

ENGLAND AND WALES / JUDGMENT

Eesa Mohammed v Adam Ali & Anor

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Neutral Citation Number:

[2026] EWHC 401 (KB) IN THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION LEEDS DISTRICT REGISTRY Case No.: KA-2025-LDS-000037 & KA-2025-LDS-000038 Date: 24 th February 2026 Before: MR JUSTICE RITCHIE

- ----- BETWEEN EESA MOHAMMED Claimant/Respondent
- and – ADAM ALI [1] THE MOTOR INSURERS BUREAU [2] Defendants/Appellants Michael Redfern KC and Mr Vanderpump (instructed by Whitehall Solicitors) for the Claimant. Caroline Harrison KC and Ms Karseras (instructed by Keoghs LLP solicitors) for the Second Defendant. Hearing date: 10.2.2026
- ----- APPROVED JUDGMENT This judgment was handed down remotely at 10.00pm on Tuesday 24th February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives. Approved Judgment: Mohammed v Ali & MIB Mr Justice Ritchie: The Parties 1. The Claimant suffered a road traffic accident on 7.12.2019 when he was a passenger, wearing a seat belt, in a Fiat car. The 1 st Defendant was an uninsured driver and drove negligently whilst being chased by the police. He crashed into the Fiat carrying the Claimant. Liability was admitted by the MIB and the claim progressed to a trial on quantum listed for 10 days in the County Court. The second Defendant carries the liability for uninsured drivers under the Uninsured Drivers Agreements made with the Secretary of State for Transport from time to time. The 1st Defendant took no part in the action. Where I write “Defendant” below I mean the 2nd Defendant. For ease of understanding, where I write “OPE” below, what I mean is One Party’s Evidence. 2. 3. The Claimant suffered the following main injuries: a traumatic brain injury; psychiatric injuries; fractured teeth; rib fractures; transection of his aorta; injury to his left renal artery; fractures to his pelvis and left hip; urethra and bladder damage. He was treated in hospital and was in a pelvic external frame for 8 months. These were serious injuries. The Claimant issued a claim in 2022 and pleaded out the injuries at some length reciting various medical experts’ opinions and asserting psychiatric and organic brain injury sequelae, but did not allege that he lacked capacity. Bundles 4. For the hearing I was provided with one updated appeal bundle, two authorities bundles and two skeleton arguments. Some mandates (authorities from the Claimant for the Defendant to obtain his records) were emailed during the hearing. Summary 5. This appeal is a rolled up hearing for: (1) permission to appeal and (2) the substance of two appeals by the MIB relating to

various decisions taken by Mr Recorder Cameron between 2.9.2025 and 12.9.2025. These were made at the trial of the quantum of the claim. Directions were given by Cotter J for the rolled-up hearing and to consolidate both appeals. 6. The trial was blown off course on day 1 by events arising in the 6 months before. Firstly, the MIB asked for a high-quality set of MRI scans of the Claimant's brain and those were done in January 2025. A radiology report was provided. The Claimant obtained a last-minute forensic neuroradiology report from Dr Stoodley on the scans during the week before trial. This contained the opinion that the scans showed Diffuse Axonal Injuries (DAI). The Claimant then applied for permission to rely on that evidence a few days before the trial. This evidence Approved Judgment: Mohammed v Ali & MIB 7. 8. should have been collected earlier. The District Judge refused to decide it and referred the application to the trial judge. The Defendant did not obtain any expert neuroradiology evidence, but when faced with the application did not object and asked for permission to get its own expert. The Recorder granted the application. In my judgment, the granting of the Claimant's application would likely have led to an adjournment of the trial in any event, because it would not have been fair for the Defendant to fight the trial without their own expert evidence on this key issue. As it turned out, when the MIB did get their own expert neuroradiology report, their expert opined that the MRI scans showed grade 3 DAI caused by the RTA (see Dr Good's report at para 4.2). Before this evidence was received, the Defendant's evidence from Prof Kemp (a neuropsychology expert) had been that the MRI scans was reported as normal (conclusions, page 37 of the report dated November 2024). The second event was that in July 2025, one month before trial, the MIB indicated that they were pursuing an allegation that the Claimant was fundamentally dishonest about the claim. They had obtained video evidence months earlier. The third event was that the Claimant obtained updated DWP records which arrived in the week before trial (late August 2025) and these suggested that the litigation friend (M, the Claimant's mother) had not been honest when reporting to the DWP about the Claimant's updated symptoms and injuries. This led to an application by the Claimant to remove M and substitute his sister (a nurse) as the Claimant's litigation friend. The Claimant and his legal team then changed their mind on the first day of the trial and withdrew the application to substitute the litigation friend. The reasons given through counsel were that M had misunderstood what she was being asked to describe. These did not impress the Recorder, so he decided to hold a hearing to determine whether the Claimant had capacity, overruling the MIB's objections to that course. After hearing evidence from the Claimant's brother and sister, with whom he lives, two medical experts called by the Claimant and two medical experts called by the Defendant, the Recorder found that the Claimant had capacity, so did not need to appoint a substitute litigation friend. This decision was made without hearing from the Claimant, who had served two witness statements for the trial. The decision appears to have surprised everyone, including the MIB who, despite winning the capacity issue, appealed and now ask for a litigation friend to be appointed. By the time the capacity hearing was over there was no time for a trial in any event. Since then, directions have been given for the trial to take place in the Autumn of

2026. Updating evidence directions have also been given. 9. So, the MIB have appealed the Recorder's initial decision to hold the capacity hearing. In fact they applied urgently to HHJ Gargan on 3.9.2025 and appeared before him on 5.9.2025. He knocked back the appeal, ruling that it was not urgent but, during that hearing, leading counsel for both parties agreed that the claim Approved Judgment: Mohammed v Ali & MIB should be transferred to the High Court and that agreement was recorded in a recital to the order made by HHJ Gargan. A few days later, when the capacity hearing was over, the Claimant changed his position on transfer to the High Court and persuaded the Court not to transfer it, but instead to list it before the Designated Civil Judge or a Judge nominated by him, so the claim remains in the County Court. The MIB have appealed that decision too. 10. I note that the MIB have not appealed the substantive decision on capacity. Instead, they ask for it to be set aside on a case management basis submitting that the capacity hearing should never have been started at all. When I asked the MIB's counsel what Order the Appellant was asking this Court to make if the appeal is granted, the submission was that the MIB seeks either: (1) an order appointing the Claimant's sister as the litigation friend or someone else; or (2) an order debarring the Claimant from being able to rely on the evidence of Drs Ford and Achinivu in relation to litigation capacity in future in this claim. The Issues 11. In my judgment, in these conjoined appeals (000037 and 000038 of 2025), there are 4 main issues: 11.1 Did the Recorder misdirect himself as to the law or correct procedure relating to how to handle capacity to litigate (Grounds 1-4 in appeal 37 and Ground 3 in appeal 38) and his decision to hold a capacity hearing. 11.2 Was the Recorder wrong to refuse to adjourn the case without any determination of capacity, as the Appellant submits he should? 11.3 Was the Recorder wrong to refuse to transfer the case to the High Court? (Grounds 1 and 2 in appeal 38). 11.4 Was the Recorder's decision on costs wrong? (Grounds 4 and 5 in appeal 38). The Civil Justice Council's Report on capacity to litigate 12. A CJC report, dated late 2024, on this type of issue was put before the Recorder before he made his decision. In the executive summary the CJC set out the problem arising from a failure properly to determine litigation capacity thus: "1.1 ... If it is wrongly decided that the party lacks capacity, the appointment of a litigation friend to take decisions on their behalf will represent a significant infringement of their personal autonomy. If it is wrongly decided that the party has capacity and can conduct the proceedings for themselves, they may be denied meaningful access to justice." 13. The CJC noted that the CPR provide no guidance on the procedure to be adopted as to when or how to assess litigation capacity before trial. At para. 2.10 the CJC noted that: "... the absence of any clear procedure or guidance means that Approved Judgment: Mohammed v Ali & MIB procedures are developed on an ad-hoc basis, which is inefficient and leads to inconsistency of approach and that some "work arounds" that are employed may lack any proper basis." The CJC summarised what they saw as all Claimant lawyers' duties to react to concerns about the Claimant's capacity and stated that it is well-established that if a legal representative has doubts about their own client's litigation capacity, they are under a professional duty to resolve the issue as quickly as possible by investigating the issue for themselves and, if necessary (in particular, where the client disputes the suggestion of incapacity), raising the

issue with the Court. The CJC warned that the relevant threshold for engaging this duty is not consistently expressed in case law or professional guidance, with various formulations used including “suspicion”, “reasonable suspicion”, “doubt”, “perception” or “belief” that the Claimant lacks capacity, or that they may lack capacity. This is not the issue in this appeal because two medical experts have reported that the Claimant does not have capacity. The CJC then summarised their understanding of the duty to investigate lack of capacity and the need for disclosure and what evidence might be needed on the concern. Then, at Part 6, the CJC considered how the Court could determine the issue of lack of capacity to litigate. They considered that: “6.1 ... Where there remains an issue as to the party’s litigation capacity, the court must determine the issue by way of a hearing at which the party must have proper opportunity to be heard”. The CJC recommended: “1.6 It is the strong view of the Working Group, and the almost unanimous view of the judges and practitioners whom it consulted, that there should be clear provision and guidance on the procedure for the determination of issues of litigation capacity. This should principally be set out in the CPR and/or a new PD, to ensure that there is a single, easily identifiable, and authoritative source. In relation to some of the issues identified, other measures may be needed, such as professional guidance, judicial training and even legislation.” 14. This report appears to me have led to some of the Recorder’s decisions. The Recorder’s judgments 15. There are 4 relevant extempore judgments. The first two are relevant to the capacity hearing. The third was the substantive decision on litigation capacity. The fourth related to costs. 16. Ruling 1: on the Claimant’s litigation capacity hearing. On 2nd September 2025 the Recorder delivered his decision on this issue. He had heard argument over 1.5 days. The Recorder considered the Claimant’s application to remove M Approved Judgment: Mohammed v Ali & MIB as his litigation friend and his request to withdraw that application. The Recorder recorded that the claim had been issued in 2022 with no litigation friend. Later, the Claimant’s experts (Drs Ford and Achinivu) had advised that the Claimant did not have capacity, so the Claimant applied to DJ Batchelor who, in December 2004, based only on OPE, appointed M to be his litigation friend. The MIB indicated they opposed the application and relied on their own evidence to dispute the application. DJ Batchelor granted the application but expressly reserved their right to challenge all capacity at trial. The Recorder noted CPR Part 21, rs.21.3

- (3) and (4) and understood that, if the Claimant did not have capacity, no step in the proceeding would have any validity without a litigation friend having first been appointed. On the other hand, he noted that, if the Claimant had capacity there was no need for a litigation friend and the Court could not appoint one. The Recorder was very concerned that M had or may have misdescribed the Claimant’s injuries to the DWP in May 2020 and concluded that she could not fairly and competently represent the Claimant. He applied the factors in CPR r.21.4. He did not accept Mr Redferns’s submissions on M’s explanations for her statements to the DWP and he was unimpressed by the Claimant’s attempted withdrawal of the application. The Recorder analysed whether he could appoint another litigation friend, at the start of the trial, where there was a dispute as to the Claimant’s capacity on the expert

evidence in the trial bundle (which no doubt he had read). He asked: “can I appoint a litigation friend just in case?” He had heard submissions. He reasoned that there had been significant differences in previous Courts’ approaches to determining litigation capacity which he described as “ad hoc” (using the CJC’s terminology). He referred to the Civil Justice Council’s report of November 2024 which had summarised that there was no procedure for determining capacity set out in the CPR. He understood that the issues of honesty and capacity might overlap. He warned that another Judge might need to hear the trial. He accepted that the evidence to be called and the cross examination thereof might be a dry run for the trial. He had offered the MIB the option of not challenging the Claimant’s evidence at the hearing (what I call the OPE approach) but the MIB had refused. He doubted whether failing to challenge the Claimant’s evidence would be the correct course in any event. He ruled that once capacity was in issue there was a case for saying that a sufficient inquiry into capacity should occur to ensure that the Claimant is not disadvantaged either way. He recorded that there was no case law on the issue (I shall return to that point below). He decided that he had to hold a capacity hearing. 17. 18. Ruling 2: on how to run the capacity hearing. This was also delivered on day 2. The Parties informed me that after the first judgment submissions were provided on how to run the capacity hearing. A second judgment was then delivered ex tempore. In this ruling the Recorder dealt with the MIB’s objections to his earlier ruling one by one: (1) redacted documents would make the hearing unfair; (2) Approved Judgment: Mohammed v Ali & MIB evidence contamination by M undermines the hearing; (3) the hearing may all be a nullity; (4) any failure by the MIB to cross examine may debar them later; (5) if the Claimant cross examines the Defendant’s expert that would be a dry run and unfair to the MIB; (6) duplication of evidence and two hearings is not appropriate;

- (7) adjournment would be better. The Recorder stated that he was beginning to think the MIB were being obstructive. He found no merit in their seven objections to the capacity hearing. He ruled there would be a capacity hearing and the MIB could either cooperate or not, as they thought fit. He did not think that he needed to see the surveillance evidence because the experts had seen it and reported on it. 19. Rulings 3 and 4: the third ruling, also on 2.9.2025, was to refuse permission to appeal. The fourth ruling, made on 10.9.2025, was his decision on capacity. None of the substance of that fourth ruling is appealed. The Grounds of Appeal 20. In appeal 000037, Grounds 1-4 were that the Recorder was wrong in law: (1) to set aside the order of DJ Batchelor made on 5.12.2024 appointing M as the litigation friend; and (2) to decide that the Court had no power to appoint a litigation friend without first deciding whether the Claimant had litigation capacity; and (3) to rule that the Court was required to hold a separate capacity hearing in a case where capacity was inextricably linked to the issues of fundamental dishonesty; and (4) to refuse to adjourn the trial and the capacity issue. 21. In appeal 000038, Grounds 1-3 were that the Recorder was wrong in law: (1) to determine the transfer to the High Court issue; and (2) to refuse to transfer the case to the High Court; and (3) to have conducted a determination of litigation capacity at all. Grounds 4-5 were that the Recorder was wrong in law: (4) to award costs in the case in

relation to: the adjournment application; the hearing to determine capacity; the other costs of the proceedings on 9.9.2025 and the Claimant's expert evidence application; and (5) to award the Claimant's costs in the case in relation to the rest of the matters heard in 1 and 2 September 2025. The submissions 22. I am going to combine the skeleton arguments with the verbal submissions. 23. The decision to determine litigation capacity as a preliminary issue The Tibbles point. In relation to the issues of the Claimant's capacity to litigate and his need, if any, for a litigation friend, the Appellant's first submission was that the Recorder was wrong to overturn the order made in December 2024 by DJ Batchelor appointing M as litigation friend. This had been made on the OPE basis. Neither party had challenged that Order. The DJ had, in effect, appointed what Ms Harrison called a "protective litigation friend" who would represent the Claimant until the issue of capacity was determined at full trial. This should not Approved Judgment: Mohammed v Ali & MIB have been overturned because there was no material change in circumstances and there had been no misstatement of the facts to the DJ. The Appellant relied on Tibbles v SIG [2012] 1 WLR 2591. Rix LJ gave the lead judgment. I need go no further than the headnote which states: "... the jurisdiction of the court to vary or revoke its own order under CPR r 3.1(7) was apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry and the need to avoid undermining the concept of appeal all required a principled curtailment of an otherwise apparently open discretion; that the discretion under rule 3.1(7) might be appropriately exercised normally only (i) where there had been a material change of circumstances since the order had been made, (ii) where the facts on which the original decision had been made had been, innocently or otherwise, misstated or (iii) where there had been a manifest mistake on the part of the judge in the formulation of his order; that the interest of justice in the finality of a court's orders was such that it ought normally to take something out of the ordinary to lead to the variation or revocation of an order under rule 3.1(7), especially in the absence of a change of circumstances in an interlocutory situation;" 24. Protective litigation friends. The Appellant submitted that the Recorder was wrong to rule that litigation capacity had to be determined first before a new litigation friend could be appointed. The Court had power to appoint a litigation friend on a protective basis. The Appellant relied on Pinkus v Direct Line [2018] EWHC 1671 at paras. 4 and 149; and Mehmood v Mayor [2024] EWHC 1057, at para. 2. This was explained and expanded in Ms Harrison's elegant submissions. The Appellant's main submission was that where fundamental dishonesty is asserted and the Claimant's capacity is in issue, it is wrong for the Court to separate off litigation capacity and deal with it at a separate hearing, whether at the start of the trial or as a preliminary hearing long before trial. This submission was justified by the following four submissions that: (1) the evidence for the capacity hearing would be incomplete unless all of the evidence relating to fundamental dishonesty was called; (2) hearing only part of the evidence and ignoring the allegations of dishonesty would undermine the whole approach because the litigation capacity decision depends to a substantial extent on expert evidence. In turn, that expert evidence, especially from psychiatrists and neuro- psychologists, depends to a large extent on the Claimant's self-reports and his/her test results. It depends also on the Claimant's

family's and lay witnesses' reports about him/her. If the Claimant is dishonest his self-reporting will be dishonest and his family's evidence and his lay witnesses' evidence will be polluted. (3) So, to hold a valid capacity hearing, the Court would need to hear all or nearly all of the evidence which will in any event be called at trial. This would be a duplication, a dry run and would breach the overriding objective in relation to doubling cost and Approved Judgment: Mohammed v Ali & MIB 25. 26. doubling the use of Court time. (4) If only part of the evidence is considered at the capacity hearing then the result will automatically be inadequate because the dishonesty issues would have been ignored or inadequately addressed. So, Ms Harrison submitted, the correct way in personal injury cases involving disputed capacity to litigate and fundamental dishonesty, is to leave the issues to be dealt with at trial and to operate a protective litigation friend procedure from start to finish. The protective litigation friend approach, it was submitted, is already in use. Claimants appoint litigation friends on an OPE basis (their own evidence only) at the start of proceeding and no court approval is needed (see CPR r.21.5). Alternatively, Claimants apply to the Court for orders to appoint litigation friends during the litigation, as occurred in this claim, and the Courts do appoint litigation friends on the OPE basis, as happened in this claim. In answer to the Appellant's submissions, the Respondent relied on Folks and Saulle (both of which I consider in more detail below) and submitted that: (1) the decision was a case management one and, as such, should not be overturned because it was immaculate (the term used in submissions and the skeleton). (2) the MIB had required all of the Claimant's witnesses to attend for cross examination and then brought none of their witnesses to Court on day 1, implying that all they wanted was the adjournment which they applied for. (3) The MIB could have called no evidence on the application for a litigation friend but chose not to do so. The appointment of the Claimant's sister would have gone through on the OPE basis and the trial would have progressed, but they refused to take that approach. The Recorder offered them that option, but they declined. (4) The MIB appealed urgently on day 2 but failed. (5) The MIB pleaded fundamental dishonesty only 1 week before trial. (6) The Claimant's solicitors are funding the claim on a conditional fee agreement with no legal expenses insurance. There is an inequality of funding and the trial should have gone ahead, but the MIB frustrated that and is trying to increase costs. (7) The MIB had been given mandates to obtain the Claimant's DWP and other records but failed to ask for them. (8) In Saulle, Andrew Edis QC (as he then was) did the same as the Recorder did in this appeal so there is precedent for the Recorder's approach. (9) The MIB threatened to bring a Part 20 claim against M but have never done so and that was used as a tool to seek an adjournment. (10) The Recorder came to believe that the MIB were being obstructive. (11) The Claimant did agree to a transfer to the High Court in front of HHJ Gargan, but few High Court Judges sit in the North now and the Designated Civil Judge could equally well hear the case.

- (12) The MIB's objection to the OPE approach based on the risk to them of there being a decision which was not binding was illusory. (13) This Court should order the parties to mediate the claim as Miles J did in *DKH v City* [2024] EWHC 3231. Appeals - CPR r. 52 Review of the decision Approved Judgment: Mohammed v Ali & MIB 27. 28. Under CPR r. 52.21 every

appeal is a review of the decision of the lower Court, not a rehearing, unless the Court decides otherwise (or a Regulation or Act provides that it is a rehearing) and will only be granted if the decision below was wrong or unjust due to a serious procedural or other irregularity. Appeals against case management decisions Appeals against case management decisions have to pass a high threshold test. In an appeal in respect of the discretionary exercise of a Master's or a Judge's case management powers, the approach of the appellate court is identified in the following authorities: *G & G (Minors' Custody Appeal)* [1985] 1 WLR 647, per Lord Fraser at 652: "The appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution, which the Court of Appeal might, or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible." In *Powell v Pallisers of Hereford Ltd* [2002] EWCA Civ. 959 per Potter LJ at para. 11: "This was, of course, a case management decision involving the exercise of the judge's discretion of a kind with which this court has repeatedly expressed reluctance to interfere; indeed it has been emphasised that it is wrong to do so unless it can be clearly demonstrated that the overriding objective will not be observed or maintained if the decision is permitted to stand." In *Royal & Sun v T & N* [2002] EWCA Civ. 1964, Chadwick LJ enunciated the deferential principle thus: "37. ... these are appeals from case management decisions made in the exercise of his discretion by a judge who, because of his involvement in the case over time, had an accumulated knowledge of the background and the issues which this Court would be unable to match. The judge was in the best position to reach conclusions as to the future course of the proceedings. An appellate Court should respect the judge's decisions. It should not yield to the temptation to "second guess" the judge in a matter peculiarly within his province.

38. I accept, without reservation, that this Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it Approved Judgment: *Mohammed v Ali & MIB* must be regarded as outside the generous ambit of the discretion entrusted to the judge." In *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ. 1537, at para. 52 the Master of the Rolls said: "We start by reiterating a point that has been made before, namely that this Court will not lightly interfere with a case management decision. In *Mannion v Ginty* [2012] EWCA Civ. 1667 at [18] Lewison LJ said: "it has been said more than once in this Court, it is vital for the Court of Appeal to uphold robust fair case management decisions made by first instance judges." In *Global Torch v Apex* [2014] 1 WLR 4495 (UKSC), Lord Neuberger summarised the power thus: "13. ... The essential question is whether it was a direction which Vos J could properly have given. Given that it was a case management decision, it would be inappropriate for an appellate court to reverse or otherwise interfere with it, unless it was "plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree" ..." In *Clearway Drainage Systems Ltd v Miles Smith Ltd* [2016] EWCA Civ. 1258, the test in considering an appeal

against a decision of this nature was neatly encapsulated by Sir Terence Etherton MR at paragraph 68: " ... The fact that different judges might have given different weight to the various factors does not make the decision one which can be overturned. There must be something in the nature of an error of principle or something wholly omitted or wrongly taken into account or a balancing of factors which is obviously untenable." Analysis of each Ground 29. The decision to determine litigation capacity as a preliminary issue The Appellant's Tibbles point does not apply on the facts of this appeal. In my judgment the Recorder was not varying the order made by DJ Batchelor, he was dealing with the Claimant's application to remove the existing litigation friend because serious, recent allegations of dishonesty had been raised against her based on documentary evidence. Thus, her continuing suitability was in issue. M's honesty had not been in issue at the hearing before the DJ. In any event, the Recorder did not proceed on the basis that he was varying the earlier order under CPR r.3.1(7). He proceeded under CPR r.21. He was determining the application to remove one litigation friend and appoint another. The removal of M was not Approved Judgment: Mohammed v Ali & MIB 30. 31. opposed. There had been a substantial change in circumstances in any event because the Defendant had pleaded fundamental dishonesty. He then descended into the question of the need for some evidence about the capacity of the Claimant to litigate. In contrast, before the DJ, the parties proceeded on the OPE basis, with the Defendant objecting and the DJ reserving the Defendant's right to object on capacity until the trial. Dealing next with the Appellant's Pinkus point. The Claimant did not have a litigation friend in Pinkus. What happened in that case was that HHJ Coe QC, sitting as a Deputy High Court Judge, after the start of the trial, determined that the Claimant might not have capacity and so appointed a litigation friend for the rest of the trial. He had the power to do so. The ruling on that issue is mentioned in para. 4 which refers to an attachment to the judgment which was not in the PIQR report included in my authorities bundle. Thus, I am unable to understand the full context for the decision. Para. 149 relates to the bizarre behaviour of the Claimant in Court which the judge took into account. Pinkus was a quantum only trial and the judge heard evidence over 6 days. Fundamental dishonesty had been raised. The judge assessed damages at £4,500 in the face of a claim for £850,000 and found the Claimant to have been fundamentally dishonest. I do not find the rulings in Pinkus determinative of the issues in this appeal. As to the Appellant's Mehmood point. The Claimant did have a litigation friend in Mehmood. The decision of Master Fontaine related to approval of an interim payment application. Quantum was to be assessed and fundamental dishonesty was in issue. The issue of capacity was disputed and had been originally listed for a preliminary issue determination before a Master but was later adjourned to be decided at trial. The judgment of Master Fontaine, which the Appellant relies upon, determined the non-approval of an interim payment. I do not find that Mehmood is determinative of any of the issues in this appeal. I do not even know if the preliminary issue relating to capacity was solely litigation capacity or also financial affairs capacity. OPE appointments and the decision to have a preliminary issue hearing

32. Whilst the title: “protective litigation friend” is catchy and makes sense from the point of view of the Defendants in personal injury litigation, it is only a partly apposite title in my judgment. It makes sense to Defendants because, if the claim is to settle, the Defendants will wish the settlement to be binding. So, where capacity is in issue and the Defendants’ experts opine that the Claimant has capacity but the Claimant’s experts opine that he does not, the safest route to a valid settlement is for the Defendants to let the Claimant appoint a litigation friend on the OPE basis and then to gain the Court’s approval for the settlement. To that extent the appointment of the litigation friend protects the Defendants. However, as the CJC identified and the Mental Capacity Act 2005 requires, no Claimant should have his/her claim handled and determined by another person if Approved Judgment: Mohammed v Ali & MIB he/she has capacity. Capacity is not only presumed under the Mental Capacity Act 2005, it is required to be supported by the provision of all reasonable support, see the principle in S.1(3) of the Act and the Mental Capacity Act Code of Practice. If a litigation friend is appointed where none is needed or wanted then that Claimant gains no protection, instead he has his liberty fettered. Indeed, later the Claimant may apply to set aside a settlement made by his litigation friend on the basis that he had capacity all along and did not approve the settlement himself. This is of course an unlikely scenario so long as the Claimant has lawyers who listen to the Claimant and understand his/her wishes. On the other hand, if the Claimant’s family or lawyers have concerns about the Claimant’s capacity to litigate despite reasonable support being provided, and have obtained relevant expert medical evidence which properly considers the legal and evidential requirements and opines that the Claimant probably does not have capacity to litigate, then the OPE approach to appointing a litigation friend makes sense and has been deployed for many years. Procedurally, if the medical evidence is obtained before the claim is issued, the Claimant can appoint the litigation friend without the need for a Court order, see CPR r.21.4 and 21.5. The Defendant has no say in that process. If the evidence is obtained after issue, then an appointment on the OPE basis can be obtained by applying for an order from a Judge. CPR R.21.6 empowers a Court to appoint a litigation friend using the words “may make an order”. The evidence required relates to the suitability of the proposed litigation friend. The Rule is silent about the evidence required by the Court to determine whether the Claimant is a Protected Party. The commonly used OPE basis to determine the status of the Claimant is a practical approach which allows the claim to progress whether or not litigation capacity has been put in issue by the Defendant. In the Civil Procedure Rules (White Book 2025 ed), in the notes at para. 21.6.1, the editors suggest that where the proposed Protected Party and the litigation friend consent to the appointment and provide adequate evidence to support the order, and so long as there is no evidence to suggest the application is lacking in bona fides, the Court should make the order. 33. So, what role can the Defendant take in such an application? In my judgment, there is no express need for the Defendant to acquiesce to the OPE approach to an application to appoint a litigation friend. The notes in the White Book question whether the Defendant can dispute the application and reference the decision in *Folks v Faizey* [2006] EWCA Civ. 381. That case was decided before the new Part 21 was introduced, but the editors consider it still to be relevant and so do I. Liability was partially admitted in a

road traffic accident claim. The District Judge (DJ) listed the Claimant's application for the appointment of a litigation friend for determination at a hearing as a preliminary issue relating only to litigation capacity. The application was supported by expert reports from a neurosurgeon and a psychiatrist and a witness statement from the Claimant's sister. The DJ gave a direction allowing the Defendant time to put in evidence in response. The Defendant then relied on a neuropsychiatrist who considered that, whilst the Approved Judgment: Mohammed v Ali & MIB Claimant did not have the capacity to manage his own affairs, he did have capacity to litigate. The decision listing the preliminary issue for a hearing was appealed. The Court of Appeal overturned the case management decision (no hearing had yet taken place) and granted the appointment of the litigation friend. Guidance was given in the judgment of Pill LJ at paras. 18-19 in relation to applications for litigation friends: "18. The application is made to protect the position of the appellant and those advising him. The rules as to capacity are not designed to create additional litigation, the result of which will have a minimal effect on the main action. Chadwick LJ, at paragraph 66 of Masterman-Lister, when considering the former RSC Order 80, Rule 3(2), stated: "The rule making body plainly contemplated, and intended, that the question whether a party was required to act through a next friend or guardian ad litem (as the case might be) should, in the ordinary case, be determined by the party himself or by those caring for him; perhaps with the advice of a solicitor but without the need for enquiry by the court."

19. In this case, those advising the respondent, without any plausible reason in terms of protecting the respondent's own position, have sought to interfere in a procedure with which they were only minimally concerned. Indeed, the appointment of a litigation friend would give them protection to them as well as to the appellant and his advisors. I should not wish to describe the opposition as an abuse of the process of the court but in my judgment it is an intermeddling, for no sound reason, which the judge, on the evidence available, ought not to have tolerated." 34. Keene LJ agreed and added: "25. ... I can also see that there could sometimes at other stages in proceedings be issues where the other party to the litigation may have a legitimate interest: for example, as to whether the litigant should be accepted as a "patient" for Court of Protection purposes. There are often costs which arise from the involvement of the Court of Protection and the other party may be entitled to be heard on such an issue. But that too is not this case. I can see no basis on which it can properly be contended that the defendant to this claim was at risk of suffering any prejudice from the appointment of a litigation friend; the reverse is in fact the case. It provides him with a degree of protection.
26. Consequently I conclude that in the situation where the proposed "patient" and the litigation friend both consent to the appointment of Approved Judgment: Mohammed v Ali & MIB the latter, where there is adequate evidence to support the application for an order appointing a litigation friend, and where there is no evidence suggesting that the application is anything but a bona fide one, the court should make the order sought. That was the case here. I too therefore came to the conclusion that this appeal should be allowed."

35. Wilson LJ was worried that because the appealed decisions were case management ones they should not be overturned, but then agreed that they should be overturned. He ruled that: “(b) the course taken by the judge condemned the parties to the unnecessary expense attendant upon a trial of the issue and to a regrettable continuation of the limbo in which, by virtue of the uncertainty as to the appellant’s capacity, no step, whether proactive or reactive, could be taken by his solicitors in the proceedings; and
- (c) the course was therefore one which, in that he was obliged to seek to give effect to the overriding objective, including saving expense and ensuring expedition, the judge should, with respect to him, not have taken.” 36. The notes to the White Book at para. 21.1.6 also reference *Greetham v Greetham*

[2021] EWHC 998 but that was not in my authorities bundles (see my footnote). The parties both referred to *Saulle v Nouvet* [2007] EWHC 2902, in which Andrew Edis QC sitting as a deputy High Court Judge, tried the identified preliminary issue of capacity, both to manage the Claimant’s own affairs and to litigate, which had been ordered by Master Leslie in July 2007. Since that order the new CPR Part 21 had been brought into effect to implement the Mental Capacity Act 2005. The judge in *Saulle* was determining far more than litigation capacity, he was determining capacity to manage affairs which would trigger Court of Protection and deputy’s costs which can be very substantial in serious brain injury claims. He heard the evidence (which did not involve allegations of dishonesty) and made his findings. He applied the factors set out in the Mental Capacity Act and *Masterman-Lister v Brutton & Co* [2003] 1 WLR 1511 and CPR Part 21. I respectfully agree with the approach taken but do not find that the case determines any of the issues in the appeal before me, because it was a substantive preliminary issue between the parties which involved determination of capacity to manage affairs which directly affected quantum. That is quite different from the narrow, more procedural, issue of litigation capacity which does not directly sound in quantum. 37. Setting aside the procedure for appointing a deputy under the Court of Protection, the Court of Appeal’s relevant guidance on the appointment of litigation friends set out in *Folks* can be summarised thus: Approved Judgment: *Mohammed v Ali & MIB* (1) (2) (3) (4) (5) A claimant can appoint a litigation friend when the claim is issued without the need for a Court order so long as the necessary consents and forms are completed, the claimant has sufficient evidence that he/she lacks capacity and the application is bona fide. The defendant is not involved in that decision. A claimant may apply after issue and the Court has power to appoint (or substitute) a litigation friend so long as the necessary consents and forms are completed, the claimant has sufficient evidence that he/she lacks capacity and the application is bona fide. The defendant is generally not involved in that decision and is generally not prejudiced by it. This remains the case even if capacity is disputed. A defendant may become involved in an application to appoint or substitute a litigation friend if it has a financial or other interest in the result which may be prejudiced. At all times when managing the appointment of litigation friends the Court is astute to consider and take into account: (a) the overriding objective; (b) efficient case management; (c) to protect the claimant who does or may lack capacity

and (d) not to disadvantage or prejudice the defendant. A decision by the Court after issuing a claim to appoint a litigation friend, or a decision by a Claimant to appoint a litigation friend before issue, does not determine any pleaded issues between the parties about the Claimant's capacity. Those will be determined at trial. 38. Decisions on Grounds 1-3 of appeal 000037 and ground 3 of appeal 000038 I take into account that the Recorder's judgments were given ex tempore. There is no appeal from the decision to remove M as the litigation friend. Nor is there any appeal against the Recorder's decision to refuse to let the Claimant withdraw that application. M was clearly not an appropriate person to continue fairly and properly to act as the Claimant's litigation friend. Once that decision was taken the Claimant was left with no protection despite his experts, Drs Ford and Achinivu, opining that he lacked litigation capacity. The Recorder identified the problem at para. 19. He then asked himself if he could proceed on the basis of DJ Batchelor's decision to appoint a litigation friend, which had been made on the OPE basis. He ruled as follows: "22. ... The answer is that I do not think I can do so. If I did so, I would hand over control of the litigation during the trial to someone who, it might turn out, should never have been appointed. Where would this - I ask the question rhetorically - leave a claimant who was unsuccessful at trial, but determined at the end of the trial to have capacity, in respect of decisions made on his behalf during the trial by his litigation friend?"

23. For the same reason, it seems to me that I cannot proceed on the basis of an assertion by, or evidence solely on behalf of, the claimant himself whilst the issue remains contentious. It follows that I therefore conclude Approved Judgment: Mohammed v Ali & MIB 39. 40. that I cannot make any appointment under rule 21.7 without first determining the issue of capacity, and having a capacity hearing for that purpose, and that I cannot take any other step in the proceedings without first doing that. I can obviously take such steps as may be necessary for the purpose of convening the capacity hearing and giving such directions as may be appropriate in respect of the evidence to be heard during that hearing." I consider that the ruling in the first three lines of paragraph 23 constituted a misdirection. In my judgment, pursuant to Folks, the Recorder could and should have proceeded on the basis of the Claimant's served and filed evidence and could and should have appointed his sister, despite the Claimant's capacity being in issue on the pleadings and on the evidence. That issue was to be determined at the trial not at a preliminary hearing. At para. 28 of the judgment the Recorder noted that he had offered to the Defendant the option of acquiescing to letting him appoint a litigation friend on the OPE basis, leaving the Defendant free to challenge the Claimant's experts at trial and to run its case in full. The Defendant did not favour that route so the Recorder did not take it. He then expressed his concerns about that route. This is the second point at which I consider the Recorder fell into error. I consider that he could and should have ruled that, pursuant to Folks, he was entitled to follow the OPE route and to appoint a litigation friend. The Claimant still wanted a litigation friend at that time. The Claimant's lawyers had proposed the Claimant's sister and she had consented to accept. The Defendant was not prejudiced by the appointment. The Defendant was informed that they could still call their experts and put their case on capacity at trial and

could cross examine the Claimant's experts. The Defendant's expressed concerns about the risk of Res Judicata or being estopped from denying capacity at trial were without merit. They would have gained the protection of a litigation friend for any settlement reached during the trial. Whilst, in my judgment, the Defendant should have acquiesced, the Recorder did not need their consent or acquiescence to proceed. He was entitled, based on Folks, to rule that they were not prejudiced by the application and so had no standing to call evidence in rebuttal on this procedural issue. The error arose because the Recorder granted the Defendant the right to challenge the Claimant's expert evidence in relation to the narrow application to appoint a substitute litigation friend. In my judgment the error arose because Folks was not cited to the Recorder by either counsel. The notes in the White Book were not referred to either. Folks was not relied on by the MIB in the skeleton arguments before the Recorder or in the skeleton arguments during the appeal. It was only cited by the Respondent's counsel in his skeleton argument in this appeal and was in the Respondent's authorities bundle. Approved Judgment: Mohammed v Ali & MIB 41. 42. 43. 44. The result of the Recorder misdirecting himself that he had to determine litigation capacity at a contested hearing was that the application went on into that hearing. Witnesses were called and were cross examined. I consider that the holding of the preliminary issue hearing was procedurally wrong, unnecessary, added to the expense of the case, was conducted with only part of the relevant evidence and effectively excluded much of the evidence relating to the allegations of dishonesty, which probably would have had direct relevance to the disputed litigation capacity issue. Once the evidence which the parties wished to call was complete the Recorder made his decision on litigation capacity and the Defendant succeeded. The Recorder decided that the Claimant had the capacity to litigate based on the evidence called. But the result does not justify the procedure. I have carefully considered the clear guidance given by the appellate Courts that this Court should not overturn case management decisions unless no reasonable judge would have made them or there is a clear misdirection of law or other clear error. I consider that this is one such case. It is not just that Folks was not cited to the Recorder to guide him, it is because the Recorder made a decision which Folks does not permit unless the Defendant is prejudiced or at risk of prejudice from the OPE approach. In my judgment the Defendant faced no real prejudice by the Claimant's sister being appoint as the litigation friend. On the contrary, the Defendant would have gained the normal protection thereby. Should I set aside the orders? I conclude that Grounds 1-3 of appeal 000037 and Ground 3 of appeal 000038 are made out on the single Folks basis explained above. I must now ask myself: what should this court do as a result? I have the power to make any order which could have been made below. M, the previous litigation friend, has had her appointment terminated by paragraph 4 of the order (which is not appealed) and no substitute litigation friend has been appointed. If I set aside the Recorder's decisions at paragraphs 5 and 6 of the order made on 12.9.2025, that may leave the Claimant and the claim in limbo. CPR r.21.2 states that a Protected Party must have a litigation friend to conduct proceedings. R.21.3(3) and (4) states that no party may take a step in proceedings without the Court's permission and that until a litigation friend is appointed and any step is a nullity unless the Court orders otherwise. Potentially no step

could be taken because the Claimant's expert evidence from Drs Ford and Achinivu contain the opinions that he has no capacity. I will therefore consider the submissions made by the parties. 45. The Claimant/Respondent explained at the appeal that the Claimant no longer seeks a litigation friend and accepts the substantive decision on capacity. In the recent directions hearing before HHJ Baddeley on 26.1.2026, the Claimant is recorded as conceding that: "(1) The Claimant will not be advancing a case that Approved Judgment: Mohammed v Ali & MIB 46. he lacks capacity to litigate at trial." I do not understand how those statements can stand when contradicted by the served expert evidence from the Claimant's experts. During the appeal it was the MIB/Appellant who asked the Court to appoint a litigation friend (suggesting the Claimant's sister) if the appeal is granted, to give them protection. At para. 6 of the Appellant's skeleton the Appellant submitted that the risk which the MIB seeks to avoid is that any procedural step is subsequently rendered a nullity by CPR r.21.3(4) unless the Court orders otherwise. I do not find the Appellant's contradictory position taking on the need for a litigation friend to be of much help in achieving the overriding objective in this claim and this appeal. I take into account that the MIB refused to acquiesce to the Recorder appointing a substitute litigation friend, fought and won the preliminary issue on capacity to litigate, do not like the result of their own success and now seek to overturn that success. I take into account that the MIB's counsel failed to put before the Recorder the key Court of Appeal decision in *Folks* which would have guided him on the direction which he should have taken, but which the MIB submitted he should not take. I also take into account that the Claimant/Respondent's position has been contradictory (Ms Harrison described it as: neither coherent nor reliable). The Claimant also failed to put *Folks* before the Recorder and now submits that the Claimant accepts that he has capacity, despite the clear opinions of the Claimant's two main experts who advise that he does not have capacity. Despite all of this contrariness, I remind myself that the way in which the claim is progressed is a matter for the parties upon appropriate legal advice. My task is to determine the appeal on the grounds raised. The decision to refuse to transfer the case to the High Court 47. The Appellant submits that the Recorder made his decision not to transfer the claim to the High Court without an application to do so, in the face of the parties' agreement to transfer as recorded in the recital to HHJ Gargan's order of 5.9.2025 and without reference to the factors listed in CPR r.30.3(2)(a)-(e). The Respondent's submission in reply, at first, was to deny that they had resiled from the agreement made between leading counsel in front of HHJ Gargan. But when taken to the transcript of the hearing before the Recorder it is plain and Mr Redfern KC did backslide from his agreement to the claim being transferred, by recommending to the Recorder that the Designated Civil Judge could equally well deal with the case in Sheffield.

48. Whilst the Recorder did not list or mention the factors in CPR r.30.3, this was an *ex tempore* judgment. I do not consider that the omission to mention that Rule means that he failed to consider the obvious factors: the value of the claim, the complexity, the convenience of the parties and the witnesses, the need for specialist judges and the public importance. These were all laid out in the submissions made to him. On the contrary, he specifically considered

the Approved Judgment: Mohammed v Ali & MIB specialist judge issue against the background of his preparation for the 10 day trial in a claim for more than £7 million on the relevant schedule. In relation to complexity and public importance, the Appellant submits that the issue of whether the dishonesty by M can be held to have been the fundamental dishonesty of the Claimant, within S.57 of the 2015 Act, is novel and important. I do not consider that issue to be particularly complicated. The Judge may find that the Claimant and M jointly put forward dishonest statements or that the Claimant adopted M's assertions. It is only if M's dishonesty is established and found to have been wholly independent of the Claimant, that the issue will arise. Even then, it is a straightforward construction point. I do not consider that the Recorder's case management decision, on which Court system the claim should be managed and tried within, was one which no reasonable judge could have made or that the Appellant has shown that the Recorder took into account an irrelevant factor or failed to take into account the relevant factors. 49. This claim will progress to trial in the Sheffield County Court in accordance with the directions given, so it will be managed and then tried, as directed, by the Designated Civil Judge or another Judge nominated by him. If thought necessary, a High Court Judge could preside sitting as a County Court Judge. The Claimant's lawyers carry duties in relation to their experts' clear opinions on the Claimant's lack of litigation capacity. The application for a substituted litigation friend remains undecided. I will not make an order appointing a substitute litigation friend because: (1) the Claimant's lawyers did not seek one in submissions, and

- (2) I do not have before me an updated consent from the Claimant's sister or anyone else and (3) the Official Solicitor appointment system is cumbersome and slow. The Costs decisions 50. I have allowed the appeal in 000037 and part of 000038 on the procedural issue, so the costs decisions will follow that decision to an extent, but I would like to hear further argument on the costs below and the costs in the appeal. Conclusions 51. Formally, I should say that I grant permission to appeal on all of the Grounds put forwards. I consider them to have been arguable. 52. Substantively, I allow the appeal against Recorder Cameron's decision to hold a separate, live evidence hearing to assess the Claimant's litigation capacity as a preliminary issue before starting the trial. I will order that the words set out in recital 5 of the Recorder's order shall be set aside. Those are: "and (after having held the hearing to inquire into the Claimant's capacity to conduct the litigation himself on 03, 04 and 09 September 2025) that the Claimant has the capacity to conduct the litigation himself". I will also set aside paragraphs 5 and 6 of the Approved Judgment: Mohammed v Ali & MIB 53. 54. Order itself in which the Recorder ordered that a hearing should take place and then dismissed the application to appoint Ms S Kauser as litigation friend. I dismiss the appeal on all other grounds save that I will consider the costs grounds and the costs of the appeal at a later hearing. I would be grateful if the Appellants would draw up the order, seek to agree it and submit it to the court. There will need to be a consequential hearing which I think should be listed for 2 hours. I will extend the time to appeal until 21 days after the consequential hearing. FOOTNOTE Because my decision applied the decision in Folks I have checked whether it has been overturned or followed and applied in more recent case law. Bright J

applied Folks in Meric v Navis & QBE [2025] EWHC 759 (KB); and likewise Bright J applied Folks in GRM v Liverpool University NHST [2025] EWHC 790, see para. 33; Soole J applied it in Greetham v Greetham [2021] EWHC 998 (QB), see para. 75; Falk J applied Folks in Hinduja v Hinduja [2020] EWHC 1533 (Ch), see paras. 34, 39. I have found no case in which Folks has been overturned or queried. END 21

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Prepared on 26 October 2026 · Esheria