Neutral Citation Number: [2024] EWHC 615 (KB)

Case No: KB-2023-001194

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 March 2024

Before:

ALISON MORGAN KC
(sitting as a Deputy High Court Judge)

- -

Between:

RACHEL JANE CRIPPS **Also known as SNUDDEN**	**Claimant**
- and -	
NORFOLK and NORWICH UNIVERSITY HOSPITALS NHS FOUNDATION TRUST	**Defendant**

- -

Eloise Power (instructed by **Boyes Turner LLP**) for the **Claimant**
David Myhill (instructed by instructed by **Kennedys Law LLP**) for the **Defendant**

Hearing date: 31 January 2024

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Approved Judgment

Alison Morgan KC:

1. This is an application for an interim payment made on behalf of the Claimant, Rachel Jane Cripps.

2. The Defendant is the Norfolk and Norwich University Hospitals NHS Foundation Trust.

3. In February 2018, the Claimant underwent a cervical smear test. The result of that test was misreported by the Defendant's Cytology Service. By 2019, the Claimant was diagnosed with cervical cancer at the age of 28, at a point in her life when she had not yet had children. She required cancer treatment resulting in her entering premature menopause and being unable to conceive naturally.

4. The Defendant has accepted liability in this matter and also accepts that damages in a significant sum will be recoverable by the Claimant. There is, however, a dispute between the parties as to whether the Claimant's claim for damages should properly extend to the costs of surrogacy arrangements in the USA. A Case Management Conference is yet to take place and no directions have been given.

5. On 25 January 2023 the Claimant received a general interim payment on account of damages in the sum of £75,000. For the purposes of this application, it has been accepted by the parties that this figure should be treated as if it reflected a conservative valuation of the sum that the Claimant would recover for general damages and past losses.

6. On 30 May 2023 the Claimant issued an application for an interim payment of £400,000 to enable her to proceed with a surrogacy arrangement in the USA.

7. On 14 December 2023 the Defendant confirmed that it would make an interim payment in the sum of £150,000. This was stated to be made "*on a voluntary basis to be offset against any damages that may be awarded at the application*", but the Defendant did not accept, either expressly or by implication, that any surrogacy costs would be recoverable in this matter. CRU in the sum of £25,821.71 was deducted from this interim payment.

8. The net sum of £124,178.29 was received by the Claimant shortly before Christmas 2023. The Claimant immediately used the funds to start the surrogacy process in the USA.

9. The interim payment application of 30 May 2023 was for £400,000. This was based on the sum of £326,091.60 for the costs of one birth involving a foreign surrogacy arrangement plus what is suggested to be 'a margin for contingencies'.

10. In light of the interim payment made by the Defendant in December 2023, from which CRU was deducted giving a net figure of £124,178.29, the Claimant now seeks an additional interim payment of £275,821.71.

11. I am grateful to Counsel on both sides for the considerable assistance that they have provided in their detailed written and oral submissions.

The issue

12. The issue before the Court is whether the interim payment sought by the Claimant represents a reasonable proportion of the likely amount of the final judgment pursuant to CPR 25.7(4).

13. In determining whether or not the figure sought represents a reasonable proportion of the likely final amount, it is common ground that it is necessary for the Court to determine whether it can say with a high degree of confidence that a future trial judge will conclude that it is reasonable for the Claimant to be awarded damages to enable her to pursue a foreign commercial surrogacy arrangement.

Background to the application

14. Before her cancer diagnosis, the Claimant worked as a primary school teacher. In a witness statement dated 27 July 2023, she explained: "I have always known I wanted children. I became a primary school teacher because I love children."

15. On 1 February 2018 the Claimant underwent her first routine cervical smear test at her General Practitioner's surgery. The sample was misreported by the Defendant's Cytology Service as "HPV Positive, Cytology Negative". This misreporting resulted in delay in the diagnosis and treatment of her cancer.

16. The Claimant did not receive any further smear invitations until August 2019. She attended for a smear test in September 2019 and the result was reported as "High grade squamous dyskaryosis (severe). High risk HPV detected." This led to further investigations and to the Claimant's diagnosis with a Grade 3 primary squamous cell carcinoma of the cervix.

17. The Claimant underwent treatment for her cancer. Following treatment, there was no residual disease identified. However, the Claimant's natural fertility and ability to carry a pregnancy was permanently lost due to irreversible damage to the ovaries, uterus and endometrium consequent upon the radiotherapy and chemoradiotherapy undertaken to treat the cancer. She is now unable to conceive naturally or with assisted conception and is unable to carry a pregnancy herself.

18. After her treatment, the Claimant met her husband, David Cripps, who is now 37 years old. They married in September 2023. The Claimant argues that there is now a pressing need for her to begin the process of surrogacy, based on her age and that of her husband. It is argued that she should not have to wait for the resolution of her trial, which it is suggested may well be over 2 years away, in order to begin the process.

19. In a witness statement dated 27 July 2023, the Claimant explained the steps that she has taken to initiate the surrogacy process in the USA. She has made enquiries with the Brilliant Beginnings surrogacy agency based in the UK. She says as follows:

> '7. I have done a lot of research into surrogacy and David and I have discussed our options.
> 8. We want to go ahead with surrogacy in the USA. We did consider surrogacy in the UK but did not feel we had the same security as having a baby through surrogacy in the US.
> 9. I got in contact with Brilliant Beginnings earlier this year. They provide support throughout the surrogacy process. They offered us an options meeting but said we may not need the meeting if we were settled on surrogacy in the US. If we don't need the meeting, which we don't feel we do, we then need to complete the application form.'

20. In a more recent statement dated 18 January 2024, she has indicated that she has used funds from her earlier interim payment to start taking steps on the surrogacy pathway. She states:

> '9. We have decided to widen our surrogate pool across the USA as we could hopefully find a surrogate sooner this way. If we look solely at New York, the waiting time could be 8-10 months for a surrogate whereas it we widen our search pool it could be 2-4 months.'

21. At present, therefore, the Claimant has set out in her statements the research that she has undertaken in relation to surrogacy in the USA, including the best approach towards identifying an egg donor, the taking of a sample of semen from her husband and the timescales for identifying a potential surrogate. She has not made positive enquiries as to the availability of surrogacy in the UK and has not yet identified with certainty the particular state in the USA where she will seek surrogacy services.

22. The Claimant's husband Mr Cripps underwent a semen analysis in March 2023. The Claimant registered with London Egg Bank, a UK based database of egg donors, and Circle Egg Donation, a US based database of egg donors. They intend to travel to the USA for Mr Cripps to provide his sample due to the high costs and practical difficulties of international shipping of samples.

23. On 28 December 2023 the Claimant and her husband submitted their application form to Brilliant Beginnings. On 8 January 2023 the Claimant made initial payments of £9,600 to Brilliant Beginnings and £2,400 to NGA Law.

24. In a statement dated 25 January 2024, the Claimant has indicated that she has been informed that locating a surrogate and starting the pregnancy may occur within 6 months.

25. The total amount claimed for surrogacy costs in the Preliminary Schedule of Loss is £1,080.802.64. This figure is based upon the Claimant's stated intention to have three children by way of surrogacy. This application for an interim payment is predicated on the costs involved in the first of those surrogacy arrangements.

The expert reports

26. The Court has considered the following expert reports:
    i. Nicholas Raine-Fenning, Consultant Gynaecologist and Reader in Reproductive Medicine and Surgery at the University of Nottingham, instructed on behalf of the Claimant, report dated March 2023, together with further letters dated 26 and 29 January 2024.
    ii. Dr Muzamil Asif, Consultant Clinical Oncologist, instructed on behalf of the Claimant, report dated 30 March 2023.
    iii. Dr Sohom Das, Consultant Forensic Psychiatrist, instructed on behalf of the Claimant, report dated 21 March 2023.
    iv. Mr Nitish Narvekar, Consultant Obstetrician and Gynaecologist, instructed on behalf of the Defendant dated 24 January 2024.

27. For the purposes of this application, the key reports/letters are those of the consultant gynaecologists Mr Raine-Fenning and Mr Narvekar. Both experts had regard to the relevant principles set out in *XX v Whittington Hospital NHS Trust* [2020] UKSC 14, which I consider in greater detail below.

28. The four key issues covered by the consultant gynaecologists in their reports and letters are as follows:

    i. Whether the Claimant would have been able to have children in any event.
    The experts agree that the Claimant's 'individual fertility' would have been normal for her age with a >50% chance of livebirth.
    Mr Raine-Fenning noted that Mr Cripps' semen analysis produced results that were '…only slightly below WHO standards and essentially normal. Importantly, the findings do not mean they would have struggled to conceive naturally if this was an option.' He further noted that no fertility clinic would have offered the Claimant fertility treatment based on her BMI. However, he noted that the Claimant had lost weight subsequently.

In response, Mr Narvekar has commented on the potential sperm abnormality on the part of Mr Cripps and also the Claimant's high BMI.

ii. Surrogacy arrangements in the UK

Both experts agree that surrogacy is well established in the UK and as to the process of finding a suitable surrogate. They disagree as to the likely wait times. Mr Narvekar cites likely waiting times of 6-24 months. Mr Raine-Fenning is not aware of any UK agency that has had a waiting time as low as 6 months. He favours a likely period of 2 years.

Mr Narvekar suggests that the advantages of UK surrogacy arrangements include close contact and support with surrogates, convenience related to travel arrangements for tests and treatments, lower costs and straightforward arrangements for legal parenthood. He also notes: '…it is important for the Court to be aware that whilst some patients do choose to travel to a foreign country for surrogacy, the advantages of doing so are not clear-cut and there are a number of downsides in doing so. Moreover, whilst there are in principle uncertainties with the UK based surrogacy regime, in practice my experience is that it tends to work relatively smoothly.'

In response, Mr Raine-Fenning describes the process of seeking a surrogate in the UK as 'variable to say the least'. He also disagrees that the process for obtaining legal parenthood is 'straightforward' noting: '…that the grant of the parental order is wholly contingent on the surrogate's continuing consent and, where relevant, that of her spouse.

Although surrogacy relationships rarely break down, it remains the fact that UK law gives the surrogate the right to withhold her consent to the transfer of parental rights and veto the intended parents obtaining a parental order. Whilst this rarely occurs in practice, it can and does happen and there have several cases, both reported and unreported, in which disputes have arisen as a result of the surrogate not relinquishing the child and/or refusing consent to the transfer of legal parenthood.

iii. Surrogacy arrangements in the USA

Mr Narvekar notes that the US is the most popular international destination for UK-based intended parents due to the established commercial' pathways, and safe legal framework. He cites likely waiting times of 6-12 months. He notes that unlike the UK, where parenthood from surrogate to intended parents is transferred upon successful application of a parental order via the courts, the parenthood in US can be legally guaranteed upon birth. Nevertheless, he refers to that fact that the intended parents would still have to complete the parental order process via UK High Courts, to secure legal parenthood upon return to the UK. He considers that 'whilst there is more legal certainty in US arrangements, there is also additional complexity. He refers to further disadvantages being the lack of close contact and support with surrogates,

inconvenience related to travel arrangements for tests and treatments, and higher costs.

In response, although Mr Raine-Fenning accepts some of the practical disadvantages cited by Mr Narvekar, he suggests that Mr Narvekar has failed to identify meaningful downsides other than the need to seek a parental order in the UK.

iv. Costs

The experts have considered the likely costs involved in surrogacy arrangements in the UK and the USA. Mr Raine-Fenning has indicated the likely cost of for surrogacy in the UK to be £28,500. He gives a range of $125,000 to $300,000 for a surrogacy arrangement in the USA.

Although the figures that they quote are not identical, there is a considerable measure of agreement between them as to the expected costs of a surrogacy arrangement in the UK and the USA.

29. Dr Sohom Das, the forensic psychiatrist, has concluded that as result of the events that led to her infertility, the Claimant has developed an adjustment disorder which, due to a prolonged depressive reaction, has developed into a depressive episode, albeit that he notes that she had prior mental health issues that would have rendered her more vulnerable to the psychiatric sequelae of the clinical negligence.

The Legal Framework

Interim payment orders

30. The Court's power to make an order for an interim payment is set out in CPR 25.7. *CPR 25.7 provides as follows:*

"(1) The court may only make an order for an interim payment where any of the following conditions are satisfied—
(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;
(b) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (other than costs) to be assessed;
(c) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment whether or not that defendant is the only defendant or one of a number of defendants to the claim;
(d) ...
(e) ...
(2) [Omitted]
(3) [Omitted]

(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.
(5) The court must take into account—
(a) contributory negligence; and
(b) any relevant set-off or counterclaim."

31. There is no dispute that condition 25.7(1)(a) is satisfied. The Defendant has admitted liability to pay damages or some other sum of money to the Claimant. Indeed, interim payments have already been made by the Defendant.

32. The question, therefore, is whether the interim payment sought represents a reasonable proportion of the likely amount of the final judgment. In making this assessment, the Court must take into account contributory negligence and any relevant set-off or counterclaim.

33. In *Eeles v Cobham Hire Services Ltd* [2009] EWCA Civ 204, the Court of Appeal summarised the approach a judge should take when considering whether to award an interim payment in a personal injury claim which a trial judge might wish to deal with by way of a periodical payments order.

34. The approach to be adopted by the Court when considering whether to make an interim payment order is set out in §§ 43 to 45 of the judgment of Smith LJ. It establishes two stages. The first stage is identified at §§43 to 44:

> '43. The judge's first task is to assess the likely amount of the final judgment, leaving out of account the heads of future loss which the trial judge might wish to deal with by PPO. Strictly speaking, the assessment should comprise only special damages to date and damages for pain, suffering and loss of amenity, with interest on both. However, we consider that the practice of awarding accommodation costs (including future running costs) as a lump sum is sufficiently well established that it will usually be appropriate to include accommodation costs in the expected capital award. The assessment should be carried out on a conservative basis. Save in the circumstances discussed below, the interim payment will be a reasonable proportion of that assessment. A reasonable proportion may well be a high proportion, provided that the assessment has been conservative. The objective is not to keep the claimant out of his money but to avoid any risk of over-payment.
> 44. For this part of the process, the judge need have no regard as to what the claimant intends to do with the money. If he is of full age and capacity, he may spend it as he will; if not, expenditure will be controlled by the Court of Protection.'

35. In relation to this first stage, as Mrs Justice Yip noted in *PAL v Davison, MacPherson & Colburn Ltd and Aviva Insurance Ltd* [2021] EWHC 1108 (QB) at §24:

> ‘This guidance and the reasons for it are readily understood. That does not mean that applying it to the facts of a particular case is always easy. A judge should not at the interim payment stage embark upon a mini-trial or seek to determine issues which are properly to be left to the trial judge. In a case in which there is relatively little dispute between the parties as to the need for accommodation and the likely cost, it may not be too difficult to make a conservative assessment of the capitalised accommodation costs and bring that into the calculation at the first stage. Where the accommodation issue is more controversial, this is far less straightforward and some attention will have to be given to the available evidence. Taking a conservative approach to the assessment does not necessarily mean adopting the defendant’s figures (see Eeles [34]). However, the court must be alert to the possibility that the defendant’s contentions will be accepted at trial and keep in mind the risk of allocating too much to the lump sum element so fettering the trial judge’s freedom to allocate damages as he or she thinks fit. As Smith LJ explained [32], if the judge makes too large an interim payment, that sum is lost for the purposes of founding a PPO because:
>
> > “It cannot be put back into the pot from which the trial judge will allocate the damages.”’.

36. At §26, Mrs Justice Yip went on to observe:

> ‘26. It seems to me that the starting point remains as stated by Smith LJ that strictly speaking the court looks at special damages “to date”. However, there will be many instances where it is entirely appropriate in making the conservative assessment at the first stage to bring in special damages which have not yet accrued but will do so before trial. I consider this a question of fact which inevitably depends on the context of the application. What is essential, is to keep in mind the clear principles which underpin the approach at stage 1 of *Eeles*. The court’s task is to estimate the likely amount of the lump sum element of the final judgment. The objective is not to keep the claimant out of his or her money but to avoid the risk of overpayment. The court must avoid fettering the trial judge’s freedom to make an appropriate PPO.’

37. At §37, considering the application of the principles in *Eeles* to an application for an interim order to pay for accommodation costs, Mrs Justice Yip stated:

> ‘As was made clear in *Eeles*, there may be good reasons to reject a defendant’s figures as too low. However, I must avoid usurping the role of the trial judge. The evidence is far from complete and has not been subject to testing through cross-examination. I cannot, at this stage, determine significant areas of contention between the parties. The defendants’ figures are based upon their

preliminary expert evidence. I should allow for the possibility that this will be preferred at trial. It follows that I do not consider that I can say that £2million is a reasonable proportion of a conservative assessment of the relevant heads of loss at stage 1. Sums which are required for other purposes cannot be put into this category. If used up now, then they cannot later be put back into the pot to fund important things like care and therapies.'

38. The second stage established in *Eeles* is set out at §45 of the judgment of Smith LJ as follows:

> 'We turn to the circumstances in which the judge will be entitled to include in his assessment of the likely amount of the final judgment additional elements of future loss. That can be done when the judge can confidently predict that the trial judge will wish to award a larger capital sum than that covered by general and special damages, interest and accommodation costs alone. We endorse the approach of Stanley Burnton J in the Braithwaite case [2008] LS Law Medical 261. Before taking such a course, the judge must be satisfied by evidence that there is a real need for the interim payment requested. For example, where the request is for money to buy a house, he must be satisfied that there is a real need for accommodation now (as opposed to after the trial) and that the amount of money requested is reasonable. He does not need to decide whether the particular house proposed is suitable; that is a matter for the Court of Protection. But the judge must not make an interim payment order without first deciding whether expenditure of approximately the amount he proposes to award is reasonably necessary. If the judge is satisfied of that, to a high degree of confidence, then he will be justified in predicting that the trial judge would take that course and he will be justified in assessing the likely amount of the final award at such a level as will permit the making of the necessary interim award.'

39. In *Salwin v Shaheed* [2022] EWHC 1440 (QB), HHJ Pearce addressed the "level playing field" argument considered by the Court of Appeal in *Campbell v Mychreest* [1999] PIQR Q17 at §§45-46 of his judgment, observing:

> '45. Mr Vincent QC reminded me of the "level playing field" argument considered by the Court of Appeal in Campbell v Mylchreest [1999] PIQR Q17. The full ambit of this principle and the interplay between it and the principle that it is a matter for the Claimant how damages are applied are by no means straightforward questions. Further, as Sir John Balcombe said in that case:
>
> > "It is accepted before us that the level playing field argument can never be an absolute bar to an interim payment. It might otherwise be possible for a defendant, by introducing one dissident voice, to hold up indefinitely an interim payment which the overwhelming

preponderance of medical evidence showed desirable for the benefit of the plaintiff."

46. However, it is clear from the judgments in the Court of Appeal in Campbell v Mylchreest that, where an interim payment is intended to be applied in a way that might tilt the playing field against the Defendant (or in the words of Sir John Balcombe, "somehow prejudice the interest of the defendant"), this is a factor which should be taken into account in determining whether an interim payment is made and if so in what amount.'

Damages for the cost of surrogacy arrangements

40. In *XX x Whittington Hospital NHS Trust* [2020] UKSC 14, the majority of the Supreme Court (Lady Hale, Kerr and Wilson LJJ) held that a claimant was entitled to recover damages to fund the cost of commercial surrogacy arrangements using donor eggs in a country where such arrangements are not unlawful. The factual background leading to the claim for damages bears considerable similarity to the current case. The claimant became infertile as a result of the defendant NHS trust's negligent delay in diagnosing her with cancer of the cervix. She brought an action for damages against the defendant claiming the cost of undergoing four pregnancies by surrogacy arrangements. In *XX*, the claimant intended to make the surrogacy arrangements either in California on a commercial basis or in the UK on a non-commercial basis, using her own eggs which had been harvested before she became infertile or, alternatively, donor egg.

41. The decision in *XX* overturned earlier Court of Appeal consideration of the issue in *Briody v St Helen's and Knowsley Area Health Authority* [2001] EWCA Civ 1010. In that case, the claimant sought damages against the defendant health authority whose negligence had deprived her of her uterus, in order that she could try to have two children through a surrogacy arrangement involving the use of the claimant's own eggs, fertilising them with her partner's sperm and implanting the resulting embryos in the womb of a surrogate mother in California. The expert evidence, however, showed that the chances of success were minimal, being less than 1%.

42. The Court of Appeal rejected the claim on a number of grounds. First, since the chance of successful outcome of a surrogacy using the claimant's own eggs was so small, it was unreasonable to expect the defendant to pay the expense of it. Secondly, although there was a higher chance of success using donor eggs, such a course would not be restorative of the claimant's position before she was injured, it would be seeking to make up for some of what she had lost by giving her something different since neither the pregnancy nor the child would be hers. Thirdly, a commercial surrogacy arrangement was clearly unlawful in the UK by virtue of s 2(1) of the

Surrogacy Arrangements Act 1985 and, therefore, it would be wrong to award damages to acquire a child by a method which did not comply with UK law.

43. In *XX*, the Supreme Court, Lady Hale (who gave the majority judgment) considered three separate issues raised in the appeal. The first was whether the claimant could recover damages to fund surrogacy arrangements using her own eggs. On this point, it was held that the *Briody* decision had not ruled out damages for own-egg surrogacy arrangements made in the UK; rather, it held that whether it was reasonable to seek to remedy the loss of a womb through surrogacy depended on the chances of a successful outcome. In the *XX* appeal, as in the current case, those chances were reasonable.

44. The second issue was whether the claimant could claim damages to fund a surrogacy using donor eggs. The Court disagreed with the approach in *Briody* that damages for donor-egg surrogacy arrangements could not be recovered as they were not restorative of what the claimant had lost. There had been dramatic developments in the law's idea of what constituted a family and damages to fund arrangements using donor eggs was the closest the court could get to putting the claimant in the position she would have been in had she not been injured. As long as the arrangement has reasonable prospects of success, damages for the reasonable costs of it could be awarded.

45. On the third issue, which was recognised as being the most difficult, the majority acknowledged that the UK courts would not enforce a foreign contract if it would be contrary to public policy. However, most items in the costs bill for a surrogacy in California could also be claimed if it occurred in this country. In addition, it was not against UK law for the claimant to do the acts prohibited by s 2(1) of the 1985 Act. Significantly, there were also important developments since *Briody*: (1) the courts had striven to recognise the relationships created by surrogacy; (2) government policy now supported it; (3) assisted reproduction had become widespread and socially acceptable; and (4) the Law Commission had proposed a surrogacy pathway which, if accepted, would enable the child to be recognised as the commissioning parents' child from birth. Awards of damages for foreign commercial surrogacy were, therefore, no longer contrary to public policy.

46. In reaching her conclusion on the third issue, Lady Hale observed as follows (§§49-53):

> '49 That leaves only the most difficult question: what about the costs of foreign commercial surrogacy? Surrogacy contracts are unenforceable here. It is well-established that the UK courts will not enforce a foreign contract which would be contrary to public policy in the UK…
>
> 50 In this case, we have the advantage of evidence about the comparative costs of UK and Californian surrogacy. One thing becomes clear. Many of the items in the Californian bill would also be claimable if the surrogacy took place

here. The costs of the fertility treatment and egg donation itself, although they are higher in the US than here, would be recoverable for a UK surrogacy. Then there is the cost of the payment to the surrogate mother herself, which is higher than the reasonable expenses thought acceptable here. But, as we have seen, it is not unlawful for commissioning parents to make such payments here. And whether made here or abroad they are likely to be retrospectively authorised by the court. Then there are the fees paid to the UK lawyers, which would also be recoverable here, if reasonable. They are very much higher for a US than for a UK surrogacy, presumably because there is so much more work to be done, but we must also presume that such work does not fall foul of the Surrogacy Arrangements Act 1985. That leaves the fees paid to the US lawyers and surrogacy agency, which would be unlawful here but are not in the US. To what extent should that taint all of the items in the bill?

…

52…The courts have bent over backwards to recognise the relationships created by surrogacy, including foreign commercial surrogacy. The government now supports surrogacy as a valid way of creating family relationships, although there are no plans to allow commercial surrogacy agencies to operate here. The use of assisted reproduction techniques is now widespread and socially acceptable. The A Law Commissions have provisionally proposed a new pathway for surrogacy which, if accepted, would enable the child to be recognised as the child of the commissioning parents from birth, thus bringing the law closer to the Californian model, but with greater safeguards. While the risks of exploitation and commodifiation are heightened in commercial surrogacy, they are not thought an insuperable ethical barrier to properly regulated arrangements.

53 For all those reasons, I conclude that it is no longer contrary to public policy to award damages for the costs of a foreign commercial surrogacy. However, that does not mean that such damages, still less damages such as are claimed in this case, will always be awarded. There are some important limiting factors. First, the proposed programme of treatments must be reasonable. There may be good reasons to think that, but for the negligence, the claimant would have had the number of children now proposed, but there may not. Second, it must be reasonable for the claimant to seek the foreign commercial arrangements proposed rather than to make arrangements within the UK. This is unlikely to be reasonable unless the foreign country has a well-established system in which the interests of all involved, the surrogate, the commissioning parents and any resulting child, are properly safeguarded. Unregulated systems where both surrogate and commissioning parents are at the mercy of unscrupulous agents and providers and children may be bought and sold should not be funded by awards of damages in the UK. This has not been explored in this case, but it should not be concluded that, even in California, all is always well (as the Report of the United Nations Special

Rapporteur shows). Third, the costs involved must be reasonable. This too has not been put in issue in this case, which has been argued as a matter of principle, but it should certainly not be taken for granted that a court would always sanction the sorts of sums of money which have been claimed here.'

47. I have set out §§49-53 of the decision in *XX* in some detail because of its significance to the application in this case.

The parties' submissions

48. The Claimant submits that the sum of £275,821.71 represents a reasonable proportion of the likely amount of the final judgment. In relation to the interim application, the Claimant further contends that having lost her natural fertility as a result of the admitted negligence of the Defendant at the age of almost 33, and in circumstances where trial may well be two years or more away, the Claimant would suffer unacceptable prejudice if she had to wait until trial of her matter in order to commence surrogacy.

49. It is further submitted that the Supreme Court's judgment in *XX* provides a clear route to be followed in the case and that the three conditions set out by Lady Hale in §53 of *XX* are met in this case.

50. First, it is submitted that the proposed programme of treatment is reasonable. There are good reasons to think that, but for the negligence, the Claimant would have had the number of children now proposed.

51. Second, it is submitted that it is reasonable for the Claimant to seek the foreign commercial arrangement proposed rather than to make arrangements within the UK. Here, it is submitted that the Court should have regard to the terms of §53 of *XX* when deciding whether this decision is reasonable, namely whether the foreign country has a well-established system in which the interests of all involved, the surrogate, the commissioning parents and any resulting child, are properly safeguarded. On behalf of the Claimant, it is submitted that her decision to seek a surrogacy arrangement in the USA is plainly reasonable, in light of the shorter timescales involved and the greater legal certainty available through that route.

52. Third, it is submitted that the costs involved are reasonable. Here the Claimant relies on the broad measure of agreement between the experts as to the likely range of figures involved in a surrogacy arrangement in the USA, demonstrating that the proposed figures are reasonable.

53. In relation to the principles established in *Eeles,* the Claimant submits that although the present case has not been fully quantified, it is unlikely that a periodical payment

order would be sought or awarded on these facts. At stage 1 of *Eeles*, it is submitted that surrogacy costs are likely to be awarded and are likely to be measured by reference to the costs of US surrogacy.

54. By way of a secondary position, if the Court is not minded to take the surrogacy costs into account at stage 1of *Eeles*, at stage 2 of *Eeles* it is submitted that there is a pressing need for the payment to be made now and that the expenditure is reasonably necessary.

55. Overall, on behalf of the Claimant it is submitted that the issues are sufficiently clear at this stage that the Court can have a high degree of confidence that a future trial judge would endorse an award predicated on the reasonableness of the Claimant's decision to seek a foreign commercial surrogacy arrangement.

56. The Defendant submits that any determination of this issue is premature and that an interim payment of the sum sought would pre-judge the central issue in any future trial, namely whether or not it is reasonable for the Claimant to seek a foreign commercial surrogacy arrangement.

57. The claim for foreign commercial surrogacy is disputed on a number of grounds, including reasonableness. The Defendant submits that this is an area of law that has not been fully tested and will need to be explored at a trial.

58. It is further submitted that it not possible to know the likely form of any award at this stage and whether or not a periodical payment order would be appropriate. It is noted that many of the future heads of loss in the preliminary schedule of loss are unparticularised, with no information in some categories.

59. Applying the principles set out on *XX*, it is submitted that there will be live trial issues between the parties as to whether the Claimant would have had children in any event; whether the Claimant will undertake the foreign surrogacy arrangement; the reasonableness of using a foreign surrogacy arrangement instead of pursuing a surrogacy arrangement in the UK; and the costs of the arrangement.

60. The Defendant submits that it will seek to challenge the Claimant's evidence as to the reasonableness of her choice to pursue surrogacy services in the USA; in particular as to why she has not made enquiries into surrogacy arrangements in the UK and whether she is fully informed as to the potential legal issues that may arise in relation to a foreign commercial arrangement. It also relies upon the extent of the disagreement between the experts and the likelihood of the need for further expert evidence on key topics.

Analysis

61. It is accepted by both parties that I should apply the well-established principles set out in *Eeles* as to the approach a judge should take when considering whether to award an interim payment in a personal injury claim.

62. It is also accepted by both parties that in order to reach a decision as to whether or not the interim payment sought represents a reasonable proportion of the likely amount of the final judgment pursuant to CPR 25.7(4), I must consider whether or not I can say with high degree of confidence that a future trial judge will conclude that it is reasonable for the Claimant to make a claim for a foreign commercial surrogacy arrangement. In short, there are no other damages sought which come close to the figure sought, which is predicated on one foreign surrogacy arrangement.

63. I must consider the principles set out by Lady Hale in §53 of *XX*. It appears to me that applying the principles in *Eeles* to the issues set out in §53, I must determine not just whether or not the Claimant appears to me to have satisfied the tripartite test set out in *XX* based on the evidence now available, but whether I can confidently predict the future determination of that three-stage test by the future trial judge when further evidence may be placed before the Court.

64. As noted in *Campbell v Mylchreest* [1999] PIQR Q17, 'the level playing field argument' can never be an absolute bar to an interim payment. It might otherwise be possible for a defendant, by introducing one dissident voice, to hold up indefinitely an interim payment which the overwhelming preponderance of medical evidence showed desirable for the benefit of the Claimant.

65. However, I am being asked to determine this application at an early stage in the proceedings. This has the inevitable consequence that the parties have not yet gathered all of the expert evidence that may yet be obtained in relation to the surrogacy issues. Equally, the precise details of the surrogacy arrangement that the Claimant will seek to undertake in the USA have not been identified, including the particular State where the arrangement will be pursued. At present, the Claimant has not made detailed enquiries in relation to the availability of surrogacy arrangements in the UK.

66. None of this should be taken to be a criticism of the Claimant. Her overwhelming desire to have children by way of surrogacy as quickly as possible is entirely understandable. However, it is inevitable that the stage of the proceedings has an impact on my ability to reach a confident conclusion about the likely future determination of this matter by a trial judge.

67. I must avoid usurping the role of the future trial judge. There are significant areas of dispute between the parties. I accept the Claimant's submissions that there are many areas of agreement as between the experts and also that the Claimant has considered these matters with great care in arriving at a reasonable decision that she should seek

a foreign commercial surrogacy arrangement. However, the evidence is far from complete and I consider that a future trial judge will have the benefit of considering, amongst other matters: a fully particularised schedule of loss which will allow a clear determination as to the appropriateness or otherwise of making a periodical payment order; further details of the Claimant's proposed surrogacy arrangements including the costs; and further evidence as to the competing merits of the UK and USA systems in terms of legal certainty.

68. I consider that all of the above matters may have an impact on a future trial judge's determination of the tripartite test in §53 of *XX*. I further note that there is disagreement between the parties as to how the Court should approach the tripartite test. For example, there is a dispute as to whether the very considerable disparity in the costs of a UK surrogacy arrangement as opposed to a foreign commercial surrogacy arrangement in the USA is a feature that the Court should take into account when determining whether it is reasonable for a Claimant to have selected the USA route.

Conclusion and disposal

69. It follows from the above that I decline to make the order for an interim payment sought under CPR 25.7.

70. Whilst I note the considerable force in the submissions advanced on behalf of the Claimant as to the reasonableness of her decision to seek a foreign surrogacy arrangement at this time, it is not possible for me to determine at this stage that I have a high degree of confidence as to the likely approach of a future trial judge on that topic, which will determine the likely amount of the final judgment.