

Case No: 04/TLQJ/1355

Neutral Citation Number: [2005] EWHC 3383 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 20th December, 2005

BEFORE:

SIR MICHAEL TURNER

BETWEEN:

BEGUM

Claimant

-v-

BARNET & CHASE FARM HOSPITAL NHS TRUST

Defendant

MR A WHITFIELD QC and MR A YOUNG (instructed by Irwin Mitchell) appeared
on behalf of the Claimant.

MR S READHEAD (instructed by Capsticks) appeared on behalf of the Defendant.

A P P R O V E D J U D G M E N T

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J U D G M E N T

SIR MICHAEL TURNER:

Introduction

1. On 4th November 2005 I approved the elements involved in the settlement of the claim. These were made up as to £1.1 million by way of capital payment and periodical payments starting at £80,000 per year rising over time to £116,000. As the title to the action suggests, the Defendant is a National Health Service Trust.

The issue

2. By section 2 of the Damages Act 1996 (as amended) the court has now the power to order the payment of damages by a defendant “wholly or partly in the form of periodical payments” – section 2(1)(a). However, the court is not so empowered “unless satisfied that the continuity of payments is reasonably secure” – section 2(3). It is also declared by subsection (4) that “for the purposes of subsection (3) the continuity of payments is reasonably secure if (a) it is protected by a guarantee given under section 6 of or the Schedule to this Act”, (b) is of no consequence to the present matter, (c): “the source of the payment is a Government or Health Service body.” The question for determination is whether the Defendant, who may apply for foundation status in the foreseeable future, can satisfy the provisions of subsection (4) in those circumstances and or alternatively whether the subsection necessarily comes into play at all. It will be logical to consider the second question first, since it raises a general issue as to the proper interpretation of subsection (3).
3. Given the cautious line which the Claimant was taking in regard to the proposed order, a ruling was sought which would not only satisfy the Claimant personally but might also obtain an order or ruling that would be of assistance to others in this developing field of jurisprudence. The immediately striking feature of subsection (3) is that what has to be satisfied, before the court can make an order for periodical payments, is that such payments are to be “reasonably secure”. The point seems almost too obvious to need making, but the requirement is not for “security” but “reasonable security”, which is clearly a lesser requirement. The other point which immediately presents itself is that subsection (4) is a deeming provision, which means that any body which is able to satisfy its provisions need go no further. This makes it unnecessary to carry out any investigation into the actual level of security.

The Claimant’s anxieties

4. It was submitted that there were two schemes which enabled NHS trusts to make periodical payments which met the requirements of the Act of 1996. Under the first, if the incident which gave rise to the claim was heard before 1st April 1995 payments would be made pursuant to the Existing Liability Scheme (ELS – see later). If the incident occurred subsequently, payments are made pursuant to the Clinical Negligence Scheme for Trusts (CNST). The problem may be that if a trust other than a foundation trust were to cease to exist, the Secretary of State must transfer the liabilities of the trust to some other body so that all its liabilities are dealt with – see National Health Service

(Residual Liabilities) Act 1996. However, a trust which has foundation status does not cease to exist – see Health and Social Care (Community Health and Standards) Act 2003. As a result, claimants may not be protected. Although the Secretary of State can dissolve a foundation trust without having to transfer its liabilities and as the independent regulator of foundation trusts has power to order a moratorium or a voluntary arrangement, it was submitted that claimants could be vulnerable if they took part of their damages as periodical payments, which were not annuitised nor subject to a guarantee of the Secretary of State.

5. The ELS Scheme was set up under the provisions of the National Health Service (Existing Liabilities Scheme) Regulations 1996, as amended. On the face of the regulation, the liability in the present case is one which would be within the scheme, since it is a qualifying liability in respect of which the Secretary of State may pay to the relevant body an amount determined by him, including an award of damages. The point which was made was that there was no absolute obligation on an eligible body to join the scheme, any more than there was obligation on the Secretary of State to make a relevant payment into it. The argument was that, when a trust was a foundation trust, there are actual problems of security for the purposes of the subsection. If a trust is not already a foundation trust, then the problems in regard to the security of periodical payments is potential rather than actual, but nevertheless still exists.
6. Finally, it was suggested that the position could not be saved by virtue of the provisions in section 2(7) of the Act of 1996, in that, if the original order had been made under the ELS Scheme, and the NHS trust were to gain foundation status, as may be the case here, the new body (the foundation trust) could not be said to be a Government or Health Service body for the purposes of section 2(4)(c) of the Damages Act 1996 – see section 2(a)(ii) of the same Act and the Damages (Government and Health Service Bodies) Order 2005.
7. Furthermore, section 2(7) of the Act of 1996 would have no application, since what was envisaged in the present context would not lead to “an alteration of the method by which the payments are made”.

The Defendant’s position

8. In short, the Defendant’s position was that the source of the payment of the proposed periodical payments was a Government body in the form of the Secretary of State, so that exceptions (2), (3) and (4) of the 1996 Act were satisfied. The bodies eligible to participate in an ELS include a NHS trust (such as the Defendant here). By Schedule 1 of the Health and Social Care (Community Health and Standards) Act 2003 (Supplementary and Consequential Provision) (NHS Foundation Trusts) Order 2004 (“the 2004 Order”) paragraph 21, a NHS foundation trust is declared to be included in the ELS Scheme. There are no circumstances which can be envisaged in which a NHS body would decide to leave the ELS. There are financial advantages and no disadvantages in being and remaining in the ELS Scheme. Being a member of the ELS, the Defendant will look to the Secretary of State to fund payments.

9. Perhaps the strongest point which the Claimant made was that the obligation on the Secretary of State to make payments into the ELS Scheme was permissive, “may” rather than mandatory, and that there was no guarantee that the Secretary of State would continue to fund to the required extent. The fact is, however, that since the scheme was set up, the Secretary of State has made the requisite payments into it so as to enable it to discharge its liabilities. Moreover, as section 2(4) of the Act of 1996 provides, where the origin of payments is the Government or a Health Service body, those payments are “reasonably secure”.
10. The matter is taken further by provisions of the Damages (Government and Health Service Bodies) Order 2005, under which the Department of Health is included as a Government body for the purposes of the Act. Even if the Secretary of State were not to make payments, which were within his power to make to an ELS, that failure would attract an undoubted challenge by way of judicial review, to which it was submitted there would be no obvious answer. On the assumption that the liability of the Defendants was one which was a qualifying liability which should be met by the ELS, if the Defendants had breached any of the terms of the scheme the Secretary of State would have no power to make payments to the ELS. The Defendant submitted that there was no evidence that they failed to comply with any of the relevant conditions. Indeed, the evidence was to the contrary effect.
11. The Claimant’s anxiety about the position of the Defendant, if it was to apply for and obtain foundation status, was groundless. It was expressed that if the Secretary of State were to dissolve the trust by virtue of sections 25(5) and 26(1) of the Act of 2003, there is no obligation on the Secretary of State to transfer the liabilities of the trust so as to ensure that they are dealt with. What this anxiety overlooks is the fact that when a NHS trust becomes a foundation trust, it nevertheless retains its membership of the ELS, so that the qualifying liability continues to fall under the ELS, as above. As the Secretary of State has power to transfer any liabilities of a trust which has been dissolved to another foundation trust, failure to make appropriate provision for the transfer of any liability under the Damages Act would, it was submitted, be equally likely to be the subject of a successful challenge by way of judicial review.

Discussion

12. What is at stake at this stage of the proceedings is the possibility that the continuation of periodical payments might be at risk for any one of a number of different eventualities. Any one of those eventualities might, according to the Claimant, result in the stream of payments failing at some stage in the future. Just as a general approach, given that the Government has introduced a raft of measures plainly intending that such a thing should not happen, it would be surprising if the Claimant’s anxieties proved to be well founded, either in fact or in law. For the reasons which follow, I am satisfied that the periodical payments, which both parties desire to form part of the settlement, will be “reasonably secure”.
13. The starting point for the exercise has to be section 2(4)(c) of the Act of 1996. If the court is satisfied that the source of the periodical payments is either

Government or a Health Service body, there is an end of the matter. As a matter of general expectation, it would be a surprising thing if a NHS hospital trust were neither of these things. It is beyond question that the liability which arises in the present case falls within an established liability scheme. The National Health Service (Existing Liabilities Scheme) 1996 provides that an eligible body and a qualifying liability mean what is set out in Regulations 3 and 4 respectively. Regulation 4 states that:

“...any liability in tort...in respect of or consequent upon personal injury...arising out of...any breach before 1st April 1995 of a duty of care...”

14. Under the provisions of the 2004 Order a NHS foundation trust was included as one of the bodies of a NHS foundation trust – see paragraph 3(2). Subject, therefore, to what should happen in the event that the Defendant, upon conversion to foundation trust status, might be subject to dissolution, it is demonstrable that the periodical payments would be “reasonably secure”. There is no factual basis for the tentative assertion that the Defendant has in any way failed to comply with the conditions of the ELS Scheme, nor yet is there any sensible reason to suppose that the Secretary of State might fail to exercise his powers to make the relevant payments so as to enable the periodical payments ordered in this case to be made, or that, even if he did, he could not be compelled to do so.

Dissolution

15. Section 1 of the National Health Service (Residual Liabilities) Act 1996 requires the Secretary of State to exercise his statutory powers to transfer rights to the liabilities in such a manner that “all...its liabilities are dealt with”. It is strictly accurate to submit that the Act makes no provision for what is to happen to these rights and liabilities if a foundation trust (a species of body not foreseen at the date of this Act) were to be dissolved. If this were the end of the matter, there would be good grounds for anxiety over the continuation of periodical payments if they were to be ordered as part of the implementation of the settlement. It is, however, important to note that a foundation trust automatically retains membership of the ELS of which its forerunner was also a member. To the extent that the Secretary of State makes payments for qualifying liabilities, such payments do not simply rank as unsecured payments but are made to meet specific or crystallised liabilities. It is also to be noted that an order for the dissolution of a trust under the provisions of section 25 of the Act of 2003 “may transfer or provide for the transfer of any...liabilities of a foundation trust to (a) another foundation trust, (b) a primary care trust, (c) a NHS trust, (d) the Secretary of State – see subsection 3. If the Secretary of State were not to exercise any of these powers which, if exercised, would have the effect of preserving the source of the periodical payments in this case, his decision would plainly be the subject of a successful challenge by way of judicial review.

Conclusion

16. In light of the above, I entertain no doubt that an order for periodical payments would in this case be reasonably secure and can therefore approve the

settlement of this claim in the terms sought.
