**Applications for Interim Payments of Costs: An Update**

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It is a feature of modern clinical negligence and personal injury litigation that there often can be substantial delay between securing judgment giving rise to the entitlement to damages and the payment of the same. Such delays are frequently due to uncertainties as to the quantification of damages and can be particularly prevalent in higher value cases concerning children and/or the most complex injuries. Claimant parties can thus experience significant ‘cash flow’ issues which may affect inter-litigation decisions, such as the procurement of evidence or choice of expert. It could be said that there may be an access to justice point to be made too: as smaller, specialist, firms of solicitors may be unable to compete against those who are more readily able to wait sometimes many years for payment. Conversely, defendant parties are likely to be resistant to having to pay out for costs which may never be ordered where uncertainties remain as to the likely outcome of any final determination of quantum issues.

Applications for interim payments on account of costs have been made by claimant parties seeking to mitigate this situation for some time. Since *Giambrone v JMC Holidays Ltd* [2002] EWHC 2932 (QB), payments on account of liability costs have been readily ordered, where there has been an admission or judgment on liability. Indeed, very recently (23 October 2019) the Court of Appeal in *Global Assets Advisory Services Ltd & Anor v Grandlane Developments Ltd & Ors* [2019] EWCA Civ 174, held that the court had the power to make such an order in circumstances where a claimant party has accepted a Part 36 offer within time. However, applications for payment on account of costs incurred in respect of quantum made before the quantum trial has taken place have not been the subject of (at least publicised) reasoned judicial decision until this year.

Earlier this year, His Honour Judge Robinson sitting in the County Court at Sheffield heard an appeal from a district judge’s refusal to grant a claimant in an obstetric negligence case such an interim payment on account of costs in *HI (a Minor by his Litigation Friend) v Hull & East Yorkshire Hospitals NHS Trust* (unreported, 25 February 2019, County Court at Sheffield).

The circuit judge held that CPR 44.2(1) and (2) were sufficiently wide to allow the court to order such an interim payment in principle, that such an entitlement could be triggered by an order for an interim payment in respect of damages and that, taking into account the presence or absence of Part 36 Offers, any likely delay between determination of liability and determination of quantum (as would be common in many cases, particularly those concerning children) was a *“very significant fact”*. It is important to note that the circuit judge made an order in respect of quantum costs before making an order for payment on account of those costs.

The Defendant sought the permission of the Court of Appeal for a second appeal on this point. This was refused with Lord Justice Irwin holding that it was *“entirely proper… to order interim costs payments with a view to the cash flow of solicitors in very long-lasting litigation where very significant liability has been conceded”*.

In *RXK v Hampshire Hospitals NHS Foundation Trust* [2019] EWHC 2751 (QB), judgment had been entered for damages to be assessed along with liability costs to be assessed if not agreed. The Defendant Trust has been ordered to make interim payments on account of damages in the sum of £100,000 and of costs in the sum of £50,000.

The claimant sought interim payments on account of damages and costs, but only an order in respect of the latter proceeded for determination before Master Cook on 3 October 2019. The Master noted that *“this sort of application has become common in high value clinical negligence and personal injury claims where there is likely to be substantial delay before quantum can be determined by the court”* (para.3).

He was critical of the way the Claimant’s application had been presented and said that he *“would give a short written judgment in the hope that such applications would be better prepared in future”* (para.3).

The Master’s judgment is indeed pithy and worthy of consideration by any Party seeking to make or respond to such an application.

Surveying CPR 44.2 and the judgment in *HI* (supra), the Master held that *the “discretion conferred by section 51 of Senior Courts Act 1981 and expressed in CPR 44 (2) is a very wide one”* and could include the making of *“a ‘prospective’ or ‘anticipatory’ costs order, …made before the conclusion of the proceedings”* (paras.10-12).

The Claimant’s further application for another interim payment of costs was supported by one paragraph in a witness statement of his solicitor. This dealt very briefly with the matter and maintained that the £100,000 sought would not exceed what the claimant expected to be awarded in costs, and referred to the delay before final judgment. A schedule of costs was exhibited to the witness statement in short summary form which did not apportion any figures between liability and quantum costs.

On the question of the principle of the existence of a power of the court to make such an order, Master Cook rejected the relevance of *“any kind of exceptionality test”*, and held it was *“clear that the court will wish to take into account the factors listed in CPR 44.2 (4) and (5) and will normally expect to be presented with sufficient information to enable it to carry out that exercise”* (para.14).

He held at paragraph 15 that a *“relevant consideration will be to preserve security for a Defendant and to ensure that there is a limited risk of such costs having to be repaid although … a defendant who has overpaid costs to a claimant's solicitor may seek to set off such costs against damages.*

He continued to hold that *“*[w]*ithout being prescriptive relevant considerations may include: i) the type of funding agreement and details of any payments made under that agreement, ii) whether any Part 36 or other admissible offer has been made, and if so, full details of the offer, iii) details of any payments on account of damages made to date, iv) a realistic valuation of the likely damages to be awarded at trial, v) a realistic estimate of the quantum costs incurred to the date of the application, vi) any other factor relevant to the final incidence of costs, such as the possibility of an issue-based costs order, arguments over rates or relevant conduct*[, and] *vii) the likely date of trial or trial window.”*

As the Master held that the Claimant’s solicitor’s witness statement failed to address the issues he considered pertinent to the exercise of the Court’s discretion when faced with such an application, he granted permission for the service of one further statement from each party. The judgment closes with the salutary remark (para.16) that *“I hope that those who make such applications in future will ensure that all relevant material is put before the court in support of the application”*.

Given the existence now of such guidance it is likely that a party not substantiating their application for such an interim payment of costs as suggested in *RXK* may find the court is inclined to dismiss it or adjourn it for further evidence, in either case very likely accompanied by an adverse costs order.

By way of a postscript, it is clear that development of the law in this area has far from run its course. There is no higher authority (other than the paper refusal by Irwin LJ) as to the principle of whether there is indeed a power or discretion to allow such interim payments, nor as to the circumstances in which the same should be allowed.

Defendant parties are likely to advance the powerful argument that it cannot be determined who is the *“successful party”* for the purposes of the exercise of the discretion afforded to judges per CPR 44.2 in making an award of costs in the context of a quantum claim until the final determination of that claim. Until such a final determination, it may well be argued for the purposes of the routine presumption for an award, that there is no ‘event’ for ‘costs to follow’.

The exceptionality argument dismissed by the circuit judge and QB Master could also find higher judicial favour, encompassing arguments pertaining to the inherent risk of such awards being found to eventually constitute overpayments or acting as a fetter upon the discretion of a trial judge. This argument indeed found favour in an unreported decision by way of a written reserved judgment of District Judge Thomas sitting in the County Court at Middlesbrough in the case of *HH (a Child by his Litigation Friend) v South Tees Hospital NHS Trust* (unreported, 4 September 2019), which distinguished *HI* on the facts and where an application for an interim payment of costs was refused.

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| **Key Points:**   * *For now at least* (though all parties should probably ‘watch this space’) the law appears settled that the Court has a discretion to order the payment of interim payments of costs pursuant to CPR 44.2 and section 51 of Senior Courts Act 1981 * Applications for interim payments of costs are likely to continue to become more commonplace * Parties seeking such an order would be well-advised to ensure that their applications deal with all likely relevant considerations of the court when exercising its discretion and substantiating the reasonableness of the size of the interim payment sought |

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