

JERSEY / JUDGMENT

Newman v de Lima and Anor

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Costs - application by the plaintiff for a payment of disbursements. [2018]JRC185 Royal Court (Samedi) 3 October 2018 Before : Advocate Matthew John Thompson, Master of the Royal Court. Between Oliver Paul James Newman (by his Curator Paul Richard Newman) Plaintiff And Wayne Rafael de Freitas de Lima First Defendant The Motor Insurers' Bureau Second Defendant Advocate G. N. A. Pearce for the Plaintiff. Advocate L. A. Ingram for the Defendants. CONTENTS Paras 1.

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judgment

the master:

Introduction

1. This judgment contains my decision in respect of an application by the plaintiff for a payment on account of disbursements. 2. The general background to this dispute is set out in my previous judgment *Newman v de Lima and Anor* [2018] JRC 155 in this matter dated 29th August, 2018, at paragraphs 2 to 13. At paragraph 61 and 62 of the judgment re-fixed a timetable for the filing of expert evidence. 3. The application before me was both for an interim payment on account of damages in the sum of £300,000 and an interim payment on account of disbursements. While the summons said this was for £280,000, Advocate Pearce explained there had been a typographical error and the amount sought was £218,000. 4. The application was based on the approach I had to take in relation to payments on accounts of disbursements was considered in *Zac (A Minor) v Estate of A (Deceased)* [2018] JRC 088A where I held that I had the power to make a payment on account of costs before a final determination on costs had been made. I therefore stated at paragraph 91 as follows:- “91. The relevance of these decisions to the issue before me is that they both emphasise the breadth of the power in Article 2 of the Civil Proceedings Law and its equivalent in Article 16 of the Court of Appeal Law. However a final costs order had been made before a payment on account was ordered in *Crociani* and before a summary assessment took place in *In the matter of C and D (Matrimonial)*. This does not mean however that a final determination on costs has to have been made before a payment on account of costs can be ordered. Article 2 gives the court full power to determine by whom and to what extent the costs are to be paid.

To rule that a payment on account of costs can only be made once the final incidence of liability for costs has been determined in my judgment is too narrow a construction of Article 2 in particular the use of the word “full”. The language of Article 2 could not confer any broader a discretion as was noted in both the Court of Appeal judgments to which I have referred.” 5. However, in exercising this jurisdiction I expressed caution at paragraphs 92 to 94 and stated as follows:- “92. However, I am also of the view that such a discretion should be exercised sparingly and only in exceptional circumstances. At present I cannot envisage of any circumstances where such an order would be made in a case where there were issues of liability and quantum in dispute and which required a trial or before any disputed summary judgment or strike out application had been resolved. Where liability has been admitted, however, such a scenario means it might be appropriate for a discretion to be exercised to order a payment on account of costs notwithstanding that the final amount of damages payable has not been quantified. Even here caution should be taken and only in exceptional circumstances would such a payment on account of costs be ordered. If the discretion was exercised too flexibly or frequently, this could encourage plaintiffs or their advisers to seek a payment on account of costs rather than trying to reach an overall settlement thus prolonging rather than shortening disputes. Care must also be taken to ensure that any decision is not unfair on a defendant because the defendant ends up funding the claim against it.

93. Before deciding whether or not to exercise such a discretion the court, as for interim payments on account of damages, the Court will also want to understand the overall financial impact of its decision if it is persuaded that the case before it is one that might justify a payment on account of cost before the ultimate incidence of liability for costs is decided. This means it will have to form a view on the amount of damages that might be awarded, the amount of costs incurred, what proportion of those costs is asked for, what costs orders might ultimately be made, the issues between the parties and the impact of any relevant payments into court or Calderbank offers. One or more of these factors may mean that a payment on account of costs is not appropriate. Ultimately, the court would be trying to assess what costs order might be made at a trial and therefore whether it was appropriate to order a payment on account of that likely costs order. A court facing such an application in personal injury cases would also have to bear in mind the protection awarded to plaintiffs under Part 12A of the Royal Court Rules which generally limits the ability of a defendant to enforce a costs order against a plaintiff beyond the amount of any damages ultimately payable to a plaintiff.
94. While I consider that a cautious approach needs to be taken to order an interim payment on account of costs before the final assessment of who is to pay what costs, I do not accept that Royal Court Rule 12/2 prevents such an order as a matter of principle. Rule 12/2 allows the Royal Court to require an interim payment on account of costs where it has ordered a person to bear the costs of any party. This could be following an interlocutory hearing or after a final determination. In my judgment however it does not cut down the breadth of the jurisdiction contained in Article 2 itself to prevent the court being able to make an order for

an interim payment before the ultimate liability of costs has been determined as a matter of discretion. Rule 12/2 simply sets out a circumstance when a payment on account of costs can be made. The rule does not mean that is the only circumstance when a payment on account of costs can be made. Extremely clear language would be required to construe the rule as in effect cutting down the broad discretion conferred by Article 2. Such language is not present and therefore Rule 12/2 does not operate to bar the plaintiff's application." 6. On the facts of the case I refused a payment on account of legal fees of the legal advisers involved including counsel because at paragraph 97 I stated:- "To go behind a no win, no fee agreement entered into for a complex case requires some special or unusual feature, not foreseen at the time of the agreement was entered into. No such feature has been identified in this case." 7. In respect of disbursements I took a different position and therefore stated at paragraph 99 as follows:- "99. Where I am sympathetic to the plaintiff is in respect of the costs of experts' reports. Such reports are necessary to identify issues in dispute and to enable the court to adjudicate on those disputes. The Bailiff in ordering a payment on account of costs in 2016 effectively met the plaintiff's disbursements at that time. There have been further reports filed since that time as well as meetings of experts. Nothing I have read suggests to me that these costs should not have been incurred. Future expert costs in terms of the discount rate argument and the care argument will also have to be incurred for these issues to be determined at trial. A payment on account of costs to meet past or future disbursements where liability has been admitted in complex cases does allow access to justice. In my judgment the importance of presenting effective expert evidence to enable a trial to take place outweighs the risk of an adverse cost order against the plaintiff in this case. In reaching this view I have taken into account that the plaintiff will recover more than sufficient damages even taking the cautious view referred to above to be able to repay these disbursements if he should be deemed to be the unsuccessful party when the question of costs is ultimately decided." 8. On the facts I was unable to reach a conclusion on what payment on account of disbursements I would order which was addressed in my judgment dated 13th June, 2018, reports at *Zac (A Minor) v Estate of A (Deceased)* [2018] JRC 102. The parties' submissions 9. The plaintiff in support of its application filed an affidavit from the curator of the plaintiff.

10. At paragraph 38 this affidavit listed the costs incurred to date in instructing experts. These totalled £68,744. It is right that I explain that the affidavit recorded the total figure being £31,047, but the figure had failed to take into account a payment on account of costs made in April of this year by the defendant of £100,000. Out of this payment, £37,697 had been used to meet disbursements of experts.
11. BCR Law also claimed disbursements totalling £22,373.51 consisting primarily of counsel's fees. By the time of the hearing, I was informed these had increased to £30,950; the total disbursements of BCR Law claimed therefore amounted to £32,148.51.
12. Stewart's Law also claimed disbursements again primarily consisting of counsel's fees in the sum £12,403.19.

13. In respect of future costs of medical experts what was set out for each category of expert ordered was:- (i) The cost of joint expert discussions; (ii) Preparation of joint reports; (iii) A conference with counsel; and (iv) A daily trial rate.
14. These amounts totalled £56,379.00. In broad terms, the total for joint experts' discussions and preparation of joint reports was around £20,000, the total for conferences with counsel was £16,000 and the total for the daily rate at trial was £20,000.
15. Finally, the plaintiff sought costs for financial experts comprising an actuarial scientist, an economist, an independent financial adviser and a curator. These costs covered preparation of a report, considering the defendants' reports, a conference with counsel and joint expert discussions and in total amounted to £96,250.00.
16. The payment on account sought was therefore in respect all outstanding medical costs, all outstanding disbursements, including counsel's fees, future medical expert costs and future financial expert's costs. After deducting the proportion of the payment on account of costs used to pay for medical experts, the resulting figure was £228,000 which exceeded the payment on account of costs of £218,000 sought by the plaintiff.
17. The rationale for the application was that the case was identical to *Zac v A* and the criteria in paragraph 99 of the judgment dated 16th May, 2018, were therefore met as set out above.
18. I was informed to date that disbursements had been funded by Stewart's Law as part of the 'no win, no fee' arrangement.
19. It was argued that the present case was more complicated than *Zac v A* because of the nature of the injuries suffered by the plaintiff and there were likely to be serious disagreements about life expectancy and the level of care required as well as in respect of a discount rate to be contended for by each party.
20. Even if the relevant discount rate contended for by the defendant was awarded, the plaintiff was still likely to recover a significant sum which would be more than adequate to meet any order requiring any disbursement costs to be repaid.
21. I was also informed that counsel was acting on a 'no win, no fee' basis.
22. In respect of future medical costs, meetings of the experts had been ordered. It was therefore appropriate for conferences with counsel to take place in relation to these meetings. What was claimed were the costs of the experts attending such meetings.
23. Advocate Ingram in response, firstly pointed out that the power in Rule 12/2 of the Royal Court Rules 2004, as amended, to make a payment on account of costs should be interpreted to include any disbursements. The same test applied in *Zac v A* therefore should apply to a payment on account of disbursements as much as to a payment on account of costs. This was relevant in this case because £100,000 on account of costs had already been paid which was more than sufficient to cover existing medical expert costs and medical expert costs to be incurred.

24. The claim for counsel's fees should not be allowed as a disbursement because these fees were no different from the profit costs of the plaintiff's English and Jersey legal advisers.
25. The claim for costs of attending at trial should not be allowed where trial dates had not yet been fixed.
26. Likewise the claim for costs in respect of financial experts should not be allowed because it was far from clear that such experts would be required. Subject to any appeals the judgment in the X Children case would address the discount rate argument and/or whether there was power to order periodic payments which could apply to the present case. The costs of financial experts involving a rerunning of the same argument in the X Children case and could not therefore be justified.
27. He was also critical of the affidavit filed on behalf of Mr Newman in that it did not set out why there were exceptional circumstances justifying a payment on account of disbursements. In particular, there was no explanation as to the basis upon which disbursements had been funded to date. It was also noteworthy that no payment on account of costs was being sought for the Jersey and English legal advisers. This was clearly because of the decision in Zac v A.
28. In terms of future costs, in addition to the general point that any such application was premature, the costs of a curator were not needed in any event.
29. If there was a problem with a plaintiff being able to fund disbursements this could be picked up by the legal aid vote.
30. In reply Advocate Pearce firstly stated that the use of counsel was justified. Secondly, the amount previously paid on account of costs to date was not limited by any restrictions as to how it was to be allocated.
31. At the conclusion of oral argument, I indicated it was not clear to me the basis upon which that payment on account of costs had been made. The payment had been made after issues concerning contributory negligence had been resolved. However, all I had was an application for an interim payment of £150,000 in August 2017 followed by a consent order. I did not have any explanation from either party as to any agreed basis upon which the payment on account of costs had been made. I indicated I wanted this information because I regarded it as material in order to determine how far the payment on account of costs should be taken into account in respect of the present application.
32. I therefore gave the second defendant 7 days to file further submissions and any evidence including correspondence on this issue with the plaintiff then being allowed 7 days to file further submissions in reply. Decision
33. Firstly, it is clear from the passages in Zac v A set out above that I possess jurisdiction to order a payment on account of disbursements. I further agree that costs include disbursements and therefore any discretion should be exercised sparingly and only in

exceptional circumstances as set out at paragraph 92 of *Zac v A*. However, at paragraph 99 of the same judgment I did draw a distinction between costs and disbursements to this extent where I stated:- “99. A payment on account of costs to meet past or future disbursements where liability has been admitted in complex cases does allow access to justice. In my judgment the importance of presenting effective expert evidence to enable a trial to take place outweighs the risk of an adverse cost order against the plaintiff in this case.”

34. In relation to this discretion I wish to emphasise that it only applies to complex cases. Simply because a claim may be of significant value does not mean that it is complex. Rather complexity, in personal injury cases, relates to the extent of any injuries suffered involving multiple medical disciplines which has the effect that it might take some time for a case to reach a conclusion at a trial or a position where a settlement can be negotiated. Complexity might also be affected by whether the extent of an individual's injuries have affected a pre-existing condition. Such issues inevitably delay when a trial can take place, or when it is possible for the settlement negotiations to realistically occur. Such circumstances may be relevant as to whether a payment on account of disbursements is justified. The above observations should not however be taken in any way limiting or altering the general discretion that exists. Rather they are simply illustrations of possible matters that would render a case sufficiently complex which would justify a payment on account of disbursements.
35. I also wish to add that even if law firms have not agreed to fund disbursements, (possibly as a result of *Zac v A*), this does not justify ordering a payment on account of disbursements. Rather the test is whether the case is sufficiently complex that not to order such a payment would deny access to justice.
36. In this case I am satisfied that the case is a complex one where the extent of the plaintiff's needs cannot be evaluated easily and where extensive expert medical advice is required. Therefore this is a case where it is appropriate to exercise the discretion in principle. For a case of this kind where the amount of any damages is likely to be awarded on any view will be very substantial even taking a cautious view and where the most likely costs order is one in the plaintiff's favour absent a payment into court or a without prejudice save as to costs offer, it is not unfair to require a defendant to make a payment towards disbursements rather than requiring the plaintiff to approach the legal aid vote. Even if I am incorrect in this approach the likely level of damages will be more than sufficient to repay any disbursements should any adverse costs order be made requiring the plaintiff to bear some or all of the disbursements covered by this decision.
37. However, the discretion does not apply to counsel's fees. Counsel is in no different position from the legal advisers who have agreed to act on a 'no win, no fee' basis. In that regard I observed in *Zac v A*, it was not appropriate to order reimbursement of counsel's fees incurred on a 'no win, no fee' basis I was informed by Advocate Pearce that the basis upon which advisers had been retained in the present case was exactly the same.

38. Secondly, it is not appropriate to order a payment on account of disbursements in respect of financial experts. This is because no directions at this stage have been given for such experts to be retained. Much will turn on the outcome of the X Children litigation as to what experts are required and in respect of what issue. The X Children case should provide a much greater certainty to identify or narrow the scope of areas of disagreement between the parties.
39. Thirdly, trial dates have not been fixed. It is therefore also premature to order a payment on account of costs for trial where the extent of what is in dispute between experts has not been determined.
40. In terms of the application for a payment on account of costs for the above reasons I am only prepared to sanction past costs of medical experts, future costs for meetings of experts and a medical experts attending a conference with counsel. While there may not be a need for expert meetings or conferences with counsel in respect of every expert, some costs incurred for individual experts may also be greater than the amount asked for. I also agree with Advocate Ingram that the amount of costs past and future that might be ordered is in the region of £100,000 which is no greater than the payment on account of costs already made. Had matters rested there I would have refused the application. However, I did not know the basis upon which the payment on account of costs had been agreed and in particular whether it was a payment on account of costs of determining the issue of contributory negligence. If the defendant had agreed to make a payment on account of costs towards the contributory negligence issue, it would not lie in the defendants' mouth to then require that payment on account of costs to be used for a different basis.
41. In response to my request the following picture emerged. There was no agreement between the parties as to how the payment on account of costs should be allocated. It was also not a payment on account of costs made towards the contributory negligence issue, but rather was made in respect of the plaintiff's costs generally. The plaintiff therefore argued in light of the fact that the offer of an interim payment on account of costs did not contain any restriction as to how it should be used meant that the plaintiff's advisers were free to defray the sum received towards profit costs or disbursements as the plaintiff saw fit.
42. In my judgment, given that the discretion is one that allows for access to justice in complex cases where liability has been admitted, where the defendants' insurers have accepted that their client was primarily responsible for the action and a discount for contributory negligence now having been agreed, it would be unfair to require the entire amount paid on account of costs (which includes disbursements) to be used to meet disbursements. Equally it would also be unfair simply to leave it to the plaintiff to decide how to allocate a sum paid on account of costs between the profit costs of the advisers and disbursements incurred. If the sum paid on account had been used to discharge the legal costs of the plaintiff entirely without discharging any disbursements, a subsequent request for a payment on account of disbursements would be unlikely to find favour with the court.

43. Ultimately, returning to the discretion vested in me which is to do justice between the parties and to provide for access to justice, I consider that the most just order is that half of the payment of account of costs may be retained by the plaintiff's advisers on account of profit costs but half should be used to meet the existing or future disbursements of the permitted medical experts. Accordingly, my decision in this matter is that the defendants should make a further payment of £50,000 on account of the disbursements that I have accepted are necessary at this stage. Authorities *Newman v de Lima and Anor* [2018] JRC 155 *Zac (A Minor) v Estate of A (Deceased)* [2018] JRC 088A *Zac (A Minor) v Estate of A (Deceased)* [2018] JRC 102 Royal Court Rules 2004, as amended

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Prepared on 23 October 2026 · Esheria