Case No: HQ13X03521

Neutral Citation Number: [2015] EWHC 3644 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2015

Before :

Mrs Justice Whipple

- -

Between :

AC (a minor suing by his litigation friend MC)	**Claimant**
- and -	
St. Georges Healthcare NHS Trust	**Defendant**

- -
- -

Simeon Maskrey QC and Deidre Goodwin (instructed by **Express Solicitors**) for the **Claimant**
Martin Spencer QC (instructed by **Bevan Brittan LLP**) for the **Defendant**

Hearing dates: 9 December 2015

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Judgment

Mrs Justice Whipple:

Introduction

1. This is an application for an interim payment in a clinical negligence case. It is brought under CPR 25.7(4).

2. The background to the application is this: AC sues by his father and litigation friend for damages for injuries sustained at birth on 21 April 2008, as a result of negligence by the treating doctors and midwives at St George's Healthcare NHS Trust. Liability has been admitted, judgment has been entered, and the matter will proceed to an assessment of damages. The Claimant is now only 7. It is too early for a final prognosis to be given, or for the claim to be quantified. The Claimant seeks damages on account, by way of interim payment, to fund expenses in the period between now and trial.

3. Before dealing with the Claimant's application for interim payment, I address the Claimant's application for an anonymity order. The relevant legal principles have recently been set out by the Court of Appeal in *JXMX v Dartford and Gravesham NHS Trust* [2015] 1 WLR 364. This is an appropriate case in which to make such an order, given the Claimant's age, his right to privacy, the fact that the details of his personal life, medical treatment and prognosis are at the centre of this litigation, and the fact that he stands to be awarded substantial damages in compensation. I make the anonymity order and the Claimant will be referred to as AC, and his litigation friend will be referred to as MC.

4. The Claimant applies for an interim payment in the amount of £1,203,300. The main reason for seeking such a payment is to enable the Claimant and his family to be re-housed in suitable accommodation. They live in south west London, where the cost of housing is high, so the capital amount sought to fund the purchase is substantial. They also wish to purchase care and psychological support to facilitate a programme of behavioural management to address aspects of the Claimant's behaviour, in advance of trial.

5. The date for trial is likely to be some time in 2018. The parties have slightly different views as to whether trial should take place at the beginning of 2018 (Defendant) or the spring of 2018 (Claimant), but the difference is not substantial and for present purposes I assume trial will be roughly 2.5 years from now.

Legal Principles

6. The relevant principles to guide the award of interim payments in damages claims such as this are set out in *Eeles v Cobham Hire Services Ltd* [2010] 1 WLR 409. I am satisfied that this is a case where the trial judge is likely to wish to make a periodical payments order in relation to some heads of future loss. The Claimant has a long life expectancy and will have care needs throughout his life. I anticipate that future care and case management, at least, will be met by a PPO when damages are assessed. The trial judge may choose to subject other future heads of loss to PPOs also. Accordingly, the guidance in *Eeles* applies.

7. Popplewell J provided a useful summary of the principles in *Smith v Bailey* [2014] EWHC 2569 (QB) at paragraph 19:

> "19. It is convenient to set out the principles which I take to be established by Eeles and the previous authorities which it sought to summarise:
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> (1) CPR r. 25.7(4) places a cap on the maximum amount which it is open to the Court to order by way of interim payment, being no more than a reasonable proportion of the likely amount of the final judgment (at [30]).
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> (2) In determining the likely amount of the final judgment, the Court should make its assessment on a conservative basis; having done so, the reasonable proportion awarded may be a high proportion of that figure (at [37], [43]).
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> (3) This reflects the objective of an award of an interim payment, which is to ensure that the claimant is not kept out of money to which he is entitled, whilst avoiding any risk of an overpayment (at [43]).
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> (4) The likely amount of a final judgment is that which will be awarded as a capital sum, not the capitalised value of a periodical payment order ("PPO") (at [31]).
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> (5) The Court must be careful not to fetter the discretion of the trial judge to deal with future losses by way of periodical payments rather than a capital award (at [32]).
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> (6) The Court must also be careful not to establish a status quo in the claimant's way of life which might have the effect of inhibiting the trial judge's freedom of decision, a danger described in Campbell v Mylchreest as creating "an unlevel playing field" (at [4], [39]).
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> (7) Accordingly the first stage is to make the assessment in relation to heads of loss which the trial judge is bound to award as a capital sum (at [36], [43]), leaving out of account heads of future loss which the trial judge might wish to deal with by a PPO. These are, strictly speaking (at [43]):
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> (a) general damages for pain, suffering and loss of amenity;
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> (b) past losses (taken at the predicted date of the trial rather than the interim payment hearing);
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> (c) interest on these sums.

> (8) For this part of the process the Court need not normally have regard 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 (at [44]). Nevertheless if the use to which the interim payment is to be put would or might have the effect of inhibiting the trial judge's freedom of decision by creating an unlevel playing field, that remains a relevant consideration (at [4]). It is not, however, a conclusive consideration: it is a factor in the discretion, and may be outweighed by the consideration that the Claimant is free to spend his damages awarded at trial as he wishes, and the amount here being considered is simply payment at the earliest reasonable opportunity of damages to which the Claimant is entitled: Campbell v Mylchreest [1999] P.I.Q.R. Q17 .
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> (9) The Court may in addition include elements of future loss in its assessment of the likely amount of the final judgment if but only if (a) it has a high degree of confidence that the trial judge will award them by way of a capital sum, and (b) there is a real need for the interim payment requested in advance of trial (para 38, 45).
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> (10) Accommodation costs are "usually" to be included within the assessment at stage one because it is "very common indeed" for accommodation costs to be awarded as a lump sum, even including those elements which relate to future running costs (at [36], [43])."

8. The first stage referred to, encapsulating paragraphs (1) to (8) above, is *"Eeles 1"*. Paragraphs (9) and (10) reflect the second stage, or "*Eeles 2"*.

Claimant's Condition and Prognosis

9. The Claimant's injuries and resulting problems are conveniently summarised in the report of Dr Rosenbloom, paediatric neurologist instructed by the Defendant, dated October 2015. I do not understand Dr Rosenbloom's report to be disputed, at least in its generality, although there may be points of detail in issue (if there are, they are not important for this application and can be resolved at trial).

10. Dr Rosenbloom examined the Claimant on April 2013 and August 2015. He describes the Claimant as suffering bilateral cerebral palsy with evidence of extrapyramidal motor dysfunction (the extrapyramidal motor system is concerned with stabilising posture and facilitating and smoothing voluntary movement). Dr Rosenbloom identifies deficits suffered by the Claimant in gross motor function, fine motor function, oromotor function, social cognitive and communication abilities, and personal care abilities. The Claimant also has an interrupted sleep pattern and behaviour problems. He has significant developmental problems and cognitive deficit. He has a statement of special educational needs and attends a special needs school in south London.

11. As to the future, Dr Rosenbloom says the Claimant will be able to walk independently throughout life, but will not be freely mobile. He will require a wheelchair for outside use, but will not be capable of using a powered wheelchair unless fully supervised given his cognitive deficit.

12. At this point I note that the Claimant, despite having some motor problems, is not so badly injured as some claimants in other reported cases, whose mobility has been significantly impaired, and who in consequence require extensive adaptation of their accommodation by installation of hoists and wheelchair access, and so on. (See, as an example, *Aiden Oxborrow v West Suffolk Hospitals NHS Trust* [2012] EWHC 1010 (QB); but contrast *Eeles*, where the Claimant had problems which in many respects were similar to this Claimant's.) This is a point made by the Defendant, in resisting this application, and I shall return to it.

13. According to Dr Rosenbloom, there is no prospect that the Claimant will ever have capacity, or be able to live independently. He will be incapable of paid work. He will be unable to marry or have any similar social relationship, or become a parent. He will always require care, including care at night time (although it is hoped that the night time care would be on a sleeping rather than waking basis).

14. As to accommodation, Dr Rosenbloom said that he will be: *"vulnerable to falling and will never be wholly safe on stairs."* He went on to say:

> "Because he will never be wholly steady on stairs especially if unsupervised he will be best suited to the provision of single storey accommodation although this will not be mandatory. [His] accommodation will require appropriately modified bathing and toileting facilities. As indicated, it will be helpful if he had a safe play space and optimally this would include outdoor play. In adult life, room for his care regime will be needed. [His] accommodation will not need facilities for moving him using hoisting nor will facilities for indoor wheelchair use be required."

15. Dr Rosenbloom thought that the Claimant had a long (although compromised) life expectancy, to around age 77, another 70 years.

Eeles 1

<u>General and Special Damages</u>

16. The first step in the analysis is to assess the likely amount of the final judgment, addressing the heads identified by the Court in *Eeles.*

17. First, on the basis of what Dr Rosenbloom says, I have considered general damages. The Claimant suggests these should be valued at £225,000 plus interest. The Defendant (by Penelope Radcliffe, solicitor, in her witness statement dated 3 December 2015) suggests £175,000. Given the extent of the Claimant's

difficulties, and the fact that he has a long life expectancy, I consider that a conservative estimate of general damages would be £200,000 including interest.

18. Secondly, I have considered the claimed figures for special damages to the date of trial with interest. Within this there are two component parts:

    i) For the period to date, the Claimant claims £100,000 on account of gratuitous care, which is based on a care expert's report, with substantial rounding down. The Defendant suggests £50,000 is more reasonable under this head, but has not produced any evidence to support that view. The Claimant is now 7 years old and his parents have had no employed help in caring for him to date. He requires day time and night time care, in considerable volumes. His father has reduced his working hours to cope with the Claimant's needs. I consider the Claimant's estimate to be realistic and to represent a conservative estimate of past care costs on a gratuitous basis. I adopt the Claimant's figure of £100,000.

    ii) For the period from now to trial, there will be further gratuitous care costs, paid care costs, and the costs of psychological assistance, to enable the behavioural management programme to be implemented. These are put at £100,000 by the Claimant and £50,000 by the Defendant. Experts for both parties support the behavioural management programme. Again, on a conservative basis, I consider the Claimant's figures to be preferable. The Defendant's figures are not supported by any evidence (beyond that of Ms Radcliffe). I conclude that the Claimant's figures are closer to the mark (and reject the Defendant's figures as too low, as I am entitled to do: see *Eeles* para 35).

Accommodation Claim

19. Thirdly, I have considered the claimed accommodation costs. This is where the real dispute arises on this application. The Claimant seeks funds to purchase a house to accommodate the Claimant and his family (his parents and two brothers). The Defendant objects and contends that the Claimant and family should rent a more suitable property until trial, at which point the trial judge can decide the appropriate model for the Claimant's future accommodation.

20. The Claimant relies (in particular) on the report of its accommodation expert, Steven Docker, dated September 2014, together with various other expert reports which support the draft Schedule dated April 2015. The Defendant complains that the Claimant has instructed a large number of experts and fully worked up quantum at a time when the case was stayed, and the Defendant has not had the permission or the time to prepare a full response to the Claimant's experts or Schedule. It is regrettable that the parties' state of readiness is so different. But so far as this application goes, the issue for the experts is a narrow one, going to the Claimant's reasonable accommodation needs, with a particular focus on those needs in the near to medium term. With respect to that issue, the Defendant relies on a letter from David Cowan, accommodation expert, dated 2 December 2015, supported by the report from Dr Rosenbloom (see above) and a short letter dated 26 November 2015 from Dr Hood, educational psychologist, who has not yet been able to examine the Claimant. The accommodation issue is one on which Dr

Rosenbloom and Mr Cowan (in particular) can speak. I do not therefore consider the Defendant to have been under any real disadvantage in answering this application. I also note that the Defendant was alerted to this application in April 2015, now 8 months ago, being sent at that stage a copy of Mr Docker's report, and so has had a reasonable amount of time to put in hand its own investigation of the accommodation issues.

21. Before considering the disputed aspects of the accommodation claim, I should set out what is common ground. It is not disputed that the Claimant's current accommodation (a two bedroom upstairs flat which he shares with his parents and two brothers) is unsuitable for him on account of his disabilities and that the Claimant and his family must move. It is not disputed that the Claimant will continue to live with his family for the foreseeable future and that the family must therefore be re-housed as a unit. It is not disputed that the prospective accommodation needs to provide the Claimant with his own bedroom and separate therapy room, and further rooms for his siblings and his parents. (It is not clear to me whether the Defendant by Mr Cowan agrees that there needs to be a room for a paid carer in addition, which would bring the total to five; or concludes that the family can manage on four bedrooms or less – if the latter, the view is not explained and I prefer the reasoned evidence of Mr Docker on this point, at least on paper.) It is not disputed that the Claimant must have access to a bathroom adapted to enable bathing and toileting with his disabilities.

22. Other aspects are not agreed. The Claimant says that the Claimant must have single storey housing, with access to a garden as well as an internal play area, and wheelchair access from the outside. The Defendant challenges these points, relying on Dr Rosenbloom's suggestion that single storey is not "mandatory", and nor is an outdoor play area, and nor is wheelchair access from the outside. The Defendant says a large flat might do, or a two storey house with stair gates installed (as for small children). But on a fair reading of Dr Rosenbloom's report, these points of challenge seem to me to be unsustainable. Dr Rosenbloom positively recommends single storey accommodation with an outdoor play area, and says the Claimant will use a wheelchair out of doors, so must envisage the Claimant having wheelchair access from the outside. I conclude that it is reasonable for the Claimant, by his representatives, to assert a claim for single storey accommodation with garden access and wheelchair access from the outside, and to value the Claimant's claim for *Eeles* purposes on that basis.

23. Mr Cowan suggests that the Claimant should rent a property up until trial, allowing the trial judge to take a view, on the basis of full evidence, about what is required for the future. There are, in my judgment, a number of problems with that recommendation. First, and notably, Mr Cowan could not in fact find a suitable rental property to fit this brief. He has found two three-bedroom flats, but he acknowledges that a fourth bedroom may well be required. He says that he has been <u>unable</u> to find any four bedroom flats in the large area examined (Streatham and Tooting/West Norwood) which are on one level. Because he could not meet the "single storey" brief, he revisited the possibility of a two-storey property with stair gates. He has found a four bedroom maisonette and a four bedroom house with stairs, which he says might work. The Claimant is entitled to reject these suggestions, which do not reasonably meet his needs. There is no evidence to

suggest that there are, in reality, any rental properties available which would meet the Claimant's needs. This is a show-stopper, in my judgment. If the Defendant cannot point to any reasonably suitable properties which are available for the Claimant to rent, then the suggestion that he should rent for the meanwhile, and that his damages should be calculated on that basis, cannot be accepted.

24. Secondly, and assuming (contrary to the evidence before me) that there was a suitable property available for the Claimant to rent, there would in any event remain a risk that the tenancy would be terminated before trial, and the family would be left looking again for a suitable rental property before trial. At that point, as now, their choices on the rental market would be very limited (as Mr Cowan's report makes strikingly clear). The problem of lack of security of tenure for rental properties was recognised in *Oxborrow* (paragraph 12). It is no answer to argue (as Mr Spencer does for the Defendant) that this family would have been vulnerable to the uncertainties of the private rental market in any event: whatever difficulties this family might have faced in any event, they now have particular and additional difficulties in finding suitable rental property as a result of the Claimant's disabilities. Renting is not, in my judgement, a satisfactory answer to the Claimant's immediate housing needs, and does not provide a reasonable valuation model for the future accommodation costs for the purposes of the *Eeles* analysis.

25. Thirdly, and in any event, there is no precedent to support the case for renting as an alternative to purchase of accommodation for severely injured claimants. The Court in *Smith* recognised that in no reported case to date has any Claimant been required to rent rather than buy (paragraphs 26-7, noting the last paragraph of *Oxborrow* where *Ryan St George v the Home Office* [2008] EWCA Civ 1068 is mentioned, that being a case in which a PPO to cover rental payments was, it appears, agreed). In *Smith*, as in *Oxborrow*, the Court calculated the accommodation claim on a *Roberts v Johnstone* basis ([1989] QB 878), with a view to facilitating the purchase of a suitable property.

26. Fourthly, Mr Cowan suggests that the Claimant's accommodation needs fall into two phases, before and after trial. That phasing is not explained. I do not understand it. It is clear from Dr Rosenbloom's report (and all the other information before me) that the Claimant's accommodation needs will not change significantly between now and trial. Although he may have had some behavioural intervention by trial (when he will be about 10 years old), so that his behaviours may be more manageable and his sleep and bowel habits better controlled, he will still (reasonably) need his own room and his therapy room (Mr Spencer did not argue to the contrary), his mobility will still be impaired and so he will still need single storey accommodation, with wheelchair access from the outside, and an adapted bathroom.

27. I do accept that the Claimant's accommodation needs in the longer term are not yet clear, and there may come a stage when he seeks greater independence, perhaps in his mid-20s, when his accommodation needs may change. That will depend on what sort of care package is to be put in place for adulthood (it is already clear he will need paid care, of some sort, both day and night, but how many carers and on what sort of shift pattern remains to be determined), and whether his parents still choose to live with him. At some point the Claimant's

siblings can be expected to leave the family home. Mr Maskrey says that the space freed up in this way can be used to accommodate carers. That may be so. These longer term uncertainties have been met, as best they can be at this stage, by the way the Claimant puts this application, reducing it in various ways to arrive at a conservative estimate for the long term. First, the Claimant does not at present pursue the adaptation costs associated with the proposed carers' annexe; the adaptation costs pursued are only the minimum to make the house habitable for the Claimant in the short term. Secondly, the Claimant gives credit for accommodation costs which he would have incurred in any event, from around the age of 25, leaving a balance which can be attributed to the additional cost of the Claimant's injuries.

28. The Defendant suggests that the Claimant will or might be cared for in some sort of institutional setting in adulthood. This suggestion is not supported by any evidence. And it is not what the Claimant's family reasonably want for him, and it is not how the claim is put. Although the Defendant is at liberty to put forward whatever case it thinks appropriate at trial, I have to take a realistic view of the way this case would fall to be quantified now, and specifically, how the accommodation head of future loss would be valued. I cannot (and do not) take any account of the proposal that the Claimant should live in long-term institutional care, for the reasons given.

29. I therefore quantify the Claimant's accommodation claim on the standard *Roberts v Johnstone* basis, on the footing that the Claimant needs a house which he can live in with his family for the foreseeable future, and stay in for the rest of his life.

30. As to the component parts of the calculation: Mr Docker notes that there may be a wide range of possible properties for the family to consider, starting at £800,000. He postulates a purchase price of £975,000. That gives an annual multiplicand of £24,375 (only very slightly more than the annual rental figures suggested by Mr Cowan for the smaller properties he has considered in his letter). The Claimant applies a multiplier of 32 (reflecting Dr Rosenbloom's life expectancy figures, rounded down), and offsets the accommodation costs which the Claimant would have incurred from (roughly) age 25 for life in any event. This gives a *Roberts v Johnstone* figure of £600,000.

31. There is no opposing evidence on the purchase price before me. Mr Cowan does not suggest that £975,000 is excessive for the area. I therefore conclude that this is a reasonable price to claim.

32. Mr Spencer argues that the Claimant's parents should give credit for rent on the property they privately rent at present. But authority is against the Defendant on that argument: see *Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066 (QB), and *Iqbal v Whipps Cross* [2007] LS Medical 97. Those cases suggest that it is not just to deprive parents of the benefit of living rent free having regard to the uncompensated effects of the Defendant's negligence on them (see *Whiten* at para 469); I do not deduct anything for the family's accommodation costs "in any event", because I doubt the trial judge would do so.

33. Relocation costs must be added. These are quantified at £48,000 (including stamp duty at £40,000, plus removal and survey fees), and increased running costs over

the Claimant's life time of £4,500 pa to give £144,000. Again, Mr Cowan does not dispute these.

34. The Claimant claims £145,000 for adaptation costs. This is based on Mr Docker's estimated figures. It includes basic adaptation works costing £96,305 together with fees and VAT of £29,346. It also includes the outside play area costing £20,010. It excludes the cost of a multi-function room, annexe for care workers, and the storeroom. I have no evidence to counter these claimed costs, from Mr Cowan or any other expert. I conclude that these costs are broadly reasonable. Specifically, I accept that it is reasonable to undertake some internal work to flatten floor surfaces, remove internal partitions and make the house wheelchair accessible from the outside, given the Claimant's unsteadiness on his feet, which is a significant problem for him consequent on his brain injury.

35. Accordingly I accept for present purposes the Claimant's valuation of additional costs at a total of £337,000.

Total Valuation for Eeles 1

36. The Claimant's total (conservative) valuation of this claim under *Eeles 1*, which valuation I accept for present purposes, is therefore

PSLA	£200,000
Special damages to date	£100,000
Projected special damages to trial	£100,000
Roberts v Johnston	£600,000
Other accommodation costs	£337,000
Total:	£1,337,000

37. Under *Eeles 1,* I am entitled to award a "high" proportion of that figure. 90% has been applied in some other cases: see *Glasgow v Hillingdon Hospitals NHS Foundation Trust* [2014] (unreported), and *TTT v Kingston Hospital NHS Trust* [2011] EWHC 3917 (QB). 90% of the above total is £1,203,300 as claimed. I award that figure by way of interim damages, as claimed.

38. I make three further comments. First, under *Eeles 1,* I do not need to concern myself with how the money will be spent. Whether any particular property is suitable and a reasonable use of the Claimant's damages is for the Claimant's deputy, not for me, to determine. The deputy will plainly wish to be sure that any property which is purchased is reasonable for the Claimant, and does not provide him (or his family) with more accommodation than is needed. I note that the

Claimant's plan would be to purchase a property and carry out the minimum necessary adaptations now; and to use the rest of the money to fund care and behavioural management in the period before trial.

39. Secondly, I do not believe that ordering payment of this sum by way of interim damages will fetter the trial judge's discretion, or create an unlevel playing field which would be to the Defendant's disadvantage at trial. But even if there is a risk of prejudging the accommodation issue by this award, I remind myself that this is merely one factor to be weighed in the balance (see *Smith*, point (8) above). The Claimant's entitlement to damages, and his obvious need to be re-housed in advance of trial, tip the balance firmly in the Claimant's favour.

40. Thirdly, the Defendant can, if so advised, challenge these figures and indeed any property purchase which has by then taken place at trial, by expert evidence, as excessive or unreasonable. It is open to the trial judge to make whatever findings are appropriate on the evidence presented at that stage.

Eeles 2

41. Even if there had been insufficient losses established to cover the payment under *Eeles 1*, I would have allowed this application under *Eeles 2* in any event. So far as accommodation is concerned, I do not consider, for reasons already given, that the rental option is reasonable or practical for this Claimant or his family. There is only one option which will reasonably safeguard the Claimant's accommodation needs now, and that is for him to purchase his own home using the damages to which he is entitled. Given the likelihood that any shortfall under *Eeles 1* would be modest and given that the Claimant's claim, once fully valued, is likely to be substantial, I have no real doubt that any trial judge faced with this conundrum would simply capitalise another head of future loss to supplement the capital fund, in order to meet the reasonable cost of buying a suitable house and funding other short term costs. The obvious candidate would be damages for future loss of earnings.

42. Applying *Eeles 2*, I can be confident that the trial judge would capitalise another head of future loss to make up any shortfall, if there was one, and I am satisfied that the interim payment is required now, well in advance of trial (recalling the twin criteria to which I am to have regard under *Eeles 2*, see *Smith*, point (9) above). Accordingly, this application would be granted under *Eeles 2*, had there been insufficient capital available under *Eeles 1*.

Conclusion

43. I allow this application for interim payment in the amount sought of £1,203,300.