Care Proceedings - Ratification of periodical payments order

[2018]JRC226

ROYAL COURT
(Family)

5 December 2018

Before : Pamela Scriven, Q.C., Commissioner and Jurats Nicolle and Sparrow.

Between	**The X Children (through their Curator, Advocate Jean-Marie Renouf, and Guardian *ad litem* Advocate Barbara Corbett)**	**Plaintiffs**
And	**The Minister for Health and Social Services**	**Defendant**

Advocate D. J. Benest (assisted by Advocate J. N. Heywood) for the Plaintiffs.

Advocate L. A. Ingram (assisted by Advocate D. A. Corbel) for the Minister.

JUDGMENT

THE COMMISSIONER:

1. This case arises out of a set of circumstances which it would be fair to categorise as tragic in its outcome for the Plaintiffs. Two very young girls were left in an appalling abusive home for some nine years after it should have been obvious that they needed protection. That negligence has been rightly accepted by the Defendant as a profound failure of social work practice.

2. As a result of this neglect, both girls, now young women aged 21 and 19 respectively, were subjected to systemic abuse of the most appalling kind throughout their young lives until they were removed from home. It included very serious sexual abuse, including penetrative abuse, probably from a number of different abusers. It included physical abuse which included (by way of example) being burnt, bitten, hit, punched and strangled. It included emotional abuse and also neglect. They were unwashed, the home was filthy, their medical and dental needs were not met, and they were not give proper nourishment.

3. The experts who saw them when they were finally moved from that abusive home environment have never forgotten them. One of the striking features of the evidence was the power those memories clearly still have on experienced professionals who are used to dealing with cases of child abuse. They were two of the most damaged children they had ever encountered.

4. The tragedy of the case is that, if they had been removed nine years earlier (when aged 26 months and 3 months old respectively), and placed within a reasonable time for adoption (as it accepted they should have been) the evidence before us is that they would have been able to live relatively ordinary lives with the benefit of support from their adoptive family, friends and the community services available. The appalling outcome of the abuse from which they were not protected is that these two young people have been extraordinarily damaged, and that the damage will live with them for the rest of their lives. One is placed in a secure unit and is likely to continue to need to be. The other is likely to need, at the least, semi secure accommodation. Both are likely to require lifelong 24 hour care and support for the rest of their lives. Such care and support is very, very expensive. They have demonstrated elements of self-harm, and harm to others, which means supervision has to be very high. Both are still young women with an actuarial expectation of life into their nineties (not taking into account, of course, the risk of self-harm). Of course, no one knows what their life span will actually prove to be, but one wishes them as long and fulfilling a life as can be achieved.

5. The principle which underlies an award of damages was described by Baroness Hale in the case of Simon v Helmot [2012] UKPC 5 , an appeal to the Privy Council from a decision of the Court of Appeal of Guernsey, in the following way:-

> ***"The only principle of law is that the claimant should receive full compensation for the loss which he has suffered as a result of the Defendant's act, not a penny more but not a penny less".***

6. Traditionally, awards of damages in Jersey have taken the form of a once and for all lump sum. In England, legislative provisions commencing with the Damages Act 1996 developed the law to provide expressly for damages to be awarded by way of orders for periodical payments rather than by a single lump sum in an appropriate case. There is no similar legislation in Jersey, but in the case of X v Estate of Y and AXA Insurance UK PLC [2014] (2) JLR 444, the Royal Court here was prepared to make an order for damages to be paid by way of periodical payments in a case where it was asked to do so with the consent of the parties. It looked to the mechanism and safeguards established within the English legislative scheme to provide guidance as to its terms. The judgment setting out the reasons for ruling that the Royal Court has jurisdiction to make such an order by consent is, in our respectful view, a model of clarity, and we accept and adopt the

approach contained there. All parties before us have agreed it was correctly decided, and that we have jurisdiction to make such an order if the parties consent.

7. However, without consent, an order for periodical payment of damages has never been made in this jurisdiction. Damages have always been made by the mechanism of a once and for all lump sum.

8. In this case, when the case opened, both parties were asking the Court to make a once and for all lump sum order, not a periodical payments order. A major issue raised by the parties related to how that sum should be calculated. The assessment of a once and for all lump sum is far from easy. It requires the Court to take a view of the cost of long term care and management, based on an annual amount adequate to meet the Plaintiffs' needs, and then to apply a multiplier to that figure based on two factors (i) an actuarial assumption as to life expectation (and thus a prediction about the number of years for which that care would be required); and (ii) an adjustment (called a "discount" although it may in fact lead to an increase rather than a reduction in the final figure) to take account of the projected investment income that might be expected to accrue on the outstanding balance.

9. The issue raised by the parties at the outset of this case was whether the Court should assess the multiplier based on a rate of return on capital if invested in interest linked government securities ("ILGS") or by some other measure. Since the case of Wells Wells [1999] 1 AC 390, the multiplier used has been based on a rate of return on capital if invested in ILGS. That mechanism has come under serious and sustained criticism in some legal and academic circles as being an inappropriate and unrealistic proxy, and in England there has been legislative change to provide for the rate to be set from time to time by the Lord Chancellor, rather than with reference to the rate of return produced by investment in ILGS. There has been no similar legislative change in Jersey, nor for that matter in Guernsey, and in the case of Simon v Helmut the Privy Council decided that the rate set by the Lord Chancellor for use in England had no application in Guernsey, and in that case, it approved the continued use in Guernsey of ILGS on the evidence available to it at that time. It was argued on behalf of the Defendant before us that the time has now come to change the approach.

10. The case of Wells itself had identified the inevitable artificiality involved in the process of calculation of the lump sum (although it considered the ILGS proxy to be the best that could be devised at that time) and acknowledged the desirability, in some cases at least, of an order being made by way of periodical payments which would have the advantage of reflecting the true lifespan of the claimant and true inflationary needs. Similar observations about the advantages of orders for damages being made by way of periodical payments rather than by means of a once

and for all lump sum were expressed in the case of Simon v Helmot by Lord Dyson, who thought such a change could only be achieved through legislation, and by Lord Clarke and Lady Hale, both of whom raised the possibility of such orders being made by development of the common law, if no legislative provision were to be made (although the point was not argued before them).

11. In that context, from the outset of this case, this Court asked the parties to keep in mind the possibility that the award of damages to these young women in the circumstances of this case might be better made by way of periodical payments – in other words, an annual sum to meet their care and management needs might be a better way forward of meeting those costs than one large, almost eye wateringly large (to put it colloquially), sum to be paid now. Although it was not originally proposed by either party, as the evidence developed and the picture became clearer, the Defendant changed position to make a positive case that this Court had jurisdiction to make a periodical payments order, and should do so, even without the consent of the Plaintiffs. As the case progressed, the Attorney General asked for and was given leave to address the Court on the issue of whether the Court had jurisdiction to make such an order absent consent (but, very properly, did not seek to address the Court on the merits of whether such an order should actually be made in this case).

12. We are grateful to all the advocates for the skilful and helpful submissions they made on this, as on all other, points which have arisen in the course of the lengthy hearing.

13. In the end, the parties have now agreed that a periodical payments order is the appropriate course in this case. We congratulate them for doing so. As the case has progressed, it has seemed to us that the evidence has pointed more and more clearly in the direction of that being the most suitable form of order here to cover the Plaintiffs' care and management costs – if, of course, and only if there is jurisdiction to make it. Such an annual payment would have to be index linked to keep pace with the appropriate measure of inflation, but would have the advantage that the base cost of care can be met for every year of the Plaintiffs' lives, however long they may in reality prove to be. It is a method that is fair to both the Plaintiffs and the Defendant, by ensuring that those care costs are met for the true length of time for which they are needed, neither a longer, nor shorter, period. There remains a need for a capital sum to cover contingencies, and some other aspects, but that too has been agreed, and is of a much smaller order than if the costs of ongoing care and management had to form part of the lump sum.

14. The parties have, in our view wisely, agreed a form of order, which we are in no doubt best meets the needs of justice here; justice to both of these young women and to the States of Jersey.

15. As a result of that sensible and constructive agreement, it has not been necessary for us to decide whether or not we had jurisdiction to make such an order in circumstances where the parties do not agree. Nor have we needed to decide upon the other issue raised by the parties, whether a lump sum should be calculated by reference to ILGS or some other rate. As things stand at the conclusion of this case it therefore remains an open question whether, in the future, an order for damages by way of periodical payments can be made where the parties do not consent. No doubt it is a question which will arise again. Such a development could undoubtedly be made by statute, as it has in other common law jurisdictions, and we have been pleased to learn today that such legislation is now being given consideration by the States. Legislation would have the great advantage of making the legal position clear and unambiguous for the future. We understand that the States are also considering legislation on the question of whether there still needs to be strict adherence to the use of ILGS in the calculation of the "discount" rate or whether a different approach should now be used to form the basis of the multipier. Once again, if there is legislation, it brings clarity and certainty to the law.

16. We turn now to the terms of the order itself.

17. The Plaintiffs here are not able to look after their own affairs. The delegate who has been appointed to do so has approved the proposals, as has the Probate and Protection Division of the Royal Court (which has supervisory authority over the delegate).

18. Our task is to consider the mechanism and security of the proposals. We have been given copies of the draft orders, and the supporting documents. They have been drafted with great care by the advocates, using the experience gained from the structures within English system, as was done in the case of X v Estate of Y. We are satisfied that meticulous care has been paid to the detail, for example in the security given for future payments, in the use of the appropriate measures of inflation, the implications of taxation and the circumstances for variation. We have no hesitation in making the orders sought.

Authorities

Simon v Helmot [2012] UKPC 5.

Damages Act 1996.

X v Estate of Y and AXA Insurance UK PLC [2014] (2) JLR 444.

Wells Wells [1999] 1 AC 390