

ENGLAND AND WALES / JUDGMENT

OH v Craven

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Neutral Citation Number: [2016] EWHC 3146 (QB) IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION MANCHESTER DISTRICT REGISTRY Case No: C90MA169 & B90MA009 Court 44 Manchester Civil Justice Centre Bridge Street West, M60 9DJ Date: 07/12/2016 Before: MR JUSTICE NORRIS

- ----- Between: OH (A minor by his Litigation Friend TA) Claimant
- and - SUSAN CRAVEN Defendant AND AKB (A Protected Person by his Litigation Friend JB) Claimant
- and - Christopher Willerton Defendant
- ----- Gregory Poole of Slater and Gordon for the Claimant OH Charles Woodhouse (instructed by Irwin Mitchell) for the Claimant AKB Hearing date: 9 November 2016
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Judgment

Mr Justice Norris: 1. 2. 3. The Claimants in their respective personal injury proceedings applied for an order that the sums paid into the Court Funds Office following settlement of their claims should be paid out to the trustees of private “personal injury trusts” established or to be established for their benefit. By arrangement with the Presiding Judges the applications were listed before me (sitting as a judge of the Queen’s Bench Division) for determination. I had to decide a number of issues. This judgment concerns only one aspect of the applications. A was a young adult when he was involved in a serious cycling accident which (two years on) leaves him confined to a wheelchair (though he is determined to learn to walk), with severe speech deficits and with a degree of cognitive impairment. Throughout the personal injury proceedings he was treated as lacking in litigation capacity and the claim was prosecuted by his mother as his Litigation Friend. When a sufficient sum was offered in settlement of the claim the approval of the Court was sought and obtained. The order of the Court recited that A was a protected party and brought the claim by his mother as Litigation Friend. The order contained the approval of the Court “Upon the Claimant by his litigation friend and through his solicitors agreeing to make an application to the Court of Protection for the appointment of a Property and Affairs Deputy” Pending that appointment most of the settlement sum (nearly £2.5m) was paid into the Court Funds Office. That sum represents only a proportion of the full loss sustained by A and it is

known that it is not of itself sufficient to meet all of his anticipated needs. 4. In preparation for the proposed application to the Court of Protection evidence of A's capacity to manage his affairs was sought. Rather to the surprise of everyone the Rehabilitation Medicine Consultant gave his opinion in these terms:- "At the time of my assessment it was vividly evident that [A] could understand the information relevant to the decision, was able to retain the information, was able to use or weigh [it] up as part of the decision making process and was effectively able to communicate the decision with the help of non-verbal communication and by typing on his phone... It is beyond any doubt that [A] has cognitive disability and impaired communication skill as a sequel of his brain injury but it is believed that [this] currently [is] not affecting his ability to make a free and balanced decision. He participated actively, recalled effectively and expressed clearly his wish to manage his property and his affairs by himself with the help of his mother". 5. To some degree this assessment had been foreshadowed at a meeting between A, his mother and the litigation solicitors at the rehabilitation facility in January 2016. On that occasion when the application to the Court of Protection was being discussed A had typed into his iPad "I can make my own decisions" thereby demonstrating that he had followed the conversation and knew exactly what the discussion was about, forming his own view - although that had not been sought. 6. The Rehabilitation Medicine Consultant's opinion has recently been confirmed by a consultant psychiatrist experienced in the requirements of the Mental Capacity Act 2005, its Code of Practice and some of the case law. He expressed the opinion:- "...there is disturbance in the functioning of the Claimant's mind or brain due to the effects of the severe traumatic brain injury that he suffered...he is able to comprehend what is said to him, but I have noted that it was necessary to use specific questions rather than broad ones. He was able to retain information sufficiently well for the purpose of weighting it up. He was able to make links between different questions and correctly identify similarities even where the content was different. My examination showed that he had an adequate understanding of his circumstances and disability. Thus, he had sufficient insight for the purpose of weighing up issues. I conclude that he is able to retain and weigh up information. He is able to communicate adequately through hand gesture or the talking device... in my opinion the Claimant retains financial capacity and there is insufficient evidence I have seen to refute that assumption... Further it seems to me that the Claimant seeks advice and that he will be able to understand it. In my opinion, the Claimant does require support and advice when the full implication of his disability is taken into account... He probably lacks an overall understanding of the process of managing his financial affairs... It therefore seems appropriate to me to suggest that a trust structure with a professional trustee will be appropriate here. I am not suggesting that this would be a remedy for lack of capacity, but a mechanism to provide the support envisaged by the [MCA 2005]." 7. 8. 9. In the light of the original opinion of the treating consultant an application was made on 9 March 2016 for an order that the settlement funds currently held in the Court Funds Office be paid out to the litigation solicitors' client account pending the establishment of a personal injury trust. To that application was later added an application that the appointment of A's Litigation Friend be terminated on the ground that he had "regained his mental capacity". Prior to 27 April 2016 A lent to the trustees of a personal injury settlement the sum of £10; and on that date created a personal injury settlement bearing his name and appointing a trust corporation formed by his litigation solicitors as the sole trustee of

the settlement. The circumstances in which he did so are set out in a witness statement which A made on 21 April 2016 with the assistance of the app on his iPad. He recorded that it had been explained to him that he had capacity and that he knew that this meant he could make his own decisions. He said that he knew that his case had ended, that he had won, that there was a settlement sum, and that because he was still recovering the money was being kept by the Court. He said:- “I would like my money to be put into a trust. I have been advised that this is a good idea. It will mean that I can keep my benefits. It will also mean that I get help with using the money. This is exactly what I need. I know that the trust is just a document. My solicitor has told me about this and how it works... I want to use a professional trustee. I want Irwin Mitchell to do this for me. I have met with the solicitor there and am happy with it. I know the service won’t be free. I’m fine with paying for the trust to be looked after.” 10. The position in A’s case is therefore that an adult capable of managing his affairs with support has made an application to the Court for an order directing payment out of the Court Funds Office to the trustees of a trust, those trustees being connected with the solicitors who have conducted the litigation.

11. When he was 10 O was involved in a traffic accident in which he sustained a head injury and severe damage to a limb (leading to amputation). He now suffers from left sided hemiplegia and experiences concentration and memory issues. A claim was brought on his behalf by his mother as litigation friend. This resulted in a satisfactory settlement proposal and payment into the Court Funds Office on 10 June 2016 of just under £2m. There is no evidence at this stage to suggest that, when he attains his majority, O will lack capacity to manage his own financial affairs. In discussions between the solicitors who conducted the litigation and O’s litigation friend it was agreed that O’s best interests would be served by the transfer of the funds standing to his credit at the Court Funds Office to the trustee of a bare trust (or “personal injury trust”), that trustee being a trust corporation incorporated and operated by the litigation solicitors. 12. 13. 14. To that end on 16 June 2016 O (acting by his mother and litigation friend) applied for an order that O’s final award be held on the terms of a bare trust for his benefit, the trust deed to be approved by the Court and to allow the professional trustee and any lay trustees (a) to invest the monies held and (b) to apply the monies in the best interest of the Claimant. The application was made, as it was put in the case summary, “on an administrative basis”. The position in O’s case is therefore that a litigation friend acting on behalf of a person whose lack of capacity arises only from minority and not from lack of mental capacity has made an application to the Court for an order directing payment out of the Court Funds Office to the trustees of a trust, those trustees again being connected with the solicitors who have conducted the litigation. I should here briefly note the role of a litigation friend in these circumstances. The issue was considered by Brightman J (as he then was) in *Re Whittall* [1973] 1 WLR
1027. The context was an application under the Variation of Trust Act 1958 in which the guardian ad litem had simply acquiesced, and the judge said the guardian: “... should not be encouraged to regard himself as a mere cipher, lending his name to the application for formal purposes but devoid of all responsibilities”. Brightman J had earlier (pp 1030-1031) described those responsibilities in the following terms. That a guardian is required to take

all measures he or she sees fit for the benefit of the infant defendant, supplementing the want of capacity and judgment of the minor, his or her function being to guard or safeguard the interests of the minor who becomes his ward or protégé for the purposes of the litigation. The discharge of that duty involves the assumption by the guardian of the obligation to acquaint him or herself of the nature of the action and, under proper legal advice, to take all due steps to further the interests of the minor. 15. 16. I sensed from the conduct of the applications that there was some surprise that the Court should think it had any real part to play. A, a capable adult, was simply asking the Court to give him his money. O's litigation friend was simply asking the Court to do what she had been advised was in the best interests of O. But the Court is not there simply to apply a rubber stamp. If its orders are sought then the Court must be satisfied that they are sought by those who have been able to weigh things up and to decide freely what to do. In expressing the matter in that way I would make three points. First, I would emphasise that this concern emerges from the general nature of the transaction itself, namely, a proposal that funds should be removed from the control of the Court and placed into the hands of trustees who will have powers of distribution, application and investment outside the control of the Court and will do so for reward. The concern does not arise out of the way either firm of solicitors has in fact conducted itself in either of the cases before me, or from any characteristics of the firms themselves. 17. Second, the focus of the present inquiry is to whether the applicant has made a free and informed decision, not whether the decision is a wise one. As Davis LJ described the general position of capable adults in DL [2012] EWCA Civ 253 at 76: "It is of course, of the essence of humanity that adults are entitled to be eccentric, entitled to be unorthodox, entitled to be obstinate, entitled to be irrational. Many are. But the decided authorities show that there can be no power of public intervention simply because an adult proposes to make a decision or to tolerate a state of affairs, which most would consider neither wise nor sensible." 18. 19. 20. Third, to address this concern those acting on behalf of the applicant will have to demonstrate to the Court that a free and informed decision has been taken by the applicant, and that process will of itself facilitate the process of decision making by the applicant. Having made those headline points I must expand and ground them. I must begin with the context of the applications. Very sizeable sums of money are paid into the Court Funds Office by way of compensation suffered by the claimants, which have to be used to support the claimants' needs over long periods of time. The Court Funds Office is an entirely secure home for those monies and they are not at risk. But the consequence of that security is a very low annual return (at present 0.5% per annum on the Special Account) and the absence of any potential for preserving (let alone increasing) the real value of the capital sum over the timescale during which the money is needed. This disadvantage might in part be addressed by leaving the money in the Court Funds Office but splitting it between the Special Account and the Equity Index Tracker Fund operated by the Court Funds Office. Whilst the charges would be low, a risk arises from investment in a single fund (even if that fund is in part operated by reference to the FTSE 100 Index and in part by reference to the FTSE World Index). An equity tracker fund of course invests only in a single asset class, preventing diversification of risk by investment in other asset classes.

To gain a greater range of investment options it would be possible for the funds to be paid out to the capable adult (or to the parent or guardian of the minor) and then invested under the guidance of an independent financial advisor or a discretionary fund manager. But there are two disadvantages to that course. The first is that the receipt of such a large capital sum would immediately disqualify the applicant from receipt of various state benefits (a matter of critical importance if the aggregate compensation sum is not sufficient to provide for the whole of the applicants' lifetime needs). Second, most applicants will be unused to the receipt of such large sums and will not want the responsibility of trying to manage them or of selecting those who are to manage them. This has led to the popularity of the bare trust where funds are taken out of the Court Funds Office by trustees who hold those funds on a bare trust for the applicant, but with a wide range of investment powers. This has the twin advantage of not affecting the benefits position of the applicant (for it appears that funds held on trust, even a bare trust, are not taken into account for "means testing") and presenting the opportunity for the funds to be invested in a wider range of asset classes (with the potential for the protection of real value) and at a higher yield than is obtainable on deposit accounts. The twin disadvantages are the greater exposure to risk (I here refer to investment risk) and the impact of charges upon the real return: and by charges I refer both to the charges of the trustees and the charges of those involved in investment management and inherent in managed funds themselves. The effect of these charges should not be underestimated. In one model portfolio shown to me the yield on the portfolio was 1.58% per annum and the investment management fees alone were 1.42% per annum. Charges are of crucial importance in a low-return environment. There are other advantages and disadvantages. In the case of a minor the establishment of a trust also affords the opportunity for the trust to continue after majority if the applicant chooses not to revoke it. On the other hand, in all these structures not only is there investment risk, but there is also the risk of default by a trustee or by an investment manager. There is a growing popularity for personal injury trusts where the Court of Protection is not involved (and the possibility of their use even when it is: see Watt [2016] EWHC 2532 (CoP)). But their facilitation by the payment out of monies in the Court 21. 22. 23. 24. 25. 26. 27. 28. 29. Funds Office at the request of a capable adult or their approval at the request of a litigation friend in the individual case should not become routine. The "personal injury trust" has assumed a fairly standard form. The Trustees will either be the litigation firm's corporate trust company acting alone, or that corporate trustee and the litigation friend. The arrangements are substantially the same, for one of the purposes of the trust is to provide support to a litigation friend who lacks the skills and experience to manage the settlement sum independently and is reliant upon the solicitors for advice. The "Trust Fund" is defined to include the settlement sum. The "Beneficiary" is identified as the claimant. It is then declared that "the Trustees shall hold the capital and income of the Trust Fund upon trust for the beneficiary absolutely". But that declaration is then in general immediately followed by (a) a power to pay income as maintenance and a trust for accumulation (often with no defined accumulation period) and (b) a power of advancement (although the Beneficiary's interest is already indefeasibly vested). Well drawn trusts include an express power of

revocation, so that the beneficiary knows simply from reading the document that he or she has the ability to bring the trust to an end (without having to receive advice about the Rule in *Saunders v Vautier*). There is invariably a trustee charging clause: and equally invariably a power for the corporate trustee to charge in accordance with its terms of business as published from time to time. There is generally no power for the Beneficiary to remove any trustee. The STEP Standard Provisions (2nd edition) are then simply incorporated, whether truly appropriate to a “personal injury trust” or not. O’s “personal injury trust” thus confers power on his trustees during his minority to invest the money taken out of the Court Funds Office in unsecured loans, or in land anywhere in the world, or to use it to carry on a trade anywhere in the world. His trustees also have the power to move the trust administration beyond the reach of the English courts. Of particular concern where “personal injury trusts” are established for capable adults is the standard provision (clause 19) relieving the Trustees of any duty to consult the Beneficiary or to give effect to his wishes, even though it is his or her absolute property. It is true that the Beneficiary can in theory revoke the trust and either assume direct control or resettle on more amenable trustees: but I ask why the provision is routinely incorporated and what advice adult claimants and litigation friends receive in relation to it? This brings me back to the focus of my concern. The firm of solicitors who have acted in the successful litigation will have established a relationship of trust and confidence with the claimant or the litigation friend. At the successful conclusion of the litigation the person in whom trust is reposed then suggests a further transaction out of which its associate will derive a personal benefit. The adviser suggests that a private trust is the preferable arrangement, and that its associated trust corporation should be appointed trustee and should charge for acting, although there are many other trust corporations who could fulfil the role. So the client is retained for the long term. The solicitors before me suggested that this arrangement was not about an integrated business model (whereby the litigation solicitors secure for their associate the future income stream of management fees, the size of which will be under its control, together with any transactional fees) but was an arrangement for the convenience of clients who wanted a “one stop shop” in personal injury litigation. But this is a shop that stocks only one product.

30. 31. 32. 33. 34. The principled approach to this situation is in my judgment as follows. The law irrebuttably presumes that a solicitor has influence over his client: *Etridge* [2001] UKHL 44 at [18]. Vesting a large sum of money to which the settlor has recently become absolutely entitled in the settlor’s solicitor upon a bare trust for the settlor (but subject to charging and other powers vested in the solicitor) cannot readily be accounted for by ordinary motives. It is a transaction that calls for an explanation (in a way that making a family solicitor the trustee of a family trust or making a partner in the will draftsman’s firm the prospective executor simply do not). It gives rise to a rebuttable evidential presumption that the solicitor’s influence has been undue. The burden lies on the solicitor to adduce evidence rebutting this presumption. Typically, that evidence will demonstrate that the settlor had independent advice such that the constitution of the bare trust was a spontaneous act undertaken in circumstances which enabled the settlor to weigh matters up and to exercise his or her own free will. How might that be done? In my judgment where

the litigation firm proposes the establishment of a “personal injury trust” in relation to a settlement of £1 million or more where its in-house trust corporation is to be a trustee then (drawing on the established practice in applications under the Variation of Trust Act 1958 and in trust compromises) a separate partner in the firm should instruct Chancery Counsel of not less than 5 years’ standing to advise the claimant or the litigation friend in writing as to the advantages and disadvantages of the proposed private trust (both as to its strategic advantages and as to its exact provisions, including the advantage of trusts other than bare trusts) and as to the trusteeship arrangements: and this should be done at the expense of the firm. The instructions to Counsel and the Opinion should be put in evidence on the occasion when the approval of a compromise incorporating such a proposal is sought, or when an application is made for a payment out of the Court Funds Office. I express the provisional view that where the Trust Fund exceeds (say) £3 million (so that the annual income may well be of the order of £75,000) serious thought ought to be given to including within the trust provisions the appointment of a suitably qualified family member or an independent professional as a “protector”, whose consent would be required to (a) any alteration in the original trustee remuneration rates originally approved by the Court when approving the compromise or payment out; (b) the engagement of any investment advisers or managers and their remuneration; and (c) the exercise of any power which would deprive the beneficiary of income or capital to which he or she would otherwise be entitled as of right. In the case of A I was able to communicate with him in Court and to ascertain that he is set upon establishing a bare trust in the terms already declared and that he did not want the opportunity to review his decision, even when the consequence in terms of expense was outlined to him. (I would note that the solicitors had put in evidence an estimate of fees for the medium term and gave instructions to Counsel as to the manner in which investment advisers would be selected). I therefore sanctioned the payment out to trustees. In the case of O I am not satisfied that the support of the litigation friend to the proposal results from an unconstrained free choice and I need to be satisfied that she has been enabled to make a free choice as to the identity of the trustee and the exact terms of the trust. The procedure outlined in paragraph [31] above should be followed: and the matter restored for directions once advice has been received and the 35. 36. litigation friend has acted upon it. (A litigation friend who does not act on proper advice may (not must) be removed: *Re Birchall* (1880) 16 ChD 41 at 42 per Sir George Jessel MR). This judgment has focussed upon the need for the Court to be satisfied that the decision to establish a “personal injury trust” of which the litigation solicitor is a paid trustee is one untainted by undue influence. There are other questions which this judgment does not address. Thus, particular care might have to be taken in relation to those who do not suffer from mental incapacity but who are vulnerable because they are unable to protect themselves against exploitation and so are entitled to the protection of the Court’s inherent jurisdiction to assist those who are disabled from making a free choice or expressing a real and genuine consent: *Re DL* [2012] EWCA Civ 253. 37. Again, where capacity is more in doubt than in the cases before me reference will need to be made to *Re ABC* [2016] EWHC 2532. There Charles J expressed the view: a) b) c) At paragraph [92(1)] that the management regime for a

substantial award of damages should be considered as soon as practicable; At paragraph [65] that in the Queen's Bench Division (as well as in the Court of Protection) parties should provide a reasoned or particularised comparison between rival options; At paragraph [86] that where a claimant who lacks capacity to litigate but has capacity (with appropriate support) to settle the claim on the basis that damages are held on trust it may be appropriate to have the settlement of the claim approved in the Queen's Bench Division and the creation of trusts approved by the Court of Protection (those trusts not necessarily being confined to the standard "personal injury trust"). 38. I mention these matters simply to underline that nothing in this judgment impacts upon how those questions are answered. My sole focus has been to see that A and that O's litigation friend mean what they say in supporting the proposal: because without that assurance I am not prepared to order payment out of the Court Funds Office.

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