Neutral Citation Number: [2018] EWHC 3456 (QB)

Case No: HQ15PO4839

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
AND IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2018

Before:

MR JUSTICE FOSKETT

- -

Between:

EXB (A Protected Party by his Mother And Litigation friend DYB) — **Claimant**

- and –

(1) FDZ
(2) MOTOR INSURERS' BUREAU
(3) GHM
(4) UK INSURANCE LTD — **Defendants**

- -
- -

Patrick Vincent (instructed by **Prince Evans LLP**) for the **Claimant**
Victoria Butler-Cole acting pro bono as an amicus curiae

Hearing date: 29 November 2018

- -

Judgment Approved

MR JUSTICE FOSKETT:

Introduction

1. This case came before me on 23 April 2018 for the purpose of considering whether to approve the proposed settlement of a personal injuries action reached between the Claimant's Litigation Friend (his mother) and the Third and Fourth Defendants. The settlement required the approval of the court pursuant to CPR Part 21.10 because the Claimant was (and remains) a protected party. I gave my approval to the settlement.

2. For reasons to which I will refer below, it was thought by those who knew him best, including his mother and his very experienced solicitor, that it would be in the

Claimant's best interests not to be told the amount at which the settlement had been achieved.

3. If this suggestion was to be pursued, with the inevitable interference with the Claimant's rights, it was felt that the issue should postponed for further consideration. Since it appeared that the issue might be one for the Court of Protection ('CoP'), the adjourned hearing was to take place before me, sitting in my normal capacity as a Judge of the Queen's Bench Division and also in my capacity as a Judge of the CoP. All High Court Judges are Judges of the CoP by virtue of their office.

4. Although, as indicated, I am a Judge of the CoP, as with many of my colleagues in the Queen's Bench Division I rarely, if ever, find myself administering the jurisdiction of that court. Since to do so would have been an unfamiliar exercise, I had originally hoped that a full-time Judge of the CoP would be able to sit with me as an assessor. That proved impracticable and, accordingly, I invited Ms Victoria Butler-Cole, who had kindly volunteered to do so, to act as a "friend of the court" in order to assist with the approach of that jurisdiction, a jurisdiction with which she is very familiar. She has done so on a *pro bono* basis and I should like to express my thanks at the outset for the very considerable assistance she has given.

Background

5. The accident the subject of this action occurred in October 2013 when the Claimant was aged 26. He was a backseat passenger in a car driven by the First Defendant when the car collided with a car being driven by the Third Defendant and then collided with a tree. The Claimant was not wearing a seatbelt. It is unnecessary to go into detail about the circumstances of the accident save to note that by an agreement approved by His Honour Judge Pearce, sitting as a High Court Judge, on 10 May 2017, it was agreed that the Claimant's damages for his orthopaedic injuries should be reduced by 25% from the full amount and the damages attributable to any other injuries, including those arising from his head and brain injury, should be reduced by 5%.

6. That summary indicates that he did indeed sustain orthopaedic injuries and a head injury. So far as the former were concerned, he suffered a fracture dislocation of the right hip, an injury to his right shoulder and a minor back injury. He sustained a severe brain injury from which he made a better than expected recovery, but nonetheless is left with permanent difficulties in executive functioning and in aspects of his behaviour. I will refer to this in a little more detail below.

7. Discussions with a view to settling the damages claim were undertaken and resulted in an agreement, subject to the approval of the court, in a sum designed to compensate him for his future loss of earnings, his support requirements in the future and, of course, the usual other heads of loss usually associated with a permanent head injury. I will not state the agreed sum in this judgment, but given that the Claimant retains a virtually full life expectancy, it will be appreciated that the sum is significant. Any profligate spending would, however, diminish the fund rapidly and could lead to a situation where there were insufficient funds available to support him for the rest of his life (such support coming from a Case Manager and a support worker who sees him on three days each week to help him plan his routine). It is that particular concern that underlies the issue which I have been invited to address.

8. The settlement did include provision for the appointment of a Deputy to manage the fund. The Deputy appointed was (and remains) Mr Ivan Barry, a partner in the firm of solicitors acting for the Claimant. He was appointed in September 2015 and the terms upon which he was appointed as a Deputy for Property and Affairs were (in standard form) as follows:

> "UPON the court being satisfied that [EXB] lacks capacity to make various decisions for himself in relation to a matter or matters concerning his property and affairs, and that the purpose for which this order is needed cannot be as effectively achieved in a way that is less restrictive of his rights and freedom of action.
>
> …
>
> IT IS ORDERED THAT:
>
> **1. Appointment of deputy**
>
> (a) [Ivan Finbarr Barry] … is appointed as deputy ("the deputy") to make decisions on behalf of [EXB] that he is unable to make for himself in relation to his property and affairs, subject to any conditions or restrictions set out in this order.
>
> …
>
> **2. Authority of deputy**
>
> (a) The court confers general authority on the deputy to take possession or control of the property and affairs of [EXB] and to exercise the same powers of management and investment, including purchasing selling and letting property, as he has as beneficial owner, subject to the terms and conditions set out in this order.
>
> (b) If the deputy considers it in [EXB's] best interests to do so [he] may appoint an investment manager, who is regulated and authorised to undertake investment business, to manage his assets on a discretionary basis under the standard terms and conditions applicable to such service from time-to-time, and to permit the investments to be held in the name of the investment manager nominee company.
>
> (c) The deputy may make provision for the needs of anyone who is related to or connected with [EXB] if he provided for, or might be expected to provide for, that person's needs by doing whatever he did, or might reasonably be expected to do, to meet those needs.

> (d) The deputy may (without obtaining any further authority from the court) dispose of [EXB's] money or property by way of gift to any charity to which he made, or might have been expected to make, such gifts, and, on customary occasions, to persons who are related to or connected with him, provided that the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of his estate.
>
> (e) For the purpose of giving effect to any decision the deputy may execute or sign any necessary deeds or documents."

9. I will return to those provisions below.

The evidence from and about the Claimant

10. Before I deal with the jurisdictional issues, I will endeavour to summarise the evidence I received about the Claimant and his ability to manage and/or understand the implications of spending money. Prior to the hearing, I had been supplied with statements from the Claimant himself, his mother, Dr Gemma Wall (his treating Consultant Neuropsychologist), his case manager (Mr Matthew Unsworth) and Mr Barry.

11. Attached to the Claimant's statement was a transcript of a conversation he had with his solicitor in June 2018 in which they discussed the question of whether he should know the amount of the award. In a nutshell, his own view at that time was that he did not want to know how much it was, his reason being that he would "probably end up spending it" and likened it to having just "won the lottery or something". He does appreciate that he receives some weekly sums that he regards as his "wages" which is a matter of some daily comfort to him.

12. He gave evidence before me in the sense that he appeared via video-link and was asked a few questions by Mr Patrick Vincent, instructed on behalf of the Claimant's Litigation Friend, and by me. As I understood him, he felt that the less stress to which he was exposed, the better, and that knowing too much about the financial position would cause him stress. He said that it was "better that I go on not knowing".

13. On that basis, he had been consistent in his attitude and had expressed the same view to others. Apparently, Dr Wall heard him say (after he left the video conference suite) that he had been "conned" into agreeing that he should not know the level of the award, but (a) if this was genuinely his state of mind at the time, it represented a considerable shift from what he had said previously, and (b) overall it was probably not his genuinely considered view, but something said when the consequences of saying it had not been weighed up. As indicated below, Dr Wall indicated that his ability to weigh up competing considerations is compromised by his brain damage. Mr Unsworth said that his "decision making is very much in the moment without consideration of the consequences", a view shared by Mr Barry and Dr Wall. Mr Unsworth continued in his witness statement thus:

> "Even now when we have a system of him receiving a not insignificant amount of money on Thursday to last him the weekend, and a top-up at the beginning of the week, EXB still struggles with his money. He is unable to control his impulses. For example, he has received a large amount to purchase presents for his daughter, and blown it on other things over the course of a couple of days. EXB is also quite impressionable, and very vulnerable. Some of the people that he associates with, putting it in a nice way, are not desirable. EXB would not be able to stop himself telling such people about a settlement figure. He is already vulnerable to being exploited by such people. He frequently talks about owing money to his associates. There is no way that his support group, whether his Deputy, myself or his support worker, can actually verify that he has borrowed money, and is required to repay it."

14. That echoes what his mother said. She will know her son better than most. She is anxious that those who do not know him know about the circle of friends he used to keep and the lifestyle he used to follow. She describes the circle of friends as "colourful" and from a working-class area in the North. By "colourful" she means that they had been involved in criminal activities, including drug-taking. Indeed, the Claimant himself had been involved in some criminal activities. She believes that he maintains the same group of acquaintances and is worried that, if that circle got to know that there was a substantial fund behind him, he would be prevailed on to lend money to them. She speaks of occasions when the Claimant says that he has borrowed money from someone and needs to pay it back. She questions whether this is the true position. She says that she does not think he would be able to keep the size of the fund to himself if he knew.

15. Mr Unsworth speaks of the frustration the Claimant experiences over money and the obsessive nature with which he feels the need to spend it. He enlarged on that in this way:

> "In that state of mind he cannot rationalise, and it increases his frustration. He gets to the point where he has smashed walls, smashed telephones, thrown other things within his house – because he gets himself so worked up over money. In my opinion, everyone who knows EXB, and knows him well, would say that it is not in his best interests to know a specific figure because he would not cope with knowing that figure. It would cause no end of problems, and increase his vulnerability. He has never said to any of his support team "How much have I got", and actually says as long as he has got the peace of mind of knowing that his future is secure, and he has his wages, then he is content.
>
> Having a figure in EXB's head would, in my view, feed the issues that he has. It would feed his impulsivity, an impulsive nature and requests for money. Even now, without that knowledge, he has asked for funds to purchase a van when he

> does not have a licence to drive, he has bought hundreds of £s worth of trainers in a couple of days."

16. He told me of an occasion when the Claimant was provided with money for a holiday and spent some of the money on a canoe or dinghy and an occasion when he received £2000 in back benefits and spent it within four days. He has been known to purchase three or four pairs of the same trainers on the same occasion.

17. Mr Barry speaks in much the same terms. One paragraph in his witness statement reads as follows:

> "With EXB it is fair to say that there is a constant push push push for more money. In my experience when lucid and calm he can hold a degree of insight into the fact that his damages are intended to pay for his support, and meet his lifetime needs for life. However, in my view that insight is limited, quickly overtaken and circumvented by a request for immediate funds for his latest material purchase. There is always something material that in his view, he needs to purchase and he cannot look beyond that immediate subject and the frustration that in many ways he creates for himself. In my view, having further information about his financial settlement exacerbate that situation."

18. Mr Barry emphasises that neither he nor the Claimant's support team are with him on a daily basis and cannot always be there to protect him from his vulnerabilities and from responding to peer pressure.

19. The evidence to which I have referred so far has largely originated from those "on the ground" who have to deal with the Claimant on a fairly regular basis. Dr Wall is a little further removed from the daily routine of the Claimant's life and the support that he requires, but has given an impressive analysis that is worth recording, at least to some extent. Much of what she says supports the validity of the observations made by the other witnesses. She also says some things of wider interest in this context to which I will return at the end of this judgment. (Incidentally, she does not know the size of the award in the present case.)

20. So far as the Claimant is concerned, she describes his thought processes as follows:

> "His thought processes are, generally speaking, rigid and concrete. He is very perseverative. The matters that generally become integrated in [his] mind are his own perspectives, and arguments that he often creates himself, and ruminates upon. This leads to escalation in frustration, often manifesting in anger, and the further diminishing prospect of him taking on board information. Therefore, his injury, cognitive and executive dysfunction, result in it being difficult to support him with understanding information and concepts. He will have his initial perception, and it is difficult to support him to explore views beyond that initial perception. Clearly his understanding of matters is not always incorrect, and is dependent upon the

> complexity of the issue at hand. However, with issues that have a multiple of levels and consequences, his understanding is generally speaking limited to his basic limited solitary perspective. In simple terms he is not someone that can be easily supported, by talking them through a problem to assist their understanding of all of the relevant factors."

21. She dealt with the question of whether he has some understanding of compensation at a basic level and said that he "understands that his claim was partly for loss of earnings, and partly to compensate him for the injuries he suffered." However, she went on to say this:

> "I believe he also has a basic appreciation that some of his compensation is intended to pay for his support and meet his future needs. However, in my view, that appreciation is likely to be somewhat superficial due to his cognitive and executive problems. He is unlikely, for example, to think about the need for money in the future in a real world everyday environment. Advance planning is not his immediate and natural way of thinking. When calm and not preoccupied by matters that he perseverates over, I think that within the confines of an office or the like and with support, in that moment he would recognise points such as the necessity of an award lasting a lifetime. However, in my opinion, the key issue is that even if he could be supported to understand such concepts in the context of a quiet office, he still would not apply such concepts to his everyday thinking and decision making.
>
> EXB's understanding and decision making is very much in the moment. Generally speaking it is isolated from the advice, information and support that he has previously received. I have seen example after example of EXB being sent money for a specific and allocated purpose, and yet when he has that money he will spend it on the first possible thing that occurs to him. He will not spend money on what even he himself had planned. He will spend money in an impulsive disinhibited rush. Although it is fair to say that at times he has, in a quiet structured environment demonstrated some retrospective understanding of these problems, this insight and appreciation does not translate to a change with EXB's thought processes and decision making in the outside world."

22. She was asked specifically to address the issue of the Claimant's "best interests" so far as knowledge of the award is concerned. I will record much of what she says about this:

> "The first issue, to my mind, would be his vulnerability. If he were to have knowledge of a specified sum he would have a significantly compromised and basic appreciation of its intended purpose. Such knowledge would translate and impact upon his behaviour. In plain terms I know that if EXB knows

> that he has a specific sum of money he (a) perseverates over it and cannot move beyond thinking about what he's going to spend it on, and (b) he will seek to spend money that he has in his head – even if he doesn't physically have it. It would, in my view, escalate his existing vulnerabilities to himself and his own actions. It would also escalate his vulnerability to others.
>
> In my clinical opinion knowledge of a crystallised figure from his perspective would cause him to be more vulnerable to his own impulses, and increase his vulnerability to other people who might, for example, propose to borrow money from him …
>
> He, in my experience, constantly lives beyond his means. This situation is not mediated by the amount he receives. It results in him borrowing money, and him being in a seemingly unbreakable cycle of what he refers to as "owing money out". There is a culture within EXB's peer group of lending money to one another and helping each other out financially. Clearly there is nothing wrong with this *per se*, but there is clearly a risk of exploitation if there is a perceived imbalance within that group of their respective means.
>
> In my opinion EXB is likely to conceptualise a crystallised figure as a pot of gold or lottery win. Upon the assumption that it is a substantial sum, it is likely to distort his perception of his own means, and exacerbate his preoccupation over money. It is likely to encourage "Well it's my money - I've got this amount - Why can't I have £x for whatever?". In my view it is likely to exacerbate EXB's existing difficulty with money and his finances, and consequently also significantly exacerbate his frustration. It would further limit his insight into situations that he already finds himself in, such as misallocating and spending money on items that he had not planned. The coherent sense that his support team are trying to employ with EXB by, for example saying if you ask for £100 for x, you need to spend it on x, would largely become missing on EXB as he would simply be preoccupied by the conceptualised pot of gold. EXB does not have an overall coherent sense and appreciation of his finances, his preoccupation with money, his behaviour, and how all of these are linked together. In my view it is therefore important to appreciate that a specified figure is not just likely to affect his actions and decision making, but also his frustration and behaviour to the detriment of himself and those around him."

23. I will return to the significance of this evidence after having reviewed the parameters within which the "best interests" issue is to be determined.

The "best interests" issue and the factors to take into account

24. Ms Butler-Cole took me to the relevant parts of section 4 of the Mental Capacity Act 2005 ('MCA') which govern this issue. They are as follows:

> "(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—
>
> (a) the person's age or appearance, or
>
> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.
>
> (2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
>
> (3) He must consider—
>
> (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and
>
> (b) if it appears likely that he will, when that is likely to be.
>
> (4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
>
> (5) …
>
> (6) He must consider, so far as is reasonably ascertainable—
>
> (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
>
> (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
>
> (c) the other factors that he would be likely to consider if he were able to do so …."

25. Other provisions potentially relevant are set out in the following subsections of Section 4:

> "(7) He must take into account, if it is practicable and appropriate to consult them, the views of—
>
> (a) …

> (b) anyone engaged in caring for the person or interested in his welfare,
>
> (c) …
>
> (d) any deputy appointed for the person by the court,
>
> as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).
>
> …
>
> (11) "Relevant circumstances" are those—
>
> (a) of which the person making the determination is aware, and
>
> (b) which it would be reasonable to regard as relevant."

26. It is clear from subsections (4) and (6) that the views of a person lacking capacity are still relevant even if he or she lacks capacity to make the particular decision. This accords with the UN Convention on the Rights of Persons with Disabilities ('CRPD') and, in particular, Article 3:

> "The principles of the present Convention shall be:
>
> 1. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
>
> 2. Non-discrimination;
>
> 3. Full and effective participation and inclusion in society …."

27. Ms Butler-Cole rightly submits that these principles suggest that, ordinarily, a person in the Claimant's position should be informed of the details of a settlement award because this would be to treat him in the same way as a person without a disability. Mr Vincent accepts that depriving the Claimant of knowledge of the size of his award constitutes an interference with those Convention rights, but the issue, he suggests, is whether, when balancing the effect of that interference against the potential harm arising from conveying the information to him, greater harm would be done by the latter.

28. I will return to that issue shortly, but to complete the other guidance there is about these matters I should refer to the Mental Capacity Act Code of Practice which contains the following provisions relevant to the involvement of the person who lacks capacity in the "best interests" decision:

> "5.21 Wherever possible, the person who lacks capacity to make a decision should still be involved in the decision-making process (section 4(4)).
>
> 5.22 Even if the person lacks capacity to make the decision, they may have views on matters affecting the decision, and on what outcome would be preferred. Their involvement can help work out what would be in their best interests.
>
> 5.23 The decision-maker should make sure that all practical means are used to enable and encourage the person to participate as fully as possible in the decision-making process and any action taken as a result, or to help the person improve their ability to participate.
>
> 5.24 Consulting the person who lacks capacity will involve taking time to explain what is happening and why a decision needs to be made.
>
> Chapter 3 includes a number of practical steps to assist and enable decision-making which may be also be helpful in encouraging greater participation. These include:
>
> • using simple language and/or illustrations or photographs to help the person understand the options
>
> • asking them about the decision at a time and location where the person feels most relaxed and at ease
>
> • breaking the information down into easy-to-understand points
>
> • using specialist interpreters or signers to communicate with the person.
>
> This may mean that other people are required to communicate with the person to establish their views. For example, a trusted relative or friend, a full-time carer or an advocate may be able to help the person to express wishes or aspirations or to indicate a preference between different options."

Discussion on the "best interests" issue

29. In relation to the question of whether the Claimant "is likely … at some time [to] have capacity in relation to the matter in question", I consider that the answer is "no". It is, of course, possible that this may occur, but that is not the statutory test. If the position now is that he does not possess such capacity, it is because of the brain damage he sustained. The evidence suggests that it is unlikely that this will now improve beyond the improvement to date. Nothing in this context is, of course, treated as permanent and the Deputy, if no one else, has to keep under review the interests of the person for whom he acts. However, for the purposes of the considerations required by statute on

the "best interests" issue, I consider it unlikely that the Claimant will have or regain capacity to make this decision.

30. The taking into account of the Claimant's own views, wishes and feelings, so far as reasonably ascertainable, is required. As will be apparent, I have received evidence about this and the conclusion to be drawn from all the evidence is that when the Claimant is capable of sitting down and weighing up the competing considerations calmly, possibly with the assistance of others, he considers that it would be in his best interests not to know the amount of the award.

31. In relation to the terms of subsection (7) of Section 4 of the Act, I have received evidence from his Case Manager, his treating Consultant Neuropsychologist, his mother and his Deputy.

32. It will come as no surprise that the evidence that it would not be in the Claimant's best interests to know the amount of the award is overwhelming, certainly as the evidence stands at the moment. Concerns over the dissipation of the fund designed to fund his lifetime's needs is one consideration of importance, as is his inability fully to understand the value of money and the frustrations (leading to confrontations) to which this gives rise. As I have said, unless his condition changes significantly (which, on the evidence, is unlikely), it is likely that this will remain the position permanently. Nonetheless, as I have also said, his condition needs to be kept under periodic review for this purpose.

33. The primary question, however, is whether I can conclude, on the balance of probabilities, that the Claimant cannot make for himself the decision about whether he should be told the value of the award. As Ms Butler-Cole says, this is difficult in the present case because "by definition, the Claimant cannot be presented with the information relevant to the decision in order to assess his capacity, as that would make the entire exercise redundant." Nonetheless, the Claimant has expressed his views on the matter without the exact figure being known to him and there is evidence (particularly in his comment after he left the videoconference room after giving his evidence) that his ability to make this decision is variable and that he could not necessarily sustain over any meaningful period the making of such a decision given his inability to control his impulses and weigh up all the relevant considerations.

34. In those circumstances a declaration as to incapacity in relation to this specific decision is justified.

What order, if any, should be made?

35. The first question is whether any order needs to be made at all under the CoP jurisdiction. Mr Barry has expressed the view that this particular "best interests" decision is not a decision that falls within the scope of his appointment. Ms Butler-Cole suggests that paragraph 1(a) of the Deputyship order (see paragraph 8 above) gives him authority "to make decisions on behalf of [EXB] that he is unable to make for himself in relation to his property and affairs …." She submits that the decision whether to inform the Claimant of the details of his settlement "can properly be construed to be within the Deputy's powers, being a decision in relation to his property and affairs." Mr Vincent submitted that this was not so clear and that the "conditions or restrictions" in paragraph 2, to which the power conferred in paragraph

1 are subject, lends a more restrictive interpretation to the apparently wide-ranging nature of that power.

36. I would prefer to leave that issue for consideration in a case where it truly arises. In this case Mr Barry has advanced a very persuasive argument (supported by other witnesses) that his role as EXB's Deputy will be enhanced and made easier if he were able to say to EXB, if he should ask the value of the award, "I can't tell you because the Court has said so." Indeed this would also remove the burden of being perceived as a gatekeeper of such information from the litigation friend, litigation solicitor, or member of the support team. If it were otherwise, it would set the Deputy (or anyone else that EXB perceives to be gatekeeper) as the arbiter of such issues which would be unwelcome and potentially divisive.

37. I can well see the force of this and, given the powers conferred on the CoP by sections 15 and 16 of the MCA, thus propose (subject to what is said in paragraph 41 below) to make the decision the decision of the court and the subject of a declaration and, if necessary, further orders or directions.

38. Section 15(1) provides as follows:

> "The court may make declarations as to—
>
> (a) whether a person has or lacks capacity to make a decision specified in the declaration;
>
> (b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;
>
> (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person."

39. Section 16 provides as follows:

> "(1) This section applies if a person ("P") lacks capacity in relation to a matter or matters concerning -
>
> (a) P's personal welfare, or
>
> (b) P's property and affairs.
>
> (2) The court may—
>
> (a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or
>
> (b) appoint a person (a "deputy") to make decisions on P's behalf in relation to the matter or matters.
>
> (3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).

> (4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that—
>
> (a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and
>
> (b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.
>
> (5) The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).
>
> (6) Without prejudice to section 4, the court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms …."

40. Any order or direction made under section 16 "may be varied or discharged by a subsequent order": section 16(7). It follows that the court can revisit its order, particularly if there is a material change of circumstances.

41. The form of order suggested by Ms Butler-Cole is that the Claimant's Deputy "shall not disclose information about the total value of the Claimant's settlement award to the Claimant, and shall direct others who have knowledge of this information not to inform the Claimant." Mr Vincent accepted that such an order might suffice, but said that it does possess the disadvantage that anyone would have to tell the Claimant, if he raised the issue, that they had been told by the Deputy not to tell him the amount of the settlement rather than telling him that the court had said that they could not do so. This risks, he suggested, the interpersonal difficulties between the Deputy and the Claimant referred to above which, if possible, should be avoided. He submitted that the court could make an order – effectively in the form of an injunction – preventing any person who knows of the size of the award from disclosing that information to the Claimant. It would be akin to an order for possession against "persons unknown" in possession proceedings. Ms Butler-Cole submits, however, that it would be unusual for the CoP to make an injunction preventing disclosure, particularly against people who are not parties to the proceedings.

42. Whilst I can see the attractions of a mandatory order such as that suggested by Mr Vincent in the Claimant's best interests, I am not at all sure how such an order could be policed and how anyone in breach of it could be dealt with. An order with a penal notice attached seems somewhat disproportionate and draconian in the circumstances and an order without teeth is arguably an order that should not be made.

43. Whilst I am not sure that a wholly effective order can be fashioned, I consider that there is a half-way house in this regard, bearing in mind that the reality in this case

seems to be that Mr Barry (and any successor of his as Deputy) will almost certainly know precisely who knows the size of the settlement and will probably (not necessarily certainly) get to know if the information has leaked out. I would propose that the order comprises a declaration as to the Claimant's incapacity to make the decision, a declaration that it is in his best interests that he does not know the size of the award, a declaration that conveying such information to him (whether by the Deputy or anyone else who has knowledge of the size of the award) would be unlawful and a provision that the Deputy may apply to the CoP on an urgent "without notice" basis for an order preventing the disclosure of the size of the settlement if he receives information that someone else has acquired knowledge of it. Further than that I am not sure it is possible to go. It would be for the Deputy initially to draw the attention of the order to anyone he knows has knowledge of the amount of the settlement.

44. It is common ground that some machinery should be incorporated an in any order to ensure periodic reviews of the position although, as I have indicated, the evidence tends to suggest that the Claimant's incapacity to make the relevant decision is seated in his brain damage which is permanent and irreversible.

45. Having seen and commented on a draft of this judgment, Ms Butler-Cole and Mr Vincent have kindly formulated an order that gives effect to it which appears as an Appendix to the judgment. I am content that an order be made in those terms.

The costs of this exercise

46. The Claimant seeks the costs of this particular exercise against the Third and Fourth Defendants, contending that it is their tort that has necessitated it. It is accepted that it would have been preferable for the question of whether an order of this nature should be made to be finalised on the day of the approval hearing (as to which see further below), but this was a novel litigation event and required handling correctly with a consequent postponement of the decision on the issue.

47. Objection is taken to paying the costs of the exercise by the Third and Fourth Defendants. They have been provided with the opportunity to comment on the application and I have seen a detailed response on their behalf from Messrs Keoghs LLP. In summary, it is said that they should not be responsible for the costs because all issues between them and the Claimant were concluded by the settlement approved in April this year and that this particular issue is a "solicitor/own client" issue that should not be laid at the door of the tortfeasor. It is also contended that this principle would apply whenever the issue of the Claimant's incapacity to make the relevant decision had arisen. Attention is drawn to the fact that no claim for the costs attributable to this issue was made in the Schedule of Loss and to the proposition that the acceptance or conferment of liability for costs on the Third and Fourth Defendants might lead to an open-ended commitment to pay the costs associated with repeat applications.

48. Ms Butler-Cole has helpfully reminded me that, since the issue has been dealt with under the CoP jurisdiction, the CoP rules concerning costs apply. These provide, as a general rule, that where the issues concern financial matters, the costs of all parties come out of the protected party's estate (rule 19.2). In welfare cases, the general rule is that each party bears his own costs. The court has a broad discretion to depart from

the general rules if the circumstances make a different order appropriate (rule 19.5). In this case, the Third and Fourth Defendants have not been made formal parties to this application, but have, of course, had the opportunity to make representations about the costs order sought. In those circumstances, an order dispensing with the need to make them parties could be made or, alternatively, the order could recite that they are to be treated as having been made parties.

49. The application for costs made on behalf of the Claimant relates only to the costs associated with the application seeking the declarations I propose making. It does not seek costs of future applications. If provision for future applications is to be sought, it seems to me that there would need to be evidence about the likely frequency and the proposed paying party would need to be able to respond to it. That is more conveniently dealt with as a head (or part of a head) of damage and claimed as such. It could well be said that claiming the costs of an application such as the one before me ought to be included as part of the damages claim and indeed there would be every reason to do so if the need to make it had been identified at an early stage. That, however, was not so in this case and, for my part, I do not see that there is any objection to making the claim in this case as an application for costs in the CoP proceedings. The general issue was flagged up before the approval hearing took place and I have not been shown any correspondence or other documentation that demonstrates that the costs of this issue was included in the settlement. This is different from saying that there might be cases where the that was clearly what had occurred.

50. The more important question is whether, in principle, such a liability should be laid at the door of the tortfeasor. In my judgment, the need to make such an application arises directly out of the injury caused by the tortfeasor and I can see no principled basis for denying liability for the costs of the exercise, whether the claim for costs is sought as a head of damage or by way of an application for costs.

51. On that basis, in this case I consider that the application is well-founded. In my view, the arguments concerning the quantum are more appropriately dealt with at a detailed assessment which I shall order.

Practical and procedural issues

52. This case is the first I can recall when an issue such as that which has arisen has occurred. That does not, of course, mean that it has not happened before, but I apprehend it may be a rare occurrence. However, cases involving head injury with frontal lobe damage (which is frequently associated with the compromise of executive functioning that occurred in this case) are relatively frequent. It is possible that an application of this nature has simply not been considered in other cases. Dr Wall, in a final passage of her witness statement, said this:

> "In my experience, with people who are moderately or severely impaired and have executive problems, [information as to the level of the award] can (but not always) be disruptive. That individual might be vulnerable to their impulses. They might be vulnerable to temptation to alcohol or illicit drugs. Their distorted perception of a sum can lead to destabilising grandiose ideas. For example that person might contemplate

> cancelling their care, on the assumption that they will be saving money which will give them money for other things. Of course at face value there is an element of truth to this, but this is often at the cost of the stabilising influences on their lives – which is not foreseen. The crystallisation of a figure can be at the root of these destabilising ideas. Often once those ideas are formed no amount of rationalisation or explanation can deter that person from that avenue - as a consequence of their executive dysfunction rather than a genuine considered decision. For the avoidance of doubt, I am speaking in general terms here, and not specifically with regard to EXB. Further I am not suggesting these issues occur with every patient involved in litigation. Each patient and their individual needs and difficulties are clearly different. However, such issues with patients who have moderate to severe impairments and executive dysfunction occur frequently."

53. If it is the case that it is an issue that might arise for consideration more frequently than hitherto, I think there is at least the makings of a case that the inter-relation of the normal rules of civil practice and the rules of the CoP is considered with a view to trying to streamline a way of dealing with the issue, if it arises, in a convenient and fair way. As I have already said, I have been greatly assisted by both Counsel in this case and, in particular, by Ms Butler-Cole who kindly agreed to act on a *pro bono* basis. However, that cannot be expected in every case, but it is possible that the issue (or some other welfare issue) will arise at the time when the case is still proceeding in the High Court. Whilst some QB Judges will have experience of the CoP jurisdiction, many will not. (There is also the question of what happens where an action in the County Court raises a similar question.)

54. All I can do is to flag up the issue and invite the appropriate bodies to consider it. I will send a copy of this judgment to the Deputy Head of Civil Justice and to the Vice-President of the Court of Protection so that they can consider whether any consultation on this issue is required and whether any action needs to be taken as a result.

Conclusion

55. There will, therefore, be declarations in the terms I have indicated and an order the Third and Fourth Defendants will pay the costs of the application to be assessed on the standard basis of not agreed.

56. I repeat my gratitude to both Counsel and to Ms Butler-Cole, in particular.

57. The Claimant's solicitor, Mr Gary Smith, is to be complimented on spotting and pursuing an apparently novel issue which undoubtedly required consideration in the Claimant's best interests.

APPENDIX

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
AND IN THE COURT OF PROTECTION
The Hon Mr Justice Foskett

CLAIM NO.HQ15P04839

B E T W E E N:-

EXB (A Protected Party by his Mother
And Litigation friend DYB)

Claimant

-and-

(1) FDZ
(2) MOTOR INSURERS' BUREAU
(3) GHM
(4) UK INSURANCE LTD

Defendants

DRAFT ORDER

UPON hearing Patrick Vincent, Counsel for the Claimant, and Victoria Butler-Cole, amicus to the court, on the 29th November 2018

AND UPON the settlement of the Claimant's claim against the Third and Fourth Defendants ("the Settlement") having been approved by the court on 23rd April 2018, on which date the court further made directions for the determination of the matters set out in this Order

AND UPON the court exercising the jurisdiction of the Court of Protection

AND UPON the Claimant's deputy undertaking to consider whether any application should made to the Court of Protection to revoke or vary this order at least every six months from the date of this order

AND UPON the Claimant's deputy having permission to apply to the Court of Protection without notice for a further order in the event that he considers there to be a realistic prospect of any person acting or preparing to act in any way that the deputy considers to have been declared unlawful by paragraph 3 of his order

IT IS DECLARED AND ORDERED PURSUANT TO SECTION 15(1)(c) AND SECTION 16 OF THE MENTAL CAPACITY ACT 2005 THAT:

1. The Claimant lacks the capacity to decide whether or not he should know the amount of the Settlement.
2. It is in the Claimant's best interests that he does not know the amount of the Settlement
3. It shall be unlawful for any person (whether the Claimant's deputy or any other person who has knowledge of the amount of the Settlement) to convey by any means to the Claimant information about the amount of the Settlement, save that this declaration does not make unlawful the conveyance of descriptive information to the Claimant to the effect that the Settlement is sufficient to meet his reasonable needs for life.

AND IT IS FURTHER ORDERED THAT:-

4. There is permission to the Deputy to disclose a copy of this order to any person with knowledge of the amount of the Settlement.
5. The Third and Fourth Defendants do pay the Claimant's costs of this application, to include the costs of the hearing on 29th November 2018, on the standard basis such costs to be subject to a detailed assessment if not agreed.