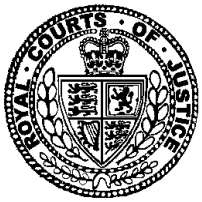

Neutral Citation Number: [2020] EWHC 2129 (QB)

Case No: QB-2019-000762

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2020

Before :

THE HON MR JUSTICE KERR

- -

Between :

KEVIN KING (a protected party by his litigation friend SUSAN RUMMEY)	**Claimant**
- and -	
THE WRIGHT ROOFING COMPANY LIMITED	**Defendant**

- -
- -

Esther Maclachlan (instructed by **Anthony Gold Solicitors**) for the **Claimant**
Anthony Reddiford (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing dates: 14 and 15 July 2020

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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The Hon Mr Justice Kerr :

Introduction

1. The question that confronts me in this case is whether the defendant's admitted tort has deprived the claimant of capacity to litigate and manage his own finances. The claimant was a roofer by trade. He suffered a severe head injury, and other serious injuries, falling from a roof in March 2016.

2. The defendant admits liability, subject to contributory negligence. The claimant has only partially recovered from the accident. There is considerable permanent damage. He began to receive interim payments before the claim was issued.

3. He can no longer work, has lost his income and has been living off the interim payments and beyond them, running up debts including to his parents with whom he had been living since before the accident. He took five or six holidays in the Dominican Republic, funded by interim payments.

4. He issued the claim in March 2019 as a protected party, with a litigation friend. In its defence, the defendant denied that he lacked capacity to litigate and manage his financial affairs. The question of capacity comes before me as a preliminary issue. I heard evidence from lay and expert witnesses.

5. The claimant did not give evidence but, I am told, regards himself as having capacity to litigate and manage his finances. He mistrusts his solicitors and others involved in the claim on his side. He is weary of and exasperated with the litigation. He has approached the defendant's insurers, bypassing his solicitors, with a view to reaching a settlement directly with the insurers.

6. The claimant has made cynical remarks indicating that he regards the litigation process as a money spinner for the professionals involved. They are, he maintains, exploiting his claim and being paid out of his compensation money. He has also expressed a desire to buy a property and settle in the Dominican Republic, where he says he has friends.

7. The claimant's solicitors at present receive instructions from the current litigation friend, Ms Susan Rummey, who gave evidence. The solicitors, with the approval of the court, are withholding certain interim payments from the claimant, wishing to protect him from squandering them. The Court of Protection appointed two deputies in February 2020 to manage his finances.

8. The claimant's litigation friend and solicitors assert that he does not have capacity to litigate this claim or manage the compensation he receives from it, applying the tests in the Mental Capacity Act 2005 (**the Act**). They are concerned that he will "under-settle" the claim, squander the fruits of it and become unable to pay for the care he needs and will need for the rest of his life.

9. A trial on contributory negligence and quantum is scheduled to take place in a window from January to April 2021. An offer or offers of settlement under CPR Part 36 have been made and rejected, but I do not know when and in what amounts. Even

if I did, I would be in no position to assess whether they are, objectively good, bad or indifferent from the claimant's perspective.

10. I must decide whether the claimant has capacity to litigate and manage his own finances, i.e. whether he is "a protected party", who "lacks the capacity to conduct the proceedings" (CPR rule 21.2(d)) and whether he is a "protected beneficiary", i.e. a protected party who also "lacks capacity to manage and control any money recovered by him or on his behalf or for his benefit in the proceedings" (CPR rule 21.2(e)).

The Law

11. I can deal with the law briefly as there was no dispute about the effect of the statutory provisions and their interpretation. It is agreed that I cannot twist the meaning of the statutory provisions to protect this claimant from himself and the risk that he will make unwise decisions. The Act prizes personal autonomy highly.

12. Capacity is presumed unless its absence is proved on the balance of probabilities (section 1(2) and 2(4)). A person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success (section 1(3)). A person must not be treated as unable to make a decision merely because he makes an unwise decision (section 1(4)).

13. A person has or does not have capacity "in relation to a matter". The test is whether "at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain" (section 2(1)). The impairment or disturbance may be permanent or temporary (section 2(2)).

14. There are four aspects to inability to make a decision (section 3(1)(a)-(d)). A person is unable to make a decision for himself if unable "to understand the information relevant to the decision" ((a)); "to retain that information" ((b)); "to use or weigh that information as part of the process of making the decision ((c)); or "to communicate his decision …" ((d)).

15. Ability to understand the information relevant to a decision includes being able to understand an explanation of it given "in a way that is appropriate to his circumstances (using simple language, visual aids or any other means)" (section 3(2)).

16. Retention of the information "for a short period" is sufficient (section 3(3)). The information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or of failing to make the decision (section 3(4)).

17. I was helpfully referred to some cases. I need not cite them in detail. I was taken by Mr Reddiford, for the defendant, to MacDonald J's useful summary in *An NHS Foundation Trust v. AB (by her litigation friend, the Official Solicitor)* [2019] EWCOP 45 at [26]; to some of the authorities examined by MacDonald J in that case; and to the judgment of Henderson J (as he then was) in *D v. R* [2010] EWHC 2305 (COP) at [43].

18. Capacity to conduct proceedings may fluctuate. The question is whether the relevant person has capacity to conduct the proceedings generally, not specific aspects of them (*Dunhill v. Burgin (Nos 1 and 2)* [2014] 1 WLR 933, per Baroness Hale at [15]). Here, the parties believe the claimant's present state is unlikely to change materially between now and the trial next year.

19. Ms Maclachlan referred me to observations of Burnett J (as he then was) in *V. v. R* [2011] EWHC 822 (QB). He explained at [10] that the policy of the Act is "to avoid concluding that incapacity is established unless, after careful enquiry, it is necessary to do so"; reflecting the common law approach that a finding of incapacity should not be lightly made as it "substantially curtails the individual's right of action" and in the context of litigation "curtails the right of unimpeded access to the law".

20. I also noted a recent Court of Protection case, *Tower Hamlets LBC v. PB (by his litigation friend, the Official Solicitor)* [2020] EWCOP 34. A man prone to alcohol abuse wished to continue drinking and disputed the suitability of local authority accommodation at which he would be denied access to alcohol. Hayden J emphasised at [6] that the requirement to differentiate between inability to make a decision and the making of an unwise decision:

> "reflected extensive common law jurisprudence, prior to the Mental Capacity Act, recognising that the law does not insist that a person behaves *"in such a manner as to deserve approbation from the prudent, the wise or the good"*: *Bird v Luckie (1850) 8 Hare 301*. It is the ability to take the decision, not the outcome of it which is in focus … ."

21. At [7], Hayden J pertinently cited the observation of McFarlane LJ in *PC v. City of York* [2013] EWCA Civ 278, at [54] (also drawn to my attention by Mr Reddiford) that:

> "there is a space between an unwise decision and one which an individual does not have the mental capacity to take and … it is important to respect that space, and to ensure that it is preserved, for it is within that space that an individual's autonomy operates".

The Facts

22. The claimant was born in June 1974. From his early twenties, he was diagnosed with depression and started taking prescribed anti-depressants. He became a roofer and enjoyed his work and social life. He had some history of cocaine abuse. He had relationships with several women and married one of them. They went on honeymoon to the Dominican Republic.

23. The claimant's marriage broke down, the couple separated but are not divorced and remain on good terms. The claimant has no children. From about 2011, he went to live with his parents because of the marriage breakdown. He paid them about £30 per week for his upkeep. He was earning about £30,000 gross, or £24,000 net, per annum as a roofer. He went out with friends most evenings.

24. There is no evidence that the claimant had any difficulty managing his finances, income and expenditure before his accident. His current litigation friend, Ms Rummey, with whom he was at one time in a romantic relationship, stated that before

the accident he was sociable, regularly drinking in local pubs with friends and appearing content and in control of his finances.

25. The accident occurred on 7 March 2016 and was horrific. The claimant fell about 40 feet through a skylight onto a concrete floor. He sustained multiple injuries including a severe traumatic brain injury and a fractured skull. He was in hospital for about five weeks and has not made a full recovery. He has permanently lost the hearing in his left ear. It is agreed that there is some personality change resulting from the accident.

26. After leaving hospital, he returned to the home of his parents, Mrs Ronita King and Mr Dennis King. He was in pain and could not at first talk or walk normally. He can no longer work for a living. He started to make a partial recovery and had hopes of recovering fully. Unfortunately, these hopes were not realised.

27. His rehabilitation has been difficult. His parents and Ms Rummey gave evidence of his difficult changes of mood, losing his temper and becoming aggressive suddenly while being apathetic in his bedroom at other times. He is more stubborn than before the accident and "fixates" on things (Ms Rummey's word), insisting that he and he alone is right.

28. The claimant's participation in the litigation process has also been difficult. He has attended some appointments alone but has also sometimes failed to attend. There is a dispute about the extent to which he is able to understand the complexities of litigating his claim and about whether he can manage the money available to him. At some point after the accident, he stopped contributing £30 per week to his parents. He ran up credit card debts of a few thousand pounds.

29. In August 2017, he received the first of several interim payments from the defendant which was clearly accepting liability, though contributory negligence was alleged in its subsequent defence to the claim. The first payment was of £10,000. In December 2017, the claimant made the first of five or six holiday trips to the Dominican Republic. He appears to have travelled alone but soon claimed to have friends there. For a time he spoke of a local woman having become his fiancée, but he is still married to his wife in England.

30. The five or six trips were made in the period from December 2017 to October 2019. They were all inclusive holiday packages, funded from interim payments. He made the bookings and travel arrangements himself and (save on one occasion) got himself to the airport. On three occasions he telephoned Mrs King from the Dominican Republic asking for money; once, because his hotel accommodation had not materialised; once because he had run out of money and once having lost his bank card.

31. The claimant is an enthusiastic aficionado of the Dominic Republic. He wants to go there as often as possible. Everyone agrees that the climate eases his pain and lightens his mood. He has spoken seriously of buying property and settling there, though his litigation friend and parents have concerns about independent living there, including access to therapeutic, medical and care facilities there may not be as good as in this country. These issues are being considered.

32. On 8-10 January 2018, the claimant was assessed by Dr Brian Toone, consultant neuropsychiatrist, for the purposes of his claim. Dr Toone noted that he was able to understand the questions but was a bit irritable, his speech was "rather rapid and jerky", words were mis-pronounced and some sentences tailed off in the middle or drifted into irrelevant matters. He admitted to increased anger, mostly towards his parents, sometimes shouting and throwing things.

33. Dr Toone noted that the claimant had met his solicitor once and spoken several times by telephone; and "seemed to have a fairly good understanding of litigation procedure". He thought the size of his settlement would be determined by the amount of his lost earnings. However, he resented expenditure on medical treatment and in the litigation process which "he feared would eat into any compensation that he was awarded".

34. Dr Toone interviewed Mrs King by telephone on 10 January 2018. She described his mood swings and irritability. She said he lent money to friends "but they repaid him". She did not think he was vulnerable to financial exploitation but might be more receptive to requests for money from people he knew well. He "appeared able to manage his own financial affairs".

35. Dr Toone's "initial impression" was that the claimant "should be capable of conducting his Litigation" but he preferred to defer a definitive view until he had seen the findings of a neuropsychological assessment. It was not clear whether the claimant would agree to a neuro-rehabilitatory programme. Dr Toone was concerned about his "seeming reluctance to accept advice".

36. He concluded that the claimant had "a reasonable grasp of his own domestic finances. His mother seemed to think that he managed them quite well". However, he noted that a credit card debt had arisen and that Mrs King was concerned that he could be vulnerable to financial exploitation by those he knew well. Again, Dr Toone deferred his opinion on this issue.

37. In February 2018, a further interim payment of £5,000 was made to the claimant. He was then managing his own money. The second anniversary of the accident was approaching. Mr Dennis King explained in evidence that the claimant had been told by one of the treating doctors that he would make a full recovery within two years of the accident. When this did not happen, the claimant took it hard.

38. He made a further trip to the Dominican Republic in spring 2018, returning on 8 May. Another payment of £10,000 was made on 13 June. A note from his general practitioner of 25 June 2018 records that he had threatened suicide as a "ploy" to "get his outstanding money back from the Solicitors". This signals tension between his wish to spend his compensation on holiday travel and the solicitors' wish to preserve it for uses such as future care and accommodation.

39. The claimant then fractured his wrist on 4 July 2018, as the medical notes show. A neuroradiological report on his injuries (concentrating on imaging) was prepared on 10 July 2018 by Dr Catriona Good. On 12 July, the claimant saw Dr MS Chong, a consultant neurologist, for the purpose of obtaining a medico-legal report.

40. Then on 15 July 2018, the claimant had a fall and cut his head. He attended the accident and emergency department of a hospital, as the general practitioner notes show. According to a later report (dated 30 April 2020) from a Dr Leng, of whom more shortly, the claimant was brought by ambulance and had been drinking alcohol and had hit his head on a table. He is said to have behaved aggressively at the hospital and refused treatment.

41. The same day, Dr Chong reported in writing for the purposes of litigation. He was aware of the claimant's fall. He had available to him a report which I do not have, from "the Neuropsychologist carried out at the National Hospital in Queen Square". It is probably a report dated 2 June 2017 from which Dr Chong quoted but which appears not to have been available to Dr Toone.

42. That report recorded, among other things, that the claimant had declined help in the form of a neuropsychology led therapeutic group for brain injury and an acquired brain injury workshop. From this report and from interviewing the claimant, Dr Chong concluded that the claimant did not have capacity to conduct the litigation or, at least, that his capacity to do so was in doubt.

43. Dr Chong noted that Dr Toone had reserved his opinion and recommended that the neuropsychology report be sent to him so he could reconsider the question of capacity. The claimant's fall was treated with sutures and on 17 July 2018 he was advised that he could travel by air, as the general practitioner's notes show. I infer that he left for the Dominican Republic again soon afterwards, fortified by the £10,000 interim payment.

44. In August 2018, first Mrs King and then another person who was a friend of the claimant were, successively, appointed to act as his litigation friend, with his consent. On 11 October 2018, a further interim payment of £25,000 was made. The claimant was still free to manage his own money at this time. I accept his parents' evidence that he was secretive about money and unwilling to share how he was spending it, while also asking them for financial support at times.

45. On 16 October 2018, the claimant was seen by Dr Nicholas Leng, a consultant neuropsychologist. Dr Leng also reviewed the extensive pre- and post-accident medical information before reporting in writing on 18 October 2018. He reported that the claimant expressed a strong desire to put an end to the compensation process; he was "hoping to see the end of this nonsense".

46. The claimant accepted that his organisational and planning abilities were "terrible" and that he used his mobile phone to remind him about things. He was asked questions relevant to capacity to conduct litigation and manage his own financial affairs. Dr Leng reported at length (in paragraph 5.10 of his report) the claimant's answers.

47. I will not set out this paragraph in full. It shows that the claimant understood the essentials of how a civil claim such as this proceeds: with lawyers, a barrister to address the court and a judge to decide. He was aware that he had a litigation friend but that "his affairs had not been placed under the Court of Protection". However, he did not demonstrate understanding of the consequences of failing to beat an offer of settlement.

48. The claimant told Dr Leng that he was managing his bank account, did not have a mortgage and did not really have bills anymore. He had bought a car for £2,500 for a friend. This must be the car purchased with money supplied by his father, Mr Dennis King, as the latter explained. It was supposed to be a loan, but the claimant did not repay it. The claimant was, in late October 2018 while in the Caribbean, banned from driving and could not drive it himself after that.

49. The claimant admitted to Dr Leng that he sometimes lent small amounts of £20 or so to friends and was not repaid. He was able to calculate sums of money. He told Dr Leng he was unhappy that a neurologist (which must be Dr Chong) whom he had "seen for 20 minutes" had decided that he lacked capacity. Dr Leng administered various tests of the claimant's intellectual, memory and executive functioning. The results were mainly in the low or low average range.

50. These tests did not rule out capacity to litigate and manage his own money. Dr Leng "found it difficult to judge whether or not he retains capacity to manage his legal and financial affairs". He thought perhaps the claimant could "manage his affairs with a supported process" but this would require "further assessment on the ground". The case was borderline, in his view.

51. In November 2018, the claimant was referred to a mental health charity in Bexley for an assessment for cognitive behavioural therapy (**CBT**). In December, a case manager, Ms Caroline Plunkett who gave evidence, was appointed to manage his participation in rehabilitation and managing his needs, benefits and financial difficulties. Her background is in occupational therapy.

52. Dr Toone was asked to look specifically at the question of capacity, as Dr Leng had recommended. He was provided with Dr Leng's report and saw the claimant with Ms Rummey on 6 February 2019. The claimant explained that he had made five two week trips to the Dominican Republic in the past year, each for about two weeks, staying in the same hotel, funded from interim payments which was what the payments were intended for.

53. He observed to Dr Toone that the climate there was warm and relieved his pain, the cost of living was lower than in the United Kingdom and the people there were friendly. In this country, he had declined the offered therapy, considering it "a waste of money". He thought it would have made inroads into his compensation from the claim.

54. Dr Toone recorded that the claimant's financial affairs were being managed by the Court of Protection at this time, against the claimant's wishes. I do not have a copy of any order of that court dating from this period. The claimant had challenged the authority of his solicitor. Dr Toone recorded that he "appeared to have a reasonable grasp of the litigation …" He had rejected an offer of settlement on his solicitor's advice. He was aware that the court would decide the amount of compensation if agreement was not reached.

55. He was aware that the amount of compensation would depend on his injuries and loss of earnings. He said the settlement money would go to his parents but he expected them to use it to fund his plan to settle in the Dominican Republic, where he could buy a two bedroom house on the waterfront for about £80,000 or rent one for about

£600 to £700 per month. He hoped to work as a DJ but it was likely this would earn him only a very small amount.

56. The claimant added, in his account to Dr Toone, that he could live with friends, his parents could send him money and there would be interest from the compensation. He expected Ms Rummey to join him in the Dominican Republic. He did not accept that he would be vulnerable to financial exploitation; his friends had advised him to commit the compensation money to his parents' care, he said.

57. He added that he no longer cared how much compensation he obtained, was fed up with waiting and wanted a lump sum rather than instalments. He regarded the process as a "stitch up", appeared to think his solicitors would retain interest on capital sums in their possession and resented paying a salary to his deputy, which must be a person appointed by the Court of Protection.

58. He owed £3,800 in credit card debts. He denied other debts. He was receiving state benefits but could not live on them. He described his monthly outgoings, including payments of £30 per month to his parents for his upkeep. Dr Toone telephoned Mrs King again, later that day. She said the interim payment money was "gone" and he owed his parents £5,000 to £6,000.

59. She said he was poor at managing money. She was very concerned at his plan to move to the Dominican Republic; she feared the money would all be gone. He put pressure on his parents to loan him money and would be unpleasant if denied but it was not being paid back. She considered him vulnerable to exploitation. He had rejected the idea of buying a house in the UK, renting it out and using the income to support himself in the Dominican Republic.

60. Dr Toone's opinion, which lies at the heart of the case against the claimant's capacity both to litigate and to manage his financial affairs, is encapsulated in paragraph 32 of his report:

> "In my opinion, Mr King lacks the temperament and the ability to evaluate, to weigh and to balance the different arguments relating to his claim and so lacks the capacity to conduct his litigation. I think that this is, at least in part, a consequence of his brain injury. I do not think that this is likely to change during the timescale of the litigation. It is my view also that he is vulnerable to financial exploitation and lacks the capacity to manage his financial affairs."

61. In oral evidence, Dr Toone was inclined to accept that the claimant had initially had capacity to litigate and manage his affairs, when Dr Toone first met him and spoke to Mrs King in January 2018. He considered that the claimant had lost capacity to do those things by February 2019, the second time they met and he spoke to Mrs King again. He felt that it was the lay witnesses' accounts that convinced him of the claimant's lack of capacity, rather than expert evidence.

62. He considered the claimant's decisions to be not just unwise, but so extreme in their unwisdom as to indicate a lack of capacity. The claimant did not lack the ability to understand and retain relevant information but was unable to "use or weigh" (in the words of section 3(1)(c) of the Act) that information, which included information about the reasonably foreseeable consequences of deciding one way or another.

63. Dr Toone relied in particular on the claimant being almost "pathologically" suspicious of his solicitors who, the claimant thought, were trying to "swindle" him out of his compensation money. The claimant's view of the financial position was completely short term, with no eye for the future. His only aim in view was to fund his next trip to the Caribbean. As I understood his evidence, Dr Toone felt that the claimant's inability to accept advice indicated an inability to use or weigh information supplied in the course of giving that advice.

64. The claim was issued on 5 March 2019. Later the same month, Ms Rummey was appointed as the claimant's litigation friend. The claimant then underwent a neurological physiotherapy assessment as part of his recommended rehabilitation. It was carried out by Ms Gail Griffiths. From late April to July 2019 he had eight sessions of therapy with the mental health charity MIND, organised through a body called Improving Access to Psychological Therapy, under the auspices of the National Health Service.

65. The defendant served its defence on 1 May 2019. Liability was not disputed but it was denied that the claimant was a protected party or lacked capacity. Contributory negligence was alleged. It was said in a counter-schedule of loss that suffering a fall through drinking excessive alcohol was contributory negligence and that the claimant had unreasonably failed to mitigate his loss by failing to cooperate with recommended treatment and rehabilitation.

66. During May 2019 the claimant or his solicitors received further interim payments, totalling £45,000. The defendant and the court were told that the claimant's solicitors intended to apply to the Court of Protection for a deputyship order. From June to August 2019, he received one interim payment each month, of £1,000. The claimant's solicitors are currently holding some interim payment monies for the claimant's benefit, contrary to his wishes.

67. On 27 June 2019, the claimant saw a neuropsychologist, Dr Sam Carter-Allison, as part of his rehabilitation programme. On 11 July, after completing the eight sessions of therapy, he saw Dr Robin Jacobson, a consultant neuropsychiatrist, who reported the next day on his progress in rehabilitation. He reported that the claimant's main "stressors" were the litigation and his financial difficulties and credit card debts.

68. The claimant complained to Dr Jacobson that it was unjust that he was having to pay interest on his credit card debts while his solicitors were withholding interim payment monies from him. The claimant had started smoking 20 cigarettes a day, as "a measure of his stress". The claimant explained to Dr Jacobson that he had stopped visiting the Dominican Republic that year because he was "out of funds".

69. He gave an account of wanting to buy a property there for £36,000 which, he said, he could rent out and thereby earn income; but the price of property had soared, out of his price range. He believed that if he had access to the interim payments or a large sum of compensation, he could rent a flat in the Dominican Republic for £450 per month and sub-let it at £900 per month.

70. Dr Carter-Allison carried out a clinic based cognitive assessment on 1 August 2019 as part of the claimant's rehabilitation programme. She reported on 12 August. This included a "multiple errands task" (**MET**) carried out in Bexleyheath town centre by

Dr Carter-Allison and a specialist occupational therapist, Ms Charlotte Mommsen. The MET, as Dr Carter-Allison explained in her report, "evaluates the effect of executive function deficits on everyday functioning through a number of real-world tasks" such as shopping and writing down information. The claimant knew the area well. He completed the tasks well with only minor errors.

71. On 1 September 2019, after a discussion with the claimant about the role of deputies and the Court of Protection, Ms Rummey instructed the claimant's current solicitors. The claimant then made one more trip to the Dominican Republic, in September and October 2019. The hotel would not accommodate him without payment or further payment.

72. He telephoned Mrs King and she reluctantly sent him money enabling him to pay the hotel. He had said he had friends there, but explained that he could not stay with any of them. The details of this episode (and two other similar episodes already mentioned) are not clear. I have not heard from the claimant himself but I accept that Mrs King helped him pay for his hotel.

73. The defendant's solicitors asked Dr Leng under CPR Part 35 "whether or not, on the balance of probabilities, the Claimant has capacity". In context, they probably meant capacity both to conduct litigation and to manage his financial affairs. In his written answer dated 12 November 2019, Dr Leng referred Dr Toone's second report. Dr Leng stated that he deferred to Dr Toone's view and that "from the further information he has obtained it is reasonable to conclude, on balance, Mr King [the claimant] lacks capacity to manage his affairs".

74. Relations between the claimant and his solicitors and Ms Rummey remained difficult and strained. The claimant received two interim payments from his solicitors in December 2019, of £500 each, with the approval of the court. I am sure this is much less than he wanted. Ms Rummey felt that he had lost interest in the case and just wanted the whole thing to end so he could get his money.

75. On 11 December 2019, a hearing took place before Deputy Master Bard. He gave directions for resolving the dispute about capacity, including giving the defendant permission to obtain reports from Dr Ahmed El-Assra, a consultant psychiatrist, and a neuropsychologist, Dr Yvonne McCulloch. The Deputy Master gave leave for Dr El-Assra to be called, alongside Dr Toone, at a forthcoming trial of capacity as a preliminary issue.

76. On 12 December 2019, the claimant's solicitors made a written application to the Court of Protection for an order appointing deputies from that firm to manage and make decisions in relation to his property and affairs, with full power to take control of his assets and invest them as advised, including buying and selling his property. Documents supporting that application included the assessment of capacity by Dr Toone, presumably his report of 6 February 2019.

77. Unfortunately, the Court of Protection was not informed when the application was made that the defendant had disputed lack of capacity in its defence served in May 2019 and that directions had been given, the day before the application was made, for a contested trial of capacity, with a report to be obtained by the defendants from Dr

El-Assra for that purpose, to be served by 6 March 2020 at the latest. Deputy Master Bard's order was sealed on 7 January 2020.

78. The claimant was then seen on 10 January 2020 by Dr El-Assra. The claimant's solicitors did not inform the Court of Protection about this appointment for the purpose of the defendant's expert's assessment of capacity. Dr El-Assra reported on 30 January 2020. He recorded in great detail the claimant's answers to his numerous questions. He found the claimant able to perform simple tests such as reciting the months of the year backwards.

79. He asked the claimant about the litigation to which he responded that "the whole thing is just a money making scheme for my Solicitor", whom he accused of keeping him poor while incurring expense on the litigation not for his benefit. Dr El-Assra elicited from him an account of his current small amounts of income and expenditure, which he gave without apparent difficulty.

80. Dr El-Assra then reviewed and quoted from the claimant's medical records going back to an attempted overdose of drugs in 1997, when he suffered from depression and had suicidal ideas, through to Dr Leng's report in October 2018. It was a very thorough review. He also quoted from a case report in December 2018 by the claimant's case manager, Ms Plunkett.

81. Dr El-Assra noted clear evidence of a longstanding constitutional depressive illness prior to the accident, dating back to 1997, combined with abuse of cocaine and alcohol when the claimant had the means. He noted the physical damage from the accident and agreed that there had been "a degree of personality change" after it occurred. He found no objective evidence of the "impulsivity" suggested by Dr Leng.

82. The personality change did not in Dr El-Assra's opinion meet the criteria for "Organic Personality Disorder (Frontal Lobe Syndrome)". He found that the claimant was capable of living independently and planning and persevering with "goal directed activities (e.g. regular holidays)". He found "no evidence of irritability, anger or apathy". There was no sign of any "cognitive disturbances in the form of suspiciousness or paranoid ideation". Nor did the claimant have post traumatic stress disorder.

83. Dr El-Assra attributed the claimant's discontent with his solicitor to "loss of control of his finances related to the litigation, in terms of receipt of interim payments and consequently the issue of capacity". After setting out the statutory provisions in the Act, he revisited the evolving views of Drs Leng, Chong and Toone over the previous two and a half years.

84. Dr El-Assra disagreed with the conclusion in Dr Toone's report of 6 February 2019 that the claimant lacked capacity to conduct the litigation and manage his money himself. He commented that Dr Toone "changed his opinion between his two reports, which in my opinion is not justified". He expressed the view that the claimant does have capacity to do both things.

85. That view he based on the following features: the claimant was looking after himself, taking regular holidays, making the arrangements with independence and planning, managing his bank account himself and attending clinic interviews and therapy

sessions. His frustration with his solicitor was understandable because he did not have enough to live on and was in debt.

86. Dr El-Assra considered that the claimant was able to understand, retain and weigh information to make decisions and able to communicate them. There was a "a reasonable level of neuropsychological and cognitive functioning" and an "absence of any severe functional psychiatric disorder", with "only a mild degree of personality change" insufficient to overturn the presumption of capacity and deprive him of his autonomy.

87. In oral evidence, Dr El-Assra underlined his strong disagreement with Dr Toone's view. He pointed out that inability to manage money was not shown by difficulty in living on a very small and shrunken income from benefits, when before the accident the claimant had about £2,000 a month to spend. It was not surprising that the claimant declined to accept advice and reacted angrily when treated as a child with his autonomy taken away.

88. Dr El-Assra agreed that he had been made aware the claimant had contacted the defendant's insurers direct about settlement of the claim. His response was that it was for the court to decide whether that evidence undermined his capacity to litigate. He did not find objective evidence to support an absence of capacity. There was no evidence of paranoid delusions or any psychotic state.

89. The problem, in Dr El-Assra's view, was something specific which had led to bad relations between the claimant and his solicitors. It appeared to date from something that happened about two years after the accident. I note, though Dr El-Assra did not say so specifically, that this was around the time when Dr Chong first cast doubt on the claimant's capacity. The claimant expressed anger about that, saying Dr Chong had only seen him for 20 minutes.

90. Beyond that, Dr El-Assra did not accept there was objective evidence of irritability, apathy or aggression. He accepted Dr Leng's point that the patient must function in "real world" situations but pointed to the good performance in the MET tests, done in August 2019. He considered that the therapy sessions organised through the charity MIND were the only continuing treatment needed. There was a mild neuro-psychological personality change, but that was all.

91. Two days after Dr El-Assra reported the above, the claimant fell down 14 steps and was admitted to hospital with a laceration to his left eye and forehead. According to the hospital records, he had received a text message that had upset him and had been drinking alcohol and taking anti-depressants and sleeping medication to excess. The wound was sutured. He left the hospital the next day of his own accord.

92. The discharge summary says he "absconded". However, he was free to leave when he wanted. He went to his parents' house. The police contacted them but, according to the hospital discharge summary the police reported that "they deemed him to have capacity". It is not clear whether "they" refers to the claimant's parents, the police or both. The claimant was at home, asleep. A follow up mental health appointment was recommended.

93. Two days after that, on 4 February 2020, the claimant was assessed by Dr Yvonne McCulloch, a clinical neuropsychologist instructed on behalf of the defendant. She had available to her the growing body of medical evidence, or much of it, including the then very recent report of Dr El-Assra. She reviewed the evidence and interviewed the claimant. Her report, to which I am coming, was dated 29 February 2020.

94. On 13 February 2020, the claimant's solicitors (not yet having received a copy of Dr El-Assra's report) wrote to the Court of Protection attaching a copy of Deputy Master Bard's sealed order. This informed anyone who read it that the defendant had permission to obtain Dr El-Assra's report and that a trial on capacity was to follow.

95. On 28 February 2020, without a hearing, Deputy Judge Simon Burrow made the order sought. His order was not sealed until 21 April 2020. It is not clear whether the Deputy Judge was aware of Deputy Master Bard's order and the dispute about capacity. There is no evidence that Deputy Judge Burrow was aware that Dr El-Assra had assessed the claimant on 10 January 2020. His order made no reference to any of these things.

96. In his order, the Deputy Judge said he was "satisfied that Kevin King lacks capacity to make various decisions for himself in relation to a matter or matters concerning his property and affairs"; that the purpose for which the order was needed could not be as effectively achieved in a way that is less restrictive of his rights and freedom of action; and that the claimant's interest and position:

> "can be properly secured without being joined to these proceedings and without making any further direction concerning Kevin King's participation in these proceedings".

97. The order provided at paragraph 4(a) that the deputies "are entitled to receive fixed costs in relation to this application, and to receive fixed costs for the general management of Kevin King's affairs"; unless they preferred their costs to be assessed. Those costs are, presumably, payable out of the interim payments and are part of the claim made against the defendant. The deputies have not yet been paid any sums.

98. The order having been made without notice, it provided at paragraph 7 that any person affected could apply within 21 days of service to have it set aside or varied. The defendant is aware of it as a result of these proceedings. No one has applied to set it aside.

99. On 29 February 2020, Dr McCulloch produced her first report, recording the claimant's account given on 4 February that Ms Rummey had been appointed as litigation friend "after he had approached the Defendant's solicitor to try and settle the claim and his solicitor had 'panicked'". The claimant had "recognised later that this approach to the Defendant's solicitor was not appropriate but was triggered by his frustration at the slow pace of his litigation."

100. He felt excluded from the litigation process, was very unhappy about it and said he had no difficulty in understanding what was discussed when the litigation friend told him of her discussions with the solicitor, in which he was not being consulted. He described the process of obtaining medical evidence, understood that it was necessary and that the defendant too was entitled to gather medical evidence.

101. He was able to explain to Dr McCulloch how the court process would operate if no settlement was reached. He "was aware of joint settlement meetings and Part 36 offers, and that if it were to go to court then there would be a minimum amount required to be received, but that there was insurance in place for this". This was a reference to the conditional fee agreement and after the event insurance in place for the purposes of the claim.

102. He explained that he had earned £30,000 a year (this is a gross figure) before the accident but had "struggled to live on minimal money" since. He had spent some of the previous interim payments on holidays to the Caribbean, "which he said was specifically to help him manage his pain better and to sort his head out and keep him active". He enjoyed these holidays and "found they significantly improved his mood and gave him something to live for as he said otherwise he would just stay in bed."

103. Dr McCulloch's last paragraph on assessment of capacity I quote in full:

> "He was aware of compensation offers and that a low figure would not be enough to cover him if he was unable to return to work. He recognised that there were costs to be paid as well as the solicitors' fee and he would require medical care and other expenses in the future. He also recognised that his benefits would stop. He said that if he obtained a larger payment he wished to buy a property as he recognised that he could not continue to live with his parents indefinitely. He considered that he would buy a property outside of London as it would be cheaper and it would be better for his health. He said that if there was enough compensation he could live off the interest or invest his money and he would seek advice if doing so. He was aware of the options of having either a lump sum or a periodic payment if compensation was received."

104. Dr McCulloch reviewed the previous medical evidence and administered a battery of tests to gauge the claimant's functioning. His performance was, broadly, found to be about average with some mild weaknesses in attention and working memory and executive function, which are not unusual after a head injury. She noted that he was motivated to do well in the tests which may reflect a better assessment than when assessed by Dr Leng in October 2018.

105. Dr McCulloch's conclusion was the same as Dr El-Assra's. She was not cross-examined. Ms Rummey was asked about her assessment. It was put to her that the claimant well understood the litigation process. Ms Rummey responded that he had told her he had spoken to a Mr Mike Anderson of the defendant's insurers and that he was going to "play off" offers from the insurers against offers from his solicitor; he would "take anything just to get it over with".

106. Ms Rummey's assessment was that the claimant was aware how the court process works, but wanted to do it his own way, bypassing his solicitor and going straight to the paying party for satisfaction. The obvious concern was that he would accept less than the claim was worth. Ms Rummey did not think the claimant understood this danger. His attitude was very much "Kevin's always right". He had harboured such views before the accident too, but then it was possible to "have a conversation with him"; no longer.

107. In mid-March 2020, the defendant's solicitors asked Dr El-Assra to consider the witness statements of Mr and Mrs King, Ms Rummey and Ms Plunkett, which I too

have seen. Dr El-Assra wrote that his opinion was unchanged, though the veracity of the statements was a matter for the court. Dr McCulloch also reviewed the four statements and commented on them in some detail, on the footing that their contents are true. She too did not change her opinion.

108. The claimant's solicitors received Dr El-Assra's report and his supplemental letter on 18 March 2020. The Court of Protection order had not yet been sealed. I do not know whether the claimant's solicitors were yet aware that it had been made. They did not send Dr El-Assra's report (or Dr McCulloch's) to the Court of Protection at that stage.

109. Also in March 2020, the claimant parted company with the case manager, Ms Plunkett. She decided she could not continue to act, as relations between them were not working. The claimant's solicitors went back to Dr Leng for a second report, based on documents, without further interviewing the claimant. Dr Leng commented at length on the rapidly expanding body of reports and witness statements addressing the issue of capacity.

110. In the concluding part of his second report of 9 April 2020, Dr Leng noted that not infrequently "brain injured individuals with this sort of presentation are able to answer factual questions related to capacity not unreasonably, and their performance on formal tests is not necessarily very impaired, but one then finds that in practice they are not functioning properly and display a disconnection between 'knowing' and 'doing'".

111. Dr Leng's concerns about capacity remained, based on his review of the documents. In paragraph 3.2 of his report, he quoted parts of the extensive body of evidence, selecting parts that pointed against capacity rather than those pointing towards capacity. Those citations led him to have "considerable doubt as to his ability to understand the full import of things, weigh information up, and make sensible decisions."

112. While capacity was a matter for the court to decide, Dr Leng relied on the citations just mentioned as "suggesting … that he is prone to be impulsive, disinhibited, rigid, inflexible, unreliable and with limited insight", leading Dr Leng to conclude "that on a balance of probabilities he lacks the ability to manage his legal and financial affairs and that the main difficulty is at the stage of 'weighing up'".

113. For some reason, the claimant's solicitors then commissioned a yet further report from Dr Leng. Deputy Master Bard's order provided for joint statements but not for rebuttal reports. The introduction to Dr Leng's further report records that the solicitors supplied further documents to him. Dr Leng did not meet the claimant again but produced his third report on 30 April 2020, by which time Deputy Judge Burrow's order had (on 21 April) been sealed.

114. Dr Leng said the additional documents raised "further concerns about Mr King's ability to manage his affairs" and mentioned "difficulties budgeting, spending money on holidays rather than settling debts including those to his parents, being unable to account for how he has spent money, in addition to which he appears to have either been unable or unwilling to accept assistance to manage his affairs".

115. The claimant's solicitors have written to the Court of Protection informing it that there was to be a trial in this court of the claimant's capacity and requesting directions in relation to Deputy Judge Burrow's order in the light of the forthcoming trial of the issue. It is accepted that the Deputy Judge's order may need to be revisited in the light of the outcome of the trial of the issues before me. The Court of Protection (which is notoriously busy) has not responded but the two deputies have not taken any action pursuant to the order.

116. Joint statements were made on 28 May 2020 by Dr Leng and Dr McCulloch. The claimant's solicitors sent Dr El-Assra's report to the Court of Protection on 2 June 2020. On 7 July, joint statements were made by Dr Toone and Dr El-Assra. Regrettably, the joint statements added little to the numerous reports amassed for the purpose of this capacity trial and the litigation. Since both sets of experts disagreed, the joint statements just repeated the disagreements expressed in reports and were barely referred to by counsel at the hearing.

Submissions of the Parties on Capacity

117. It is common ground that as a consequence of the accident the claimant, sadly, has "an impairment of, or a disturbance in the functioning of, the mind or brain" within section 2(1) of the Act. The disagreement is over whether he is "unable to make a decision for himself" (within section 2(1)) in relation to the matter of conducting the proceedings and managing his financial affairs.

118. The parties' submissions followed the opinions of the experts, respectively for and against the claimant's capacity to conduct the claim and manage his financial affairs. On the claimant's side, Ms Maclachlan very properly explained that the claimant would say he has capacity to litigate and manage his affairs. That is also evident from reading the experts' accounts of what he said to them.

119. The claimant, however, was not called by either party so I did not, unfortunately, hear from him directly. I understand he was aware that the hearing was taking place and was not willing to provide a statement. I am not privy to any privileged discussions with him about whether it would be a good idea for him to give evidence. I can see why neither side might want to risk calling him but it concerns me that, while all the experts have met him, I have not.

120. Ms Maclachlan's main submissions against capacity can be summarised in the following way:

(1) Dr Toone's view should be preferred to Dr El-Assra's and Dr Leng's to Dr McCulloch's.

(2) The claimant admits sometimes shouting, losing his temper easily and throwing things.

(3) He is emotionally volatile, intolerant, unreasonable, unpredictable and impulsive. He lacks insight into his own impairments.

(4) His changed behaviour dates from the accident, not from two years or so after the accident.

(5) Some impairment of functions is common ground. He has provided contradictory accounts of his level of functioning.

(6) The lay witnesses' evidence of his day to day behaviour supports lack of capacity.

(7) The claimant absconded from hospital and was considered an "at risk" adult by police.

(8) While he has a limited understanding of the litigation process, he did not understand why a litigation friend was needed and is unable to use and weigh information relevant to his claim.

(9) For example, he cannot use and weigh information relevant to the value of the claim and whether to accept a Part 36 offer and the consequences of recovering less than the amount of such an offer.

(10) He has particular difficulty taking into account the reasonably foreseeable consequences of any decision; thus, he declines help with rehabilitation which, the experts agree, would improve his condition.

(11) He has the misconceived view that the cost of any assessment or treatment will be funded from his compensation; he does not appreciate the need to invest in obtaining evidence in order to maximise the value of the claim.

(12) He is very impulsive and so keen to settle the claim that he is likely to "under-settle" it, even approaching the defendant's insurers directly.

(13) He does not understand that to accept less than the full value of the claim could mean not receiving care he will need in later life, being at risk of epilepsy and Alzheimer's.

(14) He has been living beyond his means, incurring debt and refusing the support of Ms Plunkett, his case manager with whom he has fallen out. He needs guidance to manage on his reduced budget.

(15) He did not manage his money successfully on three of the trips to the Dominican Republic, when he had to contact his parents and request financial help.

(16) His litigation friend has tried on numerous occasions to explain the issues in the litigation to him. She does not consider that he understands the issues in the case.

121. In oral submissions, Ms Maclachlan drew attention to the complexities of operating under funding arrangements involving a conditional fee agreement and after the event insurance. That is how the claim is being funded. She was not at liberty to elaborate but was able to indicate that unorthodox conduct such as making a direct approach to the other side's insurer, bypassing one's own solicitor, can have consequences in the context of such funding arrangements.

122. For the defendant, Mr Reddiford's main contentions may be paraphrased as follows:

(1) He invited me to prefer the opinions of Dr El-Assra and Dr McCulloch that the claimant had capacity to conduct the proceedings and manage his financial affairs.

(2) The claimant's side had by focussing on "outcome" fallen into the error of mistaking a risk of unwise decision making with lack of capacity to make a decision.

(3) It was telling that the claimant was not being called by his own side given that capacity is presumed unless disproved on the balance of probabilities.

(4) Dr Toone had adopted a legally impermissible approach by referring to decisions that are so unwise as to indicate a lack of capacity to make them.

(5) Dr Toone in oral evidence, supported by what Mrs King said when she first spoke to him in January 2018, had accepted that the claimant then had capacity to make relevant decisions. The lay witnesses' evidence had changed his mind, but the change of mind was not justified.

(6) The claimant understands both the litigation process and the process of managing money with a limited income to meet outgoings. It is commonplace for individuals to live beyond their means and incur debts.

(7) The claimant has rejected at least one offer made through his solicitors. He does not show unwillingness to accept advice, impulsivity and inability to think through the consequences of decisions in the litigation.

(8) He has accepted the inappropriateness of approaching the defendant's insurers direct.

(9) He is entitled to be frustrated with the financial position imposed on him which impoverishes him and leads him to incur debts on which he must pay interest; professionals are paid from his interim payments while he is not.

(10) It was not enough to show that the claimant could be vulnerable to financial exploitation; to be generous to friends is not the same as being unable to manage money.

(11) Nor is declining assistance with financial affairs sufficient to indicate any lack of capacity to manage them. The claimant is not a child and is entitled to consider that his finances are his business.

(12) Anger and frustration in response to removal of his autonomy does not show that the removal of autonomy was justified. Whether it was is the very issue; if it was not, his annoyance is understandable and justified.

(13) Dr El-Assra is right to regard the claimant's manifestations of anger and frustration as a reaction to removal of his autonomy, or being treated like a child, rather than evidence of incapacity.

Reasoning and Conclusions

123. I find this a worrying case, for several reasons. First, relations between the claimant and his representatives are poor and, it seems to me, at or near the point of breaking down. With Ms Plunkett, his former case manager, they have already broken down. With Ms Rummey, his relations are now very difficult.

124. I do not intend to criticise Ms Rummey in any way; she has throughout done her level best to advance the claimant's interests as best she can. But she clearly does not command the confidence of the claimant, despite the closeness of their friendship and past romantic relationship. No more do his solicitors who receive instructions from Ms Rummey command the claimant's confidence.

125. A consequence of this disagreement is that Ms Maclachlan too is put in difficulty properly representing his interests in court before me. I make no criticism whatever of her. She is right, indeed obliged, to argue for the position of the litigation friend, supported by the solicitors but not by her ultimate client.

126. Who, then, truly represents the claimant's viewpoint before me? The only party supporting his position is, paradoxically, his opponent in the underlying litigation. The interest of the defendant in the underlying claim is directly opposed to that of the claimant. It is no criticism of the defendant to say that it has a financial interest in the claimant settling the claim "fast and low".

127. I am also concerned about the costs that have been incurred in this satellite issue. Could not a joint expert on capacity have been appointed? Were four experts and six reports really needed? The directions hearings were attended by two counsel, again at considerable expense. Who is going to pay the costs of all these reports, the deputies, the Court of Protection application and the fees of solicitors and counsel?

128. Would it be fair for these costs to come out of the claimant's compensation if the defendant is right that he has capacity to litigate and manage his own finances? This is, of course, a question for me if and when that outcome is reached, but it is concerning that the claimant is, apparently, supportive of an outcome that could lead to a costs order that eats into his damages.

129. Viewed in that light, the claimant's suspicions that the professionals may gain financially at his expense are not as fanciful as they might seem. Dr Toone's description of his suspicions as close to "pathological" ought to imply that they are groundless, but it is not certain that they are.

130. The litigation friend and advisers had no choice but to act in what they consider the claimant's best interests, but that includes doing so at proportionate cost. It is obviously concerning to the claimant that his representatives are spending money on opposing his views and it is right that the money spent could, in principle (though it may be unlikely), deplete the net amount of compensation he eventually receives.

131. Another difficulty is that the claimant's direct approach to the defendant's insurers, while unorthodox and obviously inappropriate, does not lack a certain logic. If the claimant and the defendant are right, the litigation friend and solicitors may have allowed the action to become mired in unnecessary cost and delay. And it is not necessarily wrong to reason that a bird in hand may be worth two in the bush.

132. I have considered these points with some anxiety. The difficulties do not end there. The content of the claimant's discussions with Mr Anderson, of the defendant's insurers, is probably relevant to the capacity issues I have to decide; but the conversations surely took place behind the "without prejudice" curtain. The

claimant's privilege cannot reasonably be waived by his representatives even if the defendant were willing to waive privilege on its side.

133. There was some discussion at the hearing about whether, if I were to renounce the possibility of being the trial judge at the trial in early 2021, I could be told the amount of Part 36 offers made and rejected. I felt this would not be appropriate, not just because it could inhibit efficient judicial deployment but also because I do not know enough about how strong is the underlying case on quantum and contributory negligence to tell a high offer from a low one.

134. With those difficulties in mind, I come to consider the issues. There are two: whether the claimant is "a protected party", who "lacks the capacity to conduct the proceedings" (CPR rule 21.1(2)(d)) and whether he is a "protected beneficiary", i.e. a protected party who also "lacks capacity to manage and control any money recovered by him or on his behalf or for his benefit in the proceedings" (CPR rule 21.1(2)(e)).

135. I accept, like the parties, that he has an impairment of, or a disturbance in the functioning of his mind or brain within section 2(1) of the Act and that his post-accident state of mind, behaviour, outlook and attitudes are at least in part "because of" that impairment or disturbance.

136. The other four elements of inability to make decisions are inability to understand, to retain, and to use or weigh, information relevant to the decision, and inability to communicate the decision. Of these, there was something approaching consensus that the first, second and fourth were not, or not sufficiently, present in the claimant.

137. The issue is his inability to "use or weigh" the relevant information "as part of the process of making the decision" (section 3(1)(c)). The information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision (section 3(4)).

138. I bear in mind, first, Dr El-Assra's powerful point that the claimant does not suffer from any identifiable psychiatric illness such as psychotic behaviour or anything worse than a mild degree of personality change, coupled with signs of frustration, alcohol abuse and erratic behaviour also connected to constitutional depressive illness predating the accident.

139. As for capacity to conduct the proceedings, the question resolves itself into whether the claimant is unable to use or weigh information relevant to making decisions about his claim, including information about the reasonably foreseeable consequences of deciding matters relevant to his claim. That includes information about whether to solicit or accept a settlement offer, what evidence is needed and whether to claim for purchase of a property in this country or abroad.

140. I accept that there was a marked change in the claimant's behaviour and outlook a little over two years after the accident. I accept Mr King's evidence that it coincided with his son's disappointment at the prospect of not making a full recovery. I accept too that his behaviour became more difficult, with outbursts of ill temper and unpredictable, stubborn and volatile moods.

141. I bear in mind the error of equating a propensity to make an unwise decision with inability to make one; that the claimant's side have the burden of proving incapacity on the balance of probabilities and that they have to do so without calling their client. We have many hearsay accounts of what he said to others, but that does not make up for his absence from the witness box.

142. I do not accept Mr Reddiford's submission that Dr Toone's approach was legally impermissible. Inability to use or weigh information may be inferred from the outlandish product of doing so, even if phrases like "extremely unwise decision" are used. Dr Toone is a scientist not a lawyer and his phraseology does not persuade me that he misunderstood or misapplied the statutory test.

143. The claimant does understand the litigation process. He has rejected at least one offer of settlement. He has accepted the inappropriateness of approaching the defendant's insurers direct. His legitimate concern about escalating legal and professional fees does not itself prove any inability to weigh or use information about the need to invest in obtaining evidence to maximise the value of the claim.

144. In the end, I am persuaded by a fairly narrow margin that the claimant is unable to use and weigh information relevant to decisions that have to be made about his claim. His unwillingness to accept advice and inability to think through the consequences of decisions in the litigation go beyond merely disagreeing with the manner in which the claim is being conducted.

145. I accept, after considerable reflection, Ms Maclachlan's submission that the claimant cannot use and weigh information relevant to the value of the claim informing a decision such as whether to accept a Part 36 offer; and, specifically, that he cannot use or weigh the consequences of recovering less than the amount of such an offer.

146. I also accept the submission that he has particular difficulty using and weighing information about the disadvantages, from the perspective of his claim for damages, of declining help with rehabilitation which, the experts agree, would help to improve his condition.

147. With slightly more hesitation, I am just persuaded on the balance of probability that the claimant does, at least sometimes, hold the misconceived view that the cost of any assessment or treatment will *necessarily* be funded from his compensation; he is sometimes aware that you have to obtain evidence in order to maximise the amount of the claim, but his condition (not just his frustration) causes him to lose sight of this point frequently.

148. I also consider that he lacks the ability to use or weigh information about the state of the evidence which is relevant to how favourable or unfavourable an offer of settlement is or would be. This makes him at serious risk of "under-settling" the claim not just by making an unwise decision borne of impatience, but by inability to weigh the evidence.

149. I doubt whether the claimant is able to grasp the point that accepting less than the full value of the claim could lead to not receiving the care he needs and will need in later life. His litigation friend, Ms Rummey, has tried many times to explain this point and

the need to take a long term view, but I accept her evidence that he has been shutting out what she is saying because he is "fixating" on his own views and not listening.

150. Finally, I do not think the claimant is able to use and weigh information about the funding of his claim with the benefit of a conditional fee agreement and after the event insurance. I do not know the full details of the arrangements but I think the claimant's decision to make a direct approach to the defendant's insurers supports the proposition that he cannot see foreseeable potential adverse consequences for his claim likely to result from such an approach.

151. As for the claimant's capacity to manage and control money recovered, the question comes down to whether he is unable to use or weigh information relevant to making decisions about how to manage and control the financial fruits of the claim, including information about the reasonably foreseeable consequences of financial decisions such as how to balance income and expenditure, whether to buy or rent a property and if so where, and so forth.

152. This is an even more difficult issue. As Dr El-Assra pointed out, there was no evidence of any inability to manage his own money before the accident, despite a longstanding constitutional depressive illness. Ms Rummey also accepted that. And Mrs King told Dr Toone in early 2018 nearly two years after the accident that he "appeared able to manage his own financial affairs" and that though he was generous with money, loans he made to friends were repaid.

153. Mr Reddiford is correct to point out that living beyond one's means is commonplace and that generosity to friends even to the point of vulnerability to exploitation is not the same as incapacity. The issue is made more difficult by the fact that the claimant was angry at being treated like a child and being kept out of his money while it was used to pay others; and because being "secretive" about money may be perfectly reasonable for an autonomous adult.

154. I accept that these expressions of frustration are not themselves of great probative value because they beg the question whether removal of his financial autonomy and putting him on a low income was wrong. Nor is declining assistance with his financial affairs of much weight given the claimant's view that his finances were his business.

155. Furthermore, it is clear from financial discussions recorded by the experts that the claimant has a basic understanding of interest, debt, property purchase and rental, and of income and outgoings and the need for the latter not to exceed the former except in the short term. He appreciated the significance of the increase in property prices in the Dominican Republic, which he mentioned; and, on the other hand, of the lower cost of living there compared to this country.

156. The running up of debts and the failure to repay the debt to his parents is not of overwhelming weight. His income had reduced substantially, he was suffering physically and mentally, he was frustrated and was disinclined to postpone enjoying his interim payments knowing that travel to the Dominican Republic would improve his quality of life, lighten his mood and perhaps open the door to romantic attachment and female company which he prizes highly.

157. On the other hand, he is so forgetful he needs his mobile phone to remind himself of things and was unable to manage financially in the Dominican Republic without help from his mother on three out of five or six occasions, though the holidays were supposed to be all-inclusive; because the hotel was not properly booked, he ran out of money and lost his bank card.

158. In the end, by the narrowest of margins and with some hesitation, I have concluded that Mrs King was right to change her mind about her son's ability to manage his own money. She was worried by these instances of inability to manage financially while on holiday and is haunted by the prospect of her son spending all his compensation quickly and ending up unable to afford the care he needs and will need for the rest of his life.

159. I think that the claimant is at present so keen to travel in search of good cheer that he is unable to use or weigh financial information about the need for future care and the foreseeable adverse consequences of being unable to afford it. He is also so absent minded that he is likely to lose money through forgetfulness or not troubling to recover debts due to him or to pay debts due to others, thereby incurring interest charges.

160. I reach that conclusion on the balance of probabilities by a very narrow margin. I would prefer to have seen it tested by hearing evidence from the claimant himself. In reaching it, I do not dismiss as unrealistic his wish to settle in the Dominican Republic and buy or rent property there. The cost of living is indeed lower there than here and, common sense suggests, likely to remain so despite recent increases in property values.

161. Indeed, one reason it is difficult to assess the claimant's financial capacity is that it is not yet clear whether those managing his claim will quantify it on the basis that he will move there; and if so whether funded by rental income from a property in this country, a suggestion the claimant for some reason does not agree with (though it seems sensible enough for me). There is obvious merit in planning for him to settle in the place where he is most contented.

162. To conclude, the present circumstances including the claimant's absence from court make it difficult to judge his capacity. The breakdown of relations between him and his advisers and the strained relations with his litigation friend are inhibiting the court from deciding the issues on the basis of the best available evidence. Doing the best I can, I am just persuaded that absence of capacity on both counts is at present proved on the balance of probabilities.

Further Case Management

163. I have concerns about the management of this case. I have explained why above. For the most part, they are not matters that give rise to criticism of the professional people involved; though I do think the Court of Protection should have been kept more fully informed than it was by the claimant's solicitors given their duty to make full and frank disclosure in without notice proceedings.

164. In the course of reflecting on the issues discussed above in this judgment, I have considered whether I can or should myself require the claimant to attend and give

evidence, or at least require his solicitors to convey to him the court's request that he do so. Whether or not the court has power to call a witness called by neither party is an open question (see *Phipson on Evidence* 19th Ed. (Consolidated main work (2017) incorporating First Supplement (2019), at 8-19 and 11-18, and the cases there cited in the footnotes).

165. I also reconsidered whether, if the claimant were to attend, I could or should renounce the position of possible trial judge and ask him about the contents of the without prejudice conversation or conversations he had with Mr Anderson of the defendant's insurers. Even without any waiver of privilege by the parties, the content of those conversations may be admissible by way of exception to the without prejudice rule. The evidence passes the test of relevance and the categories of exception appear not to be closed: see *Phipson,* op. cit. at 24-21.

166. I decided to do neither of those things and would not have embarked on such a course without hearing argument on the points from the parties. For the future, however, there remain serious questions of case management. The possibility remains of the claimant personally attending (remotely or in person) a short case management hearing in, say, the last week of September 2020, when I will be sitting at the Royal Courts of Justice.

167. I have doubts about whether it is appropriate for Ms Rummey to continue in the role of litigation friend. She has behaved impeccably and properly in every way and has done the claimant some good service (whether or not he recognises it). But, as I have already noted, neither she nor the solicitors she instructs command the client's confidence.

168. There is still time between now and January 2021 for a different litigation friend to be appointed. I have the following case management powers, which the parties are asked to consider when we deal with consequential matters following the handing down of this judgment. I direct that the claimant should read this judgment and I hope this will help improve his understanding of the case.

169. I can require a party or a party's legal representative to attend the court (remotely or physically): CPR rule 3.1(2)(c). The commentary in the White Book vol. 1 at 3.1.5 states that this power may be used where the court considers such attendance necessary having regard to the overriding objective of dealing with a case justly and at proportionate cost.

170. The commentary continues, stating that it may be appropriate to direct the attendance of the party himself, e.g. "if the court wishes to ensure that the party knows and understands the manner in which the claim is being conducted and the possible costs consequences thereof" or "where the court presently considers that the approach being taken in the conduct of that party's case is unrealistic". I do not go as far as the latter view but the first point may be relevant here.

171. A litigation friend may stand down and be replaced by a different one, preferably with the consent of all concerned including the claimant. While agreement is preferable, the court has power under CPR rule 21.7 (and, by rule 3, on its own initiative as well as on the application of a party) to terminate the appointment of a litigation friend. In

the absence of a suitable substitute, the court may appoint the Official Solicitor who is usually willing to act, subject to costs considerations, without charging fees.

172. Difficulties in managing cases such as this fairly and effectively may arise where it is the defendant's admitted tort that has, or may have, changed the victim's personality in such a way that he acquires a propensity to under-settle the claim. The law appears to permit the wrongdoer to take advantage of this by agreeing to settle the claim at less than its true value, in its own interest.

173. This is subject to the doctrine of undue influence and fiduciary duties that may be owed to vulnerable persons (cf. *Masterman-Lister v. Brutton & Co (Nos 1 and 2)* [2003] 1 WLR 1511, CA, per Chadwick LJ at [78]). But rather than have to resort to such doctrines, it is better for the claimant's interests to be protected by effective representation by persons in whom, even if lacking capacity, he has confidence.

174. I will consider the way forward in this case in the light of the difficult features I have identified. I invite the parties to prepare any necessary brief written argument on the best way forward, as well as on the usual consequential matters such as costs. If the parties are able to agree a form of order, I will be happy to consider it. I am grateful to both counsel for their clear and cogent submissions.