

Neutral Citation Number: [2023] EWHC 468(KB)

Case No: QB-2018-001650

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 16th February 2023

Before:

MR JUSTICE RITCHIE

Between:

NKX **Claimant**
(By his mother and litigation friend NMK)

- and -

BARTS HEALTH NHS TRUST **Defendant**

ANGUS MOON KC and ELEANOR MORRISON (instructed by **Leigh Day Solicitors**) for
the **Claimant**

CLEMENTINE CORAM JAMES (instructed by **Kennedys Solicitors**) for the **Defendant**

JUDGMENT

Approved

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

MR JUSTICE RITCHIE:

1. I refer back to the previous hearing two weeks ago during which I approved the proposed settlement in NKX v Barts Health NHS Trust. The approval comments I made during that hearing related to other matters, save for one point. That point concerned clause 5 of the schedule to the Periodical Payments order (PPO). The schedule to the order is part of the proposed settlement and it contains the normal periodical payment order provisions. It is in the standard form fixed in *Thompstone v Tameside* [2008] EWCA Civ 5, and most of it is unexceptional. However, in my judgment, there is a slight concern about clause 5.
2. The purpose of this Court when approving a settlement under CPR part 21 is to fulfil its function under the Civil Procedure Rules to protect incapacitous claimants. This Court is required to fulfil that function in relation to the agreement made between the parties and proposed for approval. In relation to this proposed settlement I had no difficulty in supporting the lump sum, the periodical payments and the financial figures.
3. However, looking at clause 5 of the proposed PPO, as it was drafted, I did have some concerns. The clause says:

“The NHSLA shall be entitled to require the claimant to produce evidence in a form reasonably satisfactory to the NHSLA that the claimant remains alive before making any periodical payment.”

In the industry that is known as a *proof of life* clause and in my experience many such periodical payment orders, which do not relate to the NHSLA, contain proof of life clauses drafted in a clearer and more balanced way to protect the incapacitous Claimant. The need for proof of life is indisputable, for when the Claimant passes the periodical payment order terminates. But it is the detail of this clause which creates my concern. It states that the form of the proof of life has to be reasonably satisfactory *to the NHSLA*, it does not say objectively satisfactory, or satisfactory to the Court, or to any reasonable third party observer. Nor does it state how many such requests can be made per annum or when they may be made. Nor does it state who is to provide the proof of life.

4. I am informed by Ms Coram James and in addition through the witness statement of Ms Irene Taylor of Messrs Kennedys, that the NHSLA procedure is as follows: periodical payment orders are made annually on 15th December and so a form is required to be filled in by the Claimant’s representative which is called a data schedule. Helpfully that has been produced. It requires, perhaps not surprisingly, the bank account details for the receipt of the periodical payments, the contact person for the future verification of bank account details, the name, email address and telephone number of the proof of life provider, the name of the Deputy and the contact details

for the recalculation explanation letter. It seems like a sensible form, although it is slightly restrictive and seems to imply that the NHSLA would prefer the Deputy to be the contact and proof of life provider. However, it does provide a blank box for a proof of life provider other than the Deputy. It makes no suggestion as to who the NHSLA will consider would be a reasonable person to provide proof of life.

5. I am also informed that on or about 15th October each year, so eight weeks before the annual payment date, the NHSLA have a procedure for sending out the requests for proof of life, although the evidence in relation to that from Mrs Taylor is not detailed. In addition, the evidence from Ms Irene Taylor, helpful though it is, does not contain the source within the NHSLA of any of the assertions which she has put in her witness statement and hence does not satisfy the requirements for hearsay information obtained from third parties.
6. Whatever the current procedure is, it appears that it is working, but clause 5 does not protect this Claimant from any future changes, whether they be bureaucratic, costs saving, created by public funding difficulties, or changes in principle or policy that may be brought into effect by the NHSLA. I make it clear that my concern is not about the NHSLA's current operation or practice, but my responsibility is to protect this incapacitous Claimant for the rest of the Claimant's life, a future which is always uncertain.
7. It seems to me, therefore, that there is justification for and a need in this PPO to specify objectively how the Claimant can satisfy the need to provide proof of life and how often and when it may be requested. What I have done, is to tailor clause 5 to ensure, on the evidence provided to me, that it allows the NHSLA to continue its current system but provides protection for the Claimant in future. The clause will read as follows:

“5.1 The NHSLA shall be entitled to require the Claimant to produce to the NHSLA by 15th November each year reasonable evidence that the claimant remains alive.

5.2 Reasonable evidence may be contained in a letter or digital communication from the Claimants’: - deputy, case manager, litigation friend, GP, other treating clinician or such other person as the NHSLA may consider appropriate.”
8. Before making this decision I gave the NHSLA and Ms Coram James the opportunity to comment on whether the NHSLA's current system would in any way be affected by this protection for the Claimant, and the substance of her submissions were simple, not that there was any difficulty substantively or procedurally with this, but rather, that the NHSLA did not wish their standard form PPO to be changed, it having been fixed in *Thompstone v Tameside*.

9. *Thompstone* was decided over 14 years ago and, whilst the form for PPOs has clearly stood the test of time, in my judgment vulnerable and incapacitous claimants with relatively long life expectations need to have the proof of life requirement and the protection for them within the requirement considered and reviewed when they come before the Courts for approval.
10. Finally, I acknowledge that the Claimant's position on this issue has been neutral. I am grateful to Mr Moon KC for indicating that the last thing the Claimant wants is for this issue to be appealed. However, the protection of vulnerable claimants is the responsibility of this Court on approval and I consider that this alteration to clause 5 provides more protection for this Claimant.

(Following an application by the defendant for permission to appeal the decision)

11. The NHSLA apply for permission to appeal this approval decision. I do not grant permission to appeal. The reasons for that refusal are as follows.
12. Firstly, the suggestion is made that the NHSLA data form might need to be changed. That may be so or it may not. In fact, what the form does is provide a blank space for the suggested proof of life provider's name, address, email address or telephone number. So all or any of the persons on the list within clause 5.2 that I have suggested as protection for the Claimant can be put into that blank box. Also, the Deputy's name is required on the current form. Deputies are in the list which I have provided for the protection of the Claimant, so I do not understand the substance of the submission as to why this form needs to be changed. Even if it does involve changing the form I have heard no justification from Ms Coram James showing why that is a substantive problem.
13. Secondly, it is asserted that the new clause will require a review of internal procedures in the light of this decision. I accept of course that reviewing internal procedures is always sensible, but I do not consider that proper internal review is a reason for granting permission to appeal.
14. Finally, as to the new date provision in clause 5 of the order: 15th November, this is 4 weeks before the date when the payment has to be made, which is the 15th December. There was no evidence put before me by the NHSLA as to the deadline date on which they currently will or will not accept proof of life. A general comment was made that the NHSLA prefer it to be close to the date of the periodical payment and I was informed that the NHSLA's requests for proof of life are usually sent out eight weeks before the payment date. What I have done is to put in a clear date which the Claimant and his/her team know they can prepare for each year. If the NHSLA wish to request information annually then they must do so in good time before that date so the responses can be provided by that date. This of course permits the NHSLA, if the proof of life information is received after that date, to consider whether they are going

to kick up about late receipt of information, so to a certain extent it assists the NHSLA. In my judgment the date produces clarity and it seems to me that clarity is what is important for both the NHSLA and for Claimants.

15. I do not see that any of these matters, on the evidence which has been put before me, will in fact give rise to the adverse implications suggested by the NHSLA.
16. This potential need for clearer protection was raised by this Court at the last hearing and in an email which I sent out to the parties, indicating that the NHSLA could put before me any evidence which they wished to on this issue and could set out any concerns before me at this hearing. They have chosen what evidence they wished to put before me. Nobody within the NHSLA has been named as the source of the information which has been provided by Ms Taylor, and very little detail has been provided to Ms Taylor to justify the NHSLA's objections. So it seems to me that the NHSLA's approach was little more than: it is our form, we don't want to change it, so don't change it. I did not find that persuasive.
17. For those reasons I do not grant permission to appeal.

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