the intention of Parliament to create the verbal strait jacket advocated by Ms Higgins QC on behalf of the plaintiff it would have been easy to do so either by providing a clear definition of "amount" or to have chosen different wording such as "a specified figure" to remove any ambiguity. That in the years since PPOs have been invoked no such point has ever been successfully argued (or perhaps even raised) sufficient to excite the interest of HMRC is indicative of the wide meaning given to the legislation by the courts and a legion of lawyers on both sides.

[34] I, of course, will have to be satisfied that the formula which is finally drafted and put before me is appropriate. I simply state at this stage that I have no difficulty envisaging a form of words appropriately based on such a formulaic approach.

[35] Similarly, I consider that "dates" can be fixed on the basis of a formula which sets out with certainty the precise circumstances when they will occur e.g. those dates in the future when the child is unable to attend school or AEC. To require the degree of precision suggested by the plaintiff not only runs contrary to common parlance in arriving at dates in the future depending on fixed circumstances, but would run contrary to the spirit of the legislation in frustrating the aim of Parliament by invoking once again an overly pedantic and restrictive interpretation. Once again had Parliament intended that the meaning of the word used by it would be narrowly defined it would have been easy to make provision for this by way of the definition section or the use of appropriate adjectives confining the meaning of "date".

[36] I pause to observe that this is no criticism of Ms Hagan who as a distinguished accountant is not a lawyer and is not versed in the principles of statutory interpretation. It was entirely proper of her to voice her concerns and leave it to the lawyers to exercise their legal judgement on the matter as to whether the extra delay and costs incurred in debating this matter were justified.

[37] In short therefore, I conclude that the argument put forward by Mr Fleetwood is preferable to that put forward by Ms Hagan and I find in favour of the defendant's arguments on this net issue. Hence I find that there is no need to gross up the figures awarded in the periodical payments to include tax payments due or to make a lump sum award.