Neutral Citation No. [2014] NIQB 143

Ref: **GIL9343**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **30/06/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

KD (A MINOR) BY HIS MOTHER AND NEXT FRIEND

Plaintiff;

-and-

BELFAST SOCIAL HEALTH AND CARE TRUST

Defendant.

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GILLEN J

Introduction

[1] This has been a lengthy and drawn out case (I believe now into its third year since the case commenced) concerning the tragic circumstances of a child suffering from cerebral palsy. Surprisingly, it has proved impossible for the parties to agree a final settlement in the form of a Periodic Payments Order ("PPO"). I handed down the last of a number of judgments in this matter on 24 June 2014.

[2] In that judgment I described the central issue in this way:

> "[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'."

[3] 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.

[4] 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 1996 Act. 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 1996 Act (Periodical Payments) (including an order as varied) would cause such payments to be exempt from income tax.

[5] 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 1996 Act, 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 1980 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)."

[6] I then set out the relevant legislation and Order/Rules under the 1980 Rules. Thereafter I dealt with the evidence in these terms:

> "Evidence
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> [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.
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> [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.
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> [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:
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> > 'The periodical payments are to be paid free of taxation under Section 731-734 of the Income Tax (Trading and Other Income) Act 2005.'
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> Alternatively the court could make a lump sum award."

[7] At paragraph 14 I expressly stated that there were similar issues concerning the Assisted Adaptive Technology and Assisted Technology ("AAT/AT") therapists.

> "[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."

The Plaintiff's further request

[8] Subsequent to the judgment being handed down I understood Ms Higgins QC, who appeared on behalf of the plaintiff, to suggest the judgment had not addressed the question of the AAT/AT. I indicated to her that I was satisfied it had. I recognise now that she may also have made reference to a ruling under the ITTOIA 2005.

[9] In any event the day after the judgment was handed down her solicitor, presumably in terms drafted by counsel, wrote to the Court Office raising again the issue which it was submitted I had not yet dealt with in the judgment. The email contained the following excerpts:

> "The following issues were before the Court namely:-
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> (1) Whether the Court has jurisdiction under s2 of the Damages Act 1996;
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> (a) to order the proposed "top up "clause; and
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> (b) to order future AAC/AT payments which are contingent upon the future decisions of the court or the future agreement of the parties that they should be made.
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> (2) Whether in circumstances where the parties have been unable to agree all of the issues in the case between themselves, the Court has power to make a periodical payments order which contains provisions agreed between the parties which the court could not order under Section 2, such as reverse indemnity clauses.
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> The judge has dealt explicitly with the first issue concerning the top up clause in his Judgment but whilst mentioning the issue of future AAC/AT payments at paragraph 14, appears to have made no explicit finding in relation to his ability to order these under section 2 of the 1996 Act. If he is able to make such an order these payments would be exempt under s731(2) of the Income Tax (Trading and Other Income) Act 2005.
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> There is also the additional issue of the Court's power to make under Section 2 an order which contains terms agreed between the parties which the Court itself did not have jurisdiction to make. Mr Justice

Gillen indicated yesterday that he considered the Court clearly has this power."

[10] Before any court order has been made up it is perfectly proper for counsel to draw to the attention of the judge any matter that may have been omitted from the judgment. Thus in Breslin and others v McKevitt and others [2011] NICA 33 at (88) Higgins LJ adverted to the practice in England:

> "Lord Brennan recognised the judge had apparently omitted to deal with the Morgan material, an error which could have been picked up and addressed if the judge had circulated his draft judgment in advance of finalisation, a practice which counsel said was adopted in England in such cases."

[11] In Re L and B (children) 2013 UKSC 8 Baroness Hale cited with approval Robinson v Fernsby [2003] EWCA Civ 1820, [2004] WTLR 257 wherein Peter Gibson LJ commented, at para 120:

> "With one possible qualification it is in my judgment incontrovertible that until the order of a judge has been sealed he retains the ability to recall the order he has made even if he has given reasons for that order by a judgment handed down or orally delivered . . . . Such judicial tergiversation is in general not to be encouraged, but circumstances may arise in which it is necessary for the judge to have the courage to recall his order. If . . . the judge realises that he has made an error, how can he be true to his judicial oath other than by correcting that error so long as it lies within his power to do so? No doubt that will happen only in exceptional circumstances, but I have serious misgivings about elevating that correct description of the circumstances when that occurs as exceptional into some sort of criterion for what is required . . . .
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> The possible qualification was when the judgment has been reasonably relied upon by a party who has altered his position irretrievably in consequence."

[12] Before turning my attention to the request I draw attention to R v Secretary of State for the Home Office ex parte Salem (1999)1 AC 450 per Lord Slynn who said:

> "The discretion to hear disputes, even in the area of public law must however be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interests for so doing, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[13] I consider that to any discerning reader it would have been tolerably clear that in so far as I had expressly stated at paragraph 14 that there were similar issues concerning the proposed top up clause and the agreed AAC /AT provisions the same principles applied to the interpretation of the words "date" and "amount". Thus when I see the proposed PPO (if that is to happen) I shall apply precisely the same test. I assume an appropriate formulaic approach and methodology will be deployed after accountancy advice as in the case of the other top up matters and I anticipate that both aspects will therefore come within section 2 of the Damages Act. I repeat what I said at paragraph 32:

> "[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"

[14] I consider it unnecessary and inappropriate for me to deal with the hypothetical issue of terms "agreed between the parties which the court did not have jurisdiction to make". I certainly did not understand that proposition to have been put to me by counsel and in so far as counsel perceived me to have agreed to that there clearly has been a misunderstanding which I now correct. I have no idea what terms have or may be agreed between the parties outside section 2 of the Damages Act. Once the top up clause and AAT/AT matters are resolved, as I have indicated they can be, the issue becomes wholly academic in any event. The evidence before the court on this particular matter was vague uncertain and replete with hypothetical scenarios. Until there is a proposed PPO before me I do not intend to further enter into such hypothetical and academic discussions. Whilst therefore it is unnecessary for me to deal with this academic matter, I mention in passing for what it is worth that the court is scarcely likely to assert as coming within section 2 of the 1996 Act terms which it clearly does not consider do so. However even if the presence of material that falls outside section 2 was introduced into the PPO by oversight or misunderstanding, it is not likely to render the whole PPO invalid in so far as it would bring the whole PPO outside the provisions of the ITTOIA 2005 s731(2)(a). For all the reasons that I have given in the judgment I consider Parliament would never have intended such a draconian consequence given the purpose of the legislation.