



**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**CAUSE NO. G 91 OF 2022**

**BETWEEN:**

**AX**

**Plaintiff**

**-v-**

**TABITHA PHILANDER**

**(as Guardian ad Litem and Interim Receiver)**

**1<sup>st</sup> Defendant**

**-and-**

**KSG ATTORNEYS LTD**

**(trading as KSG Attorneys-at-Law)**

**2<sup>nd</sup> Defendant**

**Appearances:**

Mr James Chapman, Chapmans Legal, for the Plaintiff

Mr Robert Lindley, Conyers Dill & Pearman, for the 1<sup>st</sup> Defendant

Mr James Kennedy, KSG Attorneys Ltd, for the 2<sup>nd</sup> Defendant

**Before:**

The Hon. Justice Kawaley

**Heard:**

In Chambers

**Date of hearing:**

27 June 2023

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**Draft Ruling****circulated:** 11 July 2023**Ruling delivered:** 20 July 2023**INDEX**

*Active case management- preliminary issue directed by Court-breach of duty action commenced by plaintiff against his own guardian ad litem and her attorneys-whether action commenced without authority-jurisdiction to appoint guardians-presumption of capacity--liability of attorneys to wasted costs orders-Grand Court Act (2015 Revision) section 14-Mental Health Act (2022 Revision) sections 18-19-Grand Court Rules Preamble, Orders 2, 62, 80*

**RULING ON CAPACITY OF PLAINTIFF TO INSTRUCT COUNSEL****Introductory**

1. Can a person who is represented by a guardian-ad-litem validly instruct counsel to commence breach of duty proceedings against their guardian without complying with this Court's rules requiring the use of a next friend? The present action was commenced by Writ dated 21 April 2022. At that time, the 2<sup>nd</sup> Defendant was the Plaintiff's Guardian *ad litem* having been appointed in G 154 of 2001 on 4 May 2015 (the "Main Action"). A Guardian was first appointed in the Main Action under section 14 of the Grand Court Law (as it then was) on 3 October 2006 for the primary purpose of providing instructions to counsel in relation to those proceedings (a substantial claim for damages for personal injuries sustained when the Plaintiff was a minor) based on a medical letter opining that he was "*not capable to make proper decisions about his legal and financial affairs*".
2. A short 2007 letter report by the same Psychologist, to which Mr Chapman referred, suggested improvement in the Plaintiff's condition, and suggested there was no need for a Guardian (a fuller 2010 Psychological Report recanted from this position). A short letter from another doctor in 2008 also suggested a Guardian was not needed. However in 2009, Dr Richard Hamilton prepared a 14 page Neuropsychological Evaluation and concluded that, looking forward to the Plaintiff's long-term needs, "*he is not able to manage his financial affairs and major life decisions independently. He would also need to be supervised because...he would be subject to being taken advantage of by*

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*others due to his suggestibility*". On or about 17 June 2014, Dr Hamilton prepared an Addendum to his initial Report in the Main Action where he was the jointly appointed Expert at the trial of the damages assessment. In paragraph 5 he opined: "*Certainly he would need a guardian to manage large sums of funds and help him make decisions about complex matters including legal decisions as well as financial and medical decisions*".

3. Following a 10 day trial on quantum between 10- and 20 May 2016, Justice Malcolm Swift QC (Acting) delivered a 92 page Judgment on 29 July 2016. He clearly accepted Dr Hamilton's evidence. He recorded that the Plaintiff's "*brain damage is permanent and irreversible and results in issues with organizing ability, abnormality processes such as planning and decision-making...*" (paragraph 4). He noted the absence of a Court of Protection and the need of the Court to administer awards in favour of patients under GCR Order 80 rule Rules 12 and 22. Noting the temporary nature of the Guardian's role, he accepted the submission on behalf of the Plaintiff (acting by his Guardian) that a professional trustee was required to manage an award of damages rather than the Plaintiff's family:

*"190. ...The trustee of the fund must deal with the Plaintiff and his needs independently without being subjected to undue pressure from the Plaintiff or from anyone else. The Plaintiff must be protected from himself."*

4. The Final Judgment dated 9 June 2017 (filed on 30 November 2018) and Supplemental Judgment modified the 2016 Judgment by adding an award to cover the costs of administration. Thus the "Award" in the Main Action was explicitly based on the assumption that the Plaintiff would never have the capacity to make complicated decisions about his financial affairs.
5. As summarised in my Reasons for granting the Guardian's application for a Discharge Order, G 154 of 2001, *AX-v- A et al*, Judgment dated 7 July 2023 (unreported), from in and about 2021, Chapmans issued various proceedings relating to the Main Action the first of which was purportedly on behalf of the Plaintiff, challenging the validity of the Guardian's appointment (G160 of 2021). In 2022 the present action was commenced. The authority issue was not, so far as I am aware, formally raised or judicially considered until Sir Anthony Smellie CJ's Judgment dated 7 October 2022 in G167 of 2021 when he observed in relation to an attempt by Chapmans in 2020 to replace the Guardian's attorneys of record through filing a Notice of Change of Attorney in the Main Action:

*“31. Unsurprisingly, on 4 September 2020, this Notice was found by Justice Ramsay-Hale to be an abuse of the process and ordered to be struck from the record of the Court. The Notice was plainly a nullity as Daric Ebanks, a person under a disability, must act by a next friend or guardian ad litem and whilst it is possible to discharge and replace a guardian or receiver, an application must be made to the Court for those purposes. No such application has been made.”*

6. So far as I recall, my first encounter with the present proceedings came in late 2022 when I was requested to deal with an application by the Plaintiff for specific discovery and before I was aware of the 7 October 2022 Judgment of the recently retired former Chief Justice. I made a routine Case Management Order on or about 17 January 2023, failing to identify or consider the ‘capacity to sue’ issue. In March 2023 I learned that the Defendant/Guardian proposed to apply for summary judgment. By this time, I was aware of the ‘capacity to sue’ issue, and I assumed that this point would form the basis for the summary judgment application. I accordingly directed that such an application should be filed and heard in priority to the Plaintiff’s specific discovery application. When that application was filed, I was astonished that the capacity to sue point was not being taken. I accordingly of the Court’s own motion gave the following directions communicated to the parties by email dated 21 April 2023:

*“The Judge is unable to identify from the evidence filed in support of the 2<sup>nd</sup> Defendant’s Summons under GCR Order 14 rule 12 the legal basis of the application and sees no mention of the legal argument that the action should be dismissed or struck-out because it is brought without authority. The 1<sup>st</sup> Defendant was appointed as Guardian ad Litem and Interim Receiver of [AX] in GC 154 of 2001 because, as Smellie CJ put it in paragraph 24 of his 7 October 2022 Judgment in ...G167 of 2021: ‘[AX] had been in need of a guardian ad litem in the first place because of his lack of capacity to prosecute his claim himself and so there was no question of relinquishing management of his affairs to him’. Unless and until Quin J’s 4 May 2015 appointment Order is set aside, the position of record appears to remain that [AX] is deemed to lack capacity to issue proceedings on his own behalf. Sir Anthony Smellie CJ (as he then was) also held in the same judgment (which is apparently subject to appeal) also referred to Mr Chapman:*

*‘purporting to act on behalf of [AX] despite being aware that this Court (per Justice Swift) had found Daric to be incapable of managing his affairs and had for that reason, declared the need for the appointment of a guardian ad litem and receiver (the role later assumed*

*by Ms Philander) and while the order for her appointment remained valid and effective.’ (paragraph 29)*

*The Judge accordingly directs that at the initial hearing of the 2<sup>nd</sup> Defendant’s Summary Judgment application, the preliminary issue of the standing to bring the action should be determined, if Mr Chapman wishes to seek to contend that he had authority to bring the action. Establishing authority would, the Judge respectfully suggests, require the production of expert evidence and ultimately a finding that [AX] had capacity to instruct attorneys in relation to the subject matter of GC 154 of 2001 and/or his financial affairs, as of the date when the present action was commenced.”*

7. It was against this background that the question of whether the present proceedings had been validly commenced came to be argued on 27 June 2023 as a matter of law with no evidence being adduced with a view to establishing the Plaintiff’s capacity to instruct counsel to bring the present proceedings.

#### **Legal findings: the statutory regime**

8. The first Guardian was expressly appointed under section 14 of the Grand Court Law (2006 Revision). The heading of the 3 October 2006 Order also recites GCR Rule 30 (Receivers) and 80 (“Disability”). Section 14 (which appears to remain unchanged since 2006) provides as follows:

*“14. The Court shall have power to appoint guardians of the persons and estates of persons of unsound mind or suffering from mental illness and for that purpose to enquire into, hear and determine by inspection of the person the subject of such inquiry, or to examine on oath or otherwise the party in whose custody or charge such person may be, or any other person or persons, or use such other ways and means by which the truth may be best discovered.”*

9. This according to its terms confers a very broad statutory jurisdiction to appoint guardians in relation to “*persons and estates of persons of unsound mind or suffering from mental illness*” [emphasis added]. Although the term “unsound mind” might be thought to be synonymous with incapacitated by mental illness, its juxtaposition as an alternative to “mental illness” suggests a broader potential meaning. This initial view finds general support from the following sources, only the first of which was not considered in argument. Firstly, and most clearly, ‘*Black’s Law*

*Dictionary*, 2<sup>nd</sup> edition (1910) defines “*unsound mind*” as connoting “*an adult who from infirmity of mind is incapable of managing himself or his affairs.*” In a case upon which, for different purposes, both Mr Kennedy for the 2<sup>nd</sup> Defendant and Mr Chapman for the Plaintiff relied, *Masterman-Lister-v-Brutton & Co* [2002] EWCA Civ 1889, Chadwick LJ (considering the English Order 80 and the specific question of capacity to sue without a next friend) referred to the following general legal principle:

“62. *The authorities to which I have referred provide ample support for the proposition that, at common law at least, the test of mental capacity is issue-specific: that, as Lord Justice Kennedy has pointed out, the test has to be applied in relation to the particular transaction (its nature and complexity) in respect of which the question whether a party has capacity falls to be decided. It is difficult to see why, in the absence of some statutory or regulatory provision which compels a contrary conclusion, the same approach should not be adopted in relation to the pursuit or defence of litigation.*”

10. Another (in England) historical allusion made by Sir John Chadwick in the same case suggests what the antecedents of section 14 of the Grand Court Act may be:

“*The jurisdiction formerly exercised by the Crown as parens patriae in relation to persons who, by reason of unsound mind, were unable to manage their property or affairs ceased to be exercisable on the coming into force, on 1 November 1960, of the Mental Health Act 1959 and the revocation of the last warrant by which that jurisdiction had been assigned to the Lord Chancellor and the judges of the Chancery Division – see the observations of Lord Brandon of Oakbrook in In re F (Mental patient: Sterilisation) [1990] 2 AC 1, at 57D-58B. Since 1960 the position has been governed by the provisions of the 1959 Act (subsequently repealed and replaced by the Mental Health Act 1983) and the common law – ibid, page 58B-C.*”

11. The Grand Court Act jurisdiction is supplemented rather than supplanted by the Mental Health Act (2023 Revision) (“MHA”), which is the current iteration of what was originally enacted as the Mental Health Law, 2013. It critically provides:

***“Jurisdiction of the Grand Court over the property of patients and persons under guardianship***

18. *In the case of—*

(a) *a patient under this Act; or*

(b) *a person in respect of whom the Grand Court has appointed a guardian under section 14 of the Grand Court Act (2015 Revision) and has thereafter found upon examination to be a person incapable of managing their own affairs, the Grand Court may, with respect to the property and affairs of such person, do or secure the doing of all such things as appear desirable for the maintenance or benefit of such person, of such person’s family, of those for whom such person might be expected to provide if such person were not suffering from mental impairment or serious mental illness and for otherwise administering such person’s affairs but shall, in so doing, have regard to the interests of creditors and obligees and to the making of provision for them, notwithstanding that the relevant debts and obligations may not be legally enforceable.*

***Powers of the Grand Court exercising jurisdiction under section 18***

19. *In the exercise of its jurisdiction under section 18, the Grand Court may on behalf of a patient or person under guardianship—*

(a) *arrange for a person or persons to—*

(i) *manage, sell, acquire, charge or deal with property;*

(ii) *enter into any settlement;*

(iii) *provide for the management of a business;*

(iv) *dissolve a partnership;*

(v) *complete a contract;*

(vi) *conduct legal proceedings; and*

(vii) *act as trustee; or*

(b) *appoint a receiver.”*

12. There is no obviously material difference between the current and original versions of sections 18 and 19 of the MHA. Thus, since the present Guardian’s first appointment in 2015, the Grand Court has had the express statutory power to appoint a guardian:

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- (a) in relation to a person found to be “*incapable of managing their own affairs*”;
- (b) by reason of “*mental impairment or serious mental illness*”; and
- (c) *inter alia*, manage a patient’s property, create trusts (enter into settlements) and conduct legal proceedings.

13. The jurisdiction conferred on the Grand Court by section 14 of the Grand Court Act as read with sections 18-19 of the MHA on a straightforward reading of the statutory provisions appears to incorporate the following elements:

- (a) it empowers the Court to appoint a guardian in relation to all or some of a patient’s affairs or assets;
- (b) the jurisdiction is available where a person either suffers from a “*mental impairment*” or a “*mental illness*”;
- (c) depending on the scope of a guardianship order and the grounds upon which it has been made, the fact that a guardian has been appointed may not necessarily signify a judicial determination that the patient lacks capacity to handle all of his or her affairs;
- (d) whether a guardian has been appointed to deal with all or only one or more specific assets of a patient, such an appointment can only sensibly be viewed as conferring (by necessary implication) exclusive authority on the guardian to, *inter alia*, instruct counsel to commence and prosecute legal proceedings in relation to the subject-matter of the appointment.

14. Section 2(1) of the MHA contains the following definition which is pertinent to the present case. It is a non-exhaustive one, which seems designed to apply to a wide range of circumstances involving the impairment of mental capacity:

“*‘mental impairment’ means a state of arrested or incomplete development of mind, which may or may not be due to a trauma or injury and includes significant impairment of intelligence and social functioning and which may or may not manifest itself in abnormally aggressive or seriously irresponsible conduct...*”

15. Another more nuanced question, which arises out of the circumstances of the Main Action and other proceedings purportedly commenced by the patient in the present case, is less easy to resolve on a simple reading of the statutory guardianship regime. Where a guardianship order relates only to a discrete segment of a patient's affairs, what safeguards exist to ensure that the patient is not left with the ability to undermine the efficacy of the limited guardianship order? Here the Guardian was expressly appointed only for the purposes of the Main Action. However:
- (a) the appointment was made (and has been continued) on the basis of expert evidence that the Plaintiff lacks the ability to deal with complex legal and financial matters;
  - (b) the appointment was made with a view to recovering and ensuring the independent professional management of a substantial fund which was intended to financially support the Plaintiff throughout his lifetime; and
  - (c) the efficacy of the Order would clearly be undermined if the Plaintiff had the unfettered right to instruct counsel to pursue one or more pieces of unrelated litigation the costs of which would potentially diminish the Award.
16. This question, what are the implications of a limited guardianship order on the general competence of the patient to instruct counsel in their own right, need not be answered in the present case if either:
- (a) the Breach of Duty Claims asserted herein are simply viewed as falling within the ambit of the Order appointing the Guardian. On this basis, the Guardian's conduct is subject to the supervision of the Court and absent some material change of circumstances approved by the Court, the patient does not retain any competence to sue his own Guardian while she is in office; alternatively
  - (b) if the present action is in complexity terms found to be at least as complex as the Main Action, then absent a material change of circumstances in the patient's capacity, it would seem to almost inevitably follow that they lack the capacity to commence proceedings of comparable complexity while the Guardian is still in office.
17. On a preliminary analysis therefore, the proposition that a patient lacks sufficient capacity to manage a specific piece of litigation but ought to be simultaneously recognized as possessing the capacity to personally commence and manage proceedings challenging the propriety of the way in which that same litigation has been conducted by their guardian seems entirely counterintuitive. Identifying this conundrum also helps to illustrate the practical importance of the following

provisions of GCR Order 80 as a set of procedural mechanisms designed to, *inter alia*, support the efficacy of guardianship orders:

“1. (1) *In this Order —*

(a) *‘the Law’ means the Mental Health Act (as amended and revised);*

(b) *‘patient’ means —*

(i) *a person who is a patient within the meaning of Section 2 of the Law; or*

(ii) *a person in respect of whom a guardian has been appointed under Section 14 of the Grand Court Act (as amended and revised);*

(c) *‘person under disability’ means a person who is a child or a patient.*

**2. *Person under disability must sue, etc., by next friend or guardian ad litem (O.80, r.2)***

2. (1) *A person under disability may not bring, or make a claim in, any proceedings except by that person’s next friend and may not defend, make a counterclaim or intervene in any proceedings, or appear in any proceedings under a judgment or order, notice of which has been served on that person, except by that person’s guardian ad litem.*

(2) *Subject to the provisions of these Rules, anything which in the ordinary conduct of any proceedings is required or authorised by a provision of these Rules to be done by a party to the proceedings shall or may, if the party is a person under disability, be done by that party’s next friend or guardian ad litem.*

(3) *A next friend or guardian ad litem of a person under disability must act by an attorney...*

***Application to appoint receiver, etc. (O.80, r.17)***

17. (1) *Subject to rule 18, an application to appoint a receiver or other person under Section 13 of the Law may be made by —*

- (a) *the patient themselves;*
- (b) *the patient's spouse;*
- (c) *any guardian of the patient appointed under Section 14 of the Grand Court Act (as amended and revised);*
- (d) *any near relative of the patient as defined in Section 2 of the Law; or (e) the Solicitor General; or*
- (e) *the Solicitor General...*

***Application for appointment of guardian (O.80, r.28)***

28. (1) *An application for the appointment of a guardian under Section 14 of the Grand Court Act (as amended and revised) may be made by any of the persons mentioned in rule 17(1) (a), (b), (d) or (e).*

***Removal of guardian (O.80, r.32)***

32. (1) *A guardian may apply to the Court for the guardian's own removal on the ground that —*

- (a) *the guardian desires to resign; or*
- (b) *the patient has recovered, is of sound mind and no longer suffering from mental illness, provided that an order shall not be made under subparagraph (a) of this rule unless and until the Court is able to appoint a successor.*
- (2) *A patient or any person who would have been able to apply under rule 28(1) for the appointment of the guardian may apply to the Court for the guardian's removal on the ground —*
  - (a) *mentioned in subparagraph (1) (b) of this rule;*
  - (b) *that the guardian has failed to discharge the guardian's duty; or*
  - (c) *that the guardian is no longer willing, able or fit to perform the duties required of the guardian with respect to the patient..."*

18. Order 80 addresses the issue of standing to bring proceedings on behalf of a patient in the following (for present purposes) most pertinent ways:
- (a) a patient, which includes someone in relation to whom a guardian has been appointed under section 14 of the Grand Court Act, can only commence fresh proceedings through a “next friend” who has been appointed to that office by the Court;
  - (b) a patient, amongst others, has the right to apply to discharge a guardian on the grounds that they are no longer under a disability;
  - (c) anyone competent to appoint a guardian can apply for the guardian’s removal.
19. The requirement that once a guardian has been appointed the relevant patient may not issue proceedings save by a next friend not only makes eminent sense, it is additionally indispensable to ensuring the efficacy of guardianship orders and the statutory scheme laid out in the primary legislation. It reflects the legal implications of an order signifying that the patient lacks the capacity to deal with all, or a particular aspect of, their affairs. Moreover, the procedural framework also directly addresses to a significant extent two important questions of principle raised by Mr Chapman in oral argument in the course of advancing an eloquent plea for the fundamental rights of persons with compromised mental capacity. If a guardian is not properly protecting the patient’s interests, who can vindicate the patient’s interests? How meaningful is the presumption of capacity if there is an assumption of continuing incapacity without any periodic reviews?
20. The answer provided by GCR Order 80 (in particular by rules 2 and 32) is that the patient can vindicate their own rights; however they must appoint a “next friend” to advance the relevant legal claims. In addition, the patient retains the right to apply to discharge the guardianship order on the grounds that, for instance, there is fresh evidence that their previously diminished capacity has been restored.

### **The Defendants’ submissions**

21. Mr Lindley and Mr Kennedy essentially relied upon the above straightforward interpretation of the statutory and procedural regime in support of their contention that the Plaintiff was a patient who lacked the legal standing to commence the present proceedings against the Defendants in his own name. In the ‘Submissions on Behalf of the Second Defendant’, the following summary submission was made:

*“57. In the circumstances we submit that:*

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- a. *No error was made in the appointment of a Receiver or Guardian;*
- b. *Such appointments govern the position with respect to all proceedings relating to the Damages;*
- c. *Even if not accepted, the evidence before the Court is such that it is clear that a Next Friend is required to conduct this litigation;*
- d. *Both roles in GC154 of 2001 continue to exist until the funds are released outside of the litigation and outside the hands of [AX] and further order of the Court;*
- e. *No change of circumstance exists that makes [AX] capable of managing his own affairs or conducting litigation that relates to the Damages;*
- f. *Chapmans have no capacity to bring or act for [AX] in any of these proceedings.”*

22. The only perplexing aspect of the quoted submission is the fact that, Conyers (having raised the standing issue in correspondence on 16 August 2022, and KSG which had in 2020 successfully taken a standing point in the Main Action, never formally raised the capacity issue by way of an application to this Court before even filing responsive pleadings. This omission is potentially relevant to the matter of costs and I return to it when setting out my provisional views as to costs below.

### **The Plaintiff’s submissions**

23. In his Skeleton, Mr Chapman advanced the following main points:

- (a) firstly, (in a reckless submission to advance to any Court, let alone a Judge sitting alone) he suggested that the Court had only directed the capacity issue to be determined for the improper collateral motive of preventing the claim from being adjudicated on its merits:

*“3. It is hard to know what this hearing is really about save in that it appears clear the Court does not want [AX] to question that his trust fund has been mismanaged and that he has suffered loss thereby...”;*

- (b) secondly, he submitted no preliminary issue was appropriate where findings of fact were required: *Arnage Holdings et al-v- Walkers*, FSD 105 of 2014 (DDJ), Judgment dated 16 June 2023 (unreported);

- (c) thirdly, he submitted that deemed incapacity in G154/2001 was either irrelevant or had come to an end with the entering of the Final Judgment in that case;
- (d) fourthly, it was submitted that it was wrong for the Court to case manage on behalf of the Defendants and to cause them to incur costs which would be levied against AX's trust fund. This was in breach of AX's rights under sections 5, 7, 9 and 15 of the Bill of Rights;
- (e) fifthly, (in another somewhat reckless submission) it was asserted that it was improper for the Judge as a trier of fact to express a provisional view on the capacity position. This submission was based on the misconceived premise that the Court's view was based on some undisclosed factual analysis rather than a primarily legal one:

*“13...The requirement to draft this skeleton is a charade when counsel does not know what the judge is reading, who the judge is listening to, and what purported ‘facts of record’ he is relying on...”;*

- (f) sixthly, the Court's Civil Division was encouraged to follow the “modern” approach of the Criminal and Family Division, which had recognised AX's capacity to instruct counsel. This fundamental right should not be lightly interfered with. In oral argument Mr Chapman also validly pointed out that the modern approach of the English courts is to strive to maximize the extent to which persons with compromised mental capacity can enjoy autonomy in their personal lives: *Saulle (by Saulle his sister and litigation friend)-v- Nouvet* [2007] EWHC 2902 (QB) at paragraph 23.

24. By way of preliminary response to these arguments, some of which will be dealt with in further detail below, the following points must be made:

- (a) the suggestion that my case management decision to direct the trial of the capacity to instruct issue as a preliminary issue was motivated by a desire to protect the Defendants from legal scrutiny (an insinuation of actual bias) is an improper point to advance by way of bare submission. It is also patently misconceived, because it presupposes that there is no objective or rational basis for the Court concluding that there are good grounds for doubting the capacity of the Plaintiff to bring the present proceedings. In reality, the proceedings have quite clearly and unarguably been commenced in breach

of the express terms of this Court's Rules (GCR Order 80 rule 2) so the capacity issue is on view a valid point for the Court to raise Moreover, the Preamble to the GCR provides:

*“4.3 Whenever a proceeding comes before the Court, whether on a summons for directions or otherwise, the Court will consider making orders on its own motion for the purpose of giving effect to the overriding objectives of the rules”;*

- (b) the first of six principles identified by Doyle J in *Arnage Holdings et al-v- Walkers* (at paragraph 64) as informing whether or not decide part of a case as a preliminary issue is that *“each case, of course, must be carefully considered in its own context and on its own facts and circumstances”*. Standing points are quintessentially points which are in the widest array of litigation contexts routinely dealt with at the beginning of a case if it is possible that the costs of pursuing a full inquiry of the entire case will be substantial and may possibly be saved;
- (c) the impact of the appointment of the Guardian in the Main Action on the capacity issue will be addressed more fully below. However, it is clearly not irrelevant, because the present action covers the same legal terrain as the Order appointing the 1<sup>st</sup> Defendant as Guardian in the Main Action. It is also an at first blush surprising suggestion to contend that the Guardian's appointment lapsed by operation of law when the Final Judgment was entered in 2017. For the reasons set out below, I summarily reject this contention;
- (d) the complaint that the trial of the preliminary issue will cause the Defendants to incur costs which will reduce AX's Award is valid to the extent that this is the outcome which would be achieved. The direction was intended to achieve the overall impact of protecting the Award from further diminution through the costs of a full trial, a consideration to which I return below;
- (e) in the modern civil litigation context, there is nothing remarkable about judges expressing provisional views on a wide variety of discrete legal and factual issues which arise in a civil action before or at trial. It is up to counsel on an issue by issue basis to decide whether to embrace or seek to displace the provisional view; judicial transparency invariably facilitates effective advocacy and efficient litigation. In the *inter partes* context where the point raised by the Court is not agreed, the opposing

sides are able to respond to their respective arguments so the need for the Judge to fully articulate the basis for what is necessarily only an incomplete preliminary view does not arise;

- (f) as a general proposition Mr Chapman was right to contend that the Court should not lightly interfere with a litigant's right to instruct counsel and this principle applies with equal force in relation to persons who have been found at some time to lack full mental capacity. However, fitness to plead (in this Court's Criminal Jurisdiction) and the capacity to participate in family law proceedings (in this Court's Family Jurisdiction) are not entirely the same as the capacity to manage a multi-million dollar damages award which includes compensation for suffering permanent capacity-impairing mental injuries. While I accept that this Court should be slow to restrict the extent to which a patient is able control their ordinary personal affairs, the subject matter of the present action falls into a special category. The unique nature of the present action and its close connection with the Main Action will also be addressed further below.

25. In oral argument, *dicta* in *Masterman-Lister-v- Brutton* [2002] EWCA Civ 1889 were relied on to question whether or not GCR Order 80 was inconsistent with the fundamental fair hearing rights guaranteed by section 7 of the Bill of Rights. Mr Chapman appeared to me to accept that this was an ambitious proposition by identifying as his main argument the point that the Guardian's appointment in the Main Action lapsed when the Final Judgment was entered in 2017.
26. In *Masterman-Lister-v- Brutton* [2002] EWCA Civ 1889, the English version of Order 80 was thought to contravene article 6 of the European Convention on Human Rights by permitting the right to sue to be taken away without any judicial determination of a lack of capacity (Kennedy LJ, paragraph 17). The provisions of GCR Order 80 relied upon in this case are grounded in a judicial decision supported by medical evidence that a guardian should be appointed over a discrete aspect of the patient's affairs by virtue of permanent mental impairment. Nonetheless this decision can be read as supporting the proposition that GCR Order 80 rule 2 should not be applied so as to require a patient to sue by a next friend without an actual determination that at the relevant time they lack the requisite capacity. As Chadwick LJ observed:

*“75. For the purposes of RSC 80 – and, now, CPR 21 - the test to be applied, as it seems to me, is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary*

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*in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a next friend or guardian ad litem (or, as such a person is now described in the Civil Procedure Rules, a litigation friend).” [Emphasis added]*

27. Taking these principles at their highest, this Court is probably required to consider whenever asked to set aside proceedings brought in breach of GCR Order 80 rule 2 whether grounds for displacing the presumption of capacity exist as at the date of the hearing of the standing to sue challenge. On balance, I find that Mr Chapman was technically right to contend that the Defendants are not automatically entitled to rely on a ‘presumption of continuance’. As Kennedy LJ opined in the *Masterman-Lister* case:

*“17... Mr Langstaff submitted that where, as in the present case, there is evidence that as a result of a head injury sustained in an accident the doctors who have been consulted agree that for a time the claimant was incapable of managing his property and affairs he can rely on the presumption of continuance. That I would not accept. Of course, if there is clear evidence of incapacity for a considerable period then the burden of proof may be more easily discharged, but it remains on whoever asserts incapacity...”*

28. However, in my judgment the context in which those judicial observations were made is quite distinguishable from the circumstances of the present case. Here, where the Plaintiff was party to proceedings (the Main Action) in which this Court made a positive finding that he would never possess the capacity to manage his damages award, it ought not to be open to him to contend that, *prima facie*, he possesses the capacity to commence the present proceedings. If this conclusion is wrong, I would alternatively find that where there has been both a comparatively recent judicial determination of someone’s inability to manage a particular aspect of their affairs and there is no basis for doubting that the diminished capacity endures, the presumption of capacity may be very easily rebutted indeed.
29. It is therefore unsurprising that Mr Chapman felt compelled to rely primarily on a point which, if legally valid, would forensically deliver a knockout blow to the standing challenge. If the Final Judgment entered on June 2017 had the effect of bringing the Main Proceedings to an end, the Guardian’s appointment would have lapsed by operation of law. She would have been acting without authority for the last 6 years. However this was a desperately hopeless point, more like a

friendly pat than a knockout punch, which can only fairly be summarily rejected for two main reasons:

- (a) as a matter of general principle, it is trite law that a civil action does not come to a conclusive end when final judgment is entered. Such proceedings may only be regarded as concluded when the final judgment has been fully satisfied or otherwise fully implemented; and
- (b) it is clear beyond serious argument that, as far as the Main Action is concerned, the Final Judgment will not have been implemented until the Guardian has transferred the Award to a professional trustee charged with managing it for the Plaintiff's benefit.

**Findings: were the present proceedings brought without authority?**

**Non-compliance with GCR Order 80 rule 2**

30. It cannot be disputed that the present proceedings were commenced in breach of GCR Order 80 rule 2 because they were purportedly commenced by the Plaintiff, a patient under the rule, otherwise than through a next friend. This irregularity is not without more sufficient to set aside the proceedings on the grounds of invalidity, because GCR Order 2 provides:

*“1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*

*(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.”*

31. The real question is whether the non-compliance with Order 80 rule 2 which occurred in the present case is merely a procedural irregularity, or rather signifies that in substantive law terms the proceedings are liable to be struck-out on the ground that they are bound to fail for lack of standing. If there is a substantive lack of standing, there is no need for recourse to the discretionary power to set aside any steps taken under Order 2 on the grounds of irregularity arises.

### **Displacing the presumption of capacity**

32. Assuming that, contrary to my primary findings, the issue of the Plaintiff's capacity ought properly to be judicially revisited, it is important to remember that the issue arises in the context of the following significant circumstances in this case:
- (a) since 2005, the Main Action has been conducted by the Plaintiff acting through various guardians *ad-litem*. The 1<sup>st</sup> Defendant was appointed as Guardian in 2015 when this Court (Quin. J) last explicitly determined that the Plaintiff lacked sufficient capacity to instruct counsel in relation to his personal injuries damages claim;
  - (b) in the Judgment delivered in 2016 following the quantum phase of the trial, this Court (Swift, J (Acting)) determined that the Plaintiff had suffered permanent diminished capacity as a result of his injuries and that any damages award would have to be managed by a professional trustee, rather than by the Plaintiff himself or his family;
  - (c) in the 2017 Addendum to the 2016 Judgment, this Court (Swift, J (Acting)) decided that the Award should include provision for the costs of managing it. The Final Judgment was filed in 2018 against this background;
  - (d) in 2019, this Court (Kawaley J) approved the 1<sup>st</sup> Defendant's initial attempt to transfer the Award to a professional trustee;
  - (e) in 2020, this Court (Ramsay-Hale, J) struck-out a Notice of Change of Attorney filed by Chapman's in the Main Action on the grounds that the Plaintiff could only be represented by the Guardian;

(f) in 2022, in these proceedings, this Court (Smellie, CJ) doubted the authority of the Plaintiff to instruct counsel to bring proceedings and issued a strident call for the urgent transfer of the Award to a professional trustee for its long-term management;

(g) on 27 July 2023, in these proceedings, I implicitly found that the Plaintiff lacked capacity to personally exercise his legal and financial rights in relation to the implementation of the Final Judgment obtained by him through the Guardian in the Main Action. This finding was implicit in my granting the Discharge Order on the application of the 2<sup>nd</sup> Defendant, the Plaintiff's Guardian in the Main Action, on terms that the Award be transferred to a professional trustee to be managed for the Plaintiff's benefit.

33. Against this background, I have little difficulty in concluding that the presumption of capacity, if it applies, has been rebutted. Mr Kennedy suggested in the course of argument that the complexity of giving instructions in relation to the present Breach of Duty claims is far greater than the complexity of giving instructions in relation to the Main Action. It is probably enough for me to be satisfied that the complexity of giving instructions in relation to the present proceedings is not materially less than it is or was in relation to the Main Action. However, I am inclined to agree with Mr Kennedy's submission that the present phase of the Main Action (and assessing whether the Defendants have acted improperly in relation thereto) is more complex than the trial phase. The point finds support in the following observations of Kennedy LJ in *Masterman-Lister-v-Brutton & Co* [2002] EWCA Civ 1889 :

*“27... It is not difficult to envisage claimants in personal injury actions with capacity to deal with all matters and take all ‘lay client’ decisions related to their actions up to and including a decision whether or not to settle, but lacking capacity to decide (even with advice) how to administer a large award....”*

34. The present case is on any sensible view very far removed from cases where there has never been a judicial determination of a lack of capacity to manage a particular aspect of the patient's affairs. In the present case the Plaintiff has never judicially been considered capable of giving instructions in relation to his personal injuries claim and has been found to have suffered injuries resulting in permanent diminished capacity. The Guardian sought to facilitate a further medical assessment by Dr Lockhart in the Main Action following a hearing before the Chief Justice on 29 October 2021, but the Plaintiff did not attend for the relevant examination. In terms of substantiating a change of his capacity position therefore, the Plaintiff and/or his attorneys were seemingly *“willing to wound and yet afraid to strike”*. In effect, the Plaintiff has declined to adduce positive evidence that the

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capacity which existing medical evidence shows he lacks (and has permanently lost) has been restored. There is no scope for the operation of the presumption of capacity in the particular factual matrix of the present case.

35. Absent new and surprising medical evidence about the Plaintiff's ability to manage complex legal and/or financial matters, there is no evidential basis for concluding that the Plaintiff possesses the capacity to give instructions in relation to highly complex aspects of the same broad matter various guardians have been appointed to deal with in the Main Action over a period of more than 15 years. The record in the Main Action, and in particular the Judgments and Orders made therein between 2015 and 2017, are sufficient to support a confident finding that the Plaintiff lacks the requisite capacity. The Plaintiff submits through his attorney that "*he is more alert and more capable of managing his affairs than Ms Philander*" and "*has pressed constantly from 2020 to mitigate the losses visited upon him by having the fund invested*" (Skeleton, paragraphs 64-65).
36. Those are bare submissions, and overlook a very large 'elephant in the room'. Had the Plaintiff through his attorneys "pressed constantly" for the Award to be transferred to a professional trustee, by way of implementation of this Court's Judgments in the Main Action, rather than obstructing their implementation, some form of investment would long since have occurred. This incoherent and meandering course of litigation conduct, purportedly on the Plaintiff's behalf, can hardly be prayed in aid as evidence of the Plaintiff's capacity to manage the Award. Instead it seems to confirm the wisdom of Justice Swift's conclusions in 2016 that a professional trustee was required: "*The Plaintiff must be protected from himself.*"

**The legal consequences for the validity of these proceedings of a patient purporting to commence proceedings without a next friend**

37. The normal consequence of proceedings being brought without authority by a person who lacks capacity is that they are dismissed or struck-out: see e.g. *Fletcher-v-Keatley* [2017] EWCA Civ 1540 at paragraph 63 (per McCombe LJ.). If it was obvious that fresh proceedings could properly be brought if a next friend were to be duly appointed because the claim was clearly one that should be brought in the best interests of the patient, the proper course would probably be to stay the proceedings. No explanation has been advanced as to why the Plaintiff's attorney in this action failed to apply to appoint a next friend, or failed to obtain medical evidence of capacity, prior to commencing the present proceedings. It is obvious in all the circumstances of the present case that GCR Order 80 rule 2 deems the Plaintiff to be a patient who cannot validly commence proceedings on his own behalf.

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38. In *Masterman –Lister*, Kennedy LJ opined as follows:

*“30. Normally no problem arises as to when the issue of capacity should be raised. It raises itself. A responsible solicitor acting for a claimant or defendant has doubts about the capacity of his client, and seeks a medical opinion. If the opinion suggests that the client lacks the necessary capacity then the solicitor arranges for the appointment of a litigation friend. Sometimes the doubts may arise in relation to an opponent acting in person, and then it may be appropriate to bring the issue of capacity before the court...But what if, as is said to have been the case here, the claimant did lack capacity but, without any fault on anyone’s part, no one recognised that fact? Order 80 and CPR 21 are worded in such a way as to indicate that in that event the litigation is ineffective and decisions made in the course of litigation are invalid – see, for example, Order 80 Rules 2(1) and 10, CPR 21.2(1) and 21.10(1), but CPR 21.3(4) does suggest a solution. It provides –*

*“Any step taken before a child or patient has a litigation friend shall be of no effect, unless the court otherwise orders.”*

*31. So a court can regularise the position retrospectively, and that was also possible under the Rules of the Supreme Court (see Kirby v Leather supra). Provided everyone has acted in good faith and there has been no manifest disadvantage to the party subsequently found to have been a patient at the relevant time I cannot envisage any court refusing to regularise the position. To do otherwise would be unjust and contrary to the overriding objective of the Civil Procedure Rules, but in any given case the ultimate decision must depend on the particular facts. In the context of litigation Rules as to capacity are designed to ensure that claimants and defendants who would otherwise be at a disadvantage are properly protected, and in some cases that parties to litigation are not pestered by other parties who should be to some extent restrained...” [Emphasis added]*

39. The present case is a world away from the scenario addressed in the just cited passage. On the grounds set out in the Reasons for the 27 June 2023 Discharge Order, the present proceedings were in my judgment obviously not brought in the interests of the Plaintiff/patient because:

- (a) suing the Plaintiff’s Guardian for not promptly investing the Award in the Main Action was inconsistent with impeding the Guardian’s attempts to transfer the Award to a professional trustee so that it could be promptly invested. A party that creates delay cannot complain of it;

- (b) the terms of the Guardian's appointment did not contemplate her making investment decisions and it has been obvious since the Final Judgment that the Plaintiff's best financial interests lay in expediting the consensual transfer of the Award to a professional trustee for investment and maximising the sum to be invested by minimizing the attendant legal costs. The suggestion that the Court's desire to expedite the transfer of the Award to a professional trustee is more attributable to sympathy for (or preoccupation with) the predicament of the Guardian (a former officer of the Court) than concern for the Plaintiff's best interests is on any objective analysis entirely misconceived;
- (c) requiring the Guardian and her attorneys to defend the present proceedings exposed the Award to the risk of being diminished by three sets of legal costs in support of a doubtful claim; and
- (d) no responsible attorney would have failed to consider the need to address the issue of the Plaintiff's capacity to sue before commencing proceedings in all the circumstances of the present case. The present action does not advance an entirely discrete claim unconnected with the Main Action but launches an unambiguous collateral attack on the Order appointing the Guardian by necessarily implying that the Plaintiff, unassisted by a next friend, is better able than her to judge where his interests in implementing the Final Judgment lie.

40. Mr Chapman made the bare assertion that as much as \$100,000 potential investment income has been lost due to the 1<sup>st</sup> Defendant's failure to either pay the Award into Court or make some interim investment. Even assuming that to be correct, and assuming further that Chapman had no authority to obstruct the investment process was contemplated by this Court, it seems doubtful that the 1<sup>st</sup> Defendant could on any basis be found to be personally liable for such financial loss as may have been sustained. She was appointed as Guardian in the Main Action initially by dint of occupying the position of Clerk of Court in the absence of an Official Solicitor, and has remained in office because of difficulties in appointing a private professional trustee. Those difficulties have doubtless been exacerbated by the pendency of these and other proceedings commenced against the Guardian. The 1<sup>st</sup> Defendant has acted under the supervision of this Court in the face of what I view as a sustained campaign to impede her attempts to relinquish her office in the manner directed by this Court. There is no hint, let alone a pleaded allegation, of wilful default or neglect on her part. In the course of argument, I wondered whether some responsibility might ultimately rest with the

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Crown. The most obvious causes for any depreciation in the Award which has occurred, apart from the litigation strategy purportedly directed by the Plaintiff himself, are the absence of any statutory officer whose duty is to manage damages awards recovered by patients and the resultant inability of this Court to effectively implement the Final Judgment in the Main Action.

41. If my assessment as to lack of merit of the present claims is wrong and the Plaintiff has meritorious claims which he could have brought against the Defendants through a duly appointed next friend, it is not too late for fresh claims to be brought. On any sensible view the need to consider an interim investment could not have arisen sooner than when it first became apparent (at some point in 2020) that it would not be possible to settle the Award on the trust it was contemplated would be formed in late 2019. For these reasons I see no justification for staying the present action. There is no discernible basis for this Court exercising any inherent jurisdiction it may possess to preserve the validity of the present action. The present action is accordingly liable to be dismissed or struck-out on the grounds that the Plaintiff lacked capacity to bring the proceedings. However, because counsel have not yet been heard as to the consequences of any finding of a lack of capacity, I will hear them as to whether the present action ought instead to be stayed. However it seems clear based on *Yonge-v-Toynbee* [1909] 1 K.B. 215, which Mr Kennedy placed before the Court, that that the starting assumption generally is that an action brought without authority is liable to be struck-out. This view has not changed in over 100 years, because in *Bank of Scotland –v- Azam Qutb* [2012] EWCA Civ 1661, Mummery LJ cited the earlier case with approval:

*“In the leading case of Yonge v. Toynbee [1910] 1 KB 215 the court invoked its summary jurisdiction over solicitors to make an order against a firm of solicitors personally to pay the plaintiff’s costs of proceedings on the ground that they had acted for the defendant without authority, the defendant having been certified as a person of unsound mind. The certification terminated the authority of the solicitors, who, by continuing to act in relation to legal proceedings on behalf of the defendant, thereby impliedly warranted that they had authority to do so and were personally liable to pay the plaintiff’s costs of the action.”*

#### **Provisional views as to costs**

42. Mr Kennedy on behalf of the 2<sup>nd</sup> Defendant submitted that the present proceedings should be dismissed with costs on the indemnity basis ordered to be paid by Chapmans. This issue was not addressed in argument and counsel should obviously be heard. Raising the issue of a potential wasted costs order against the Plaintiff’s counsel is, for reasons I will come to, something of a

double-edged sword. Nonetheless, to assist the parties and potentially avoid or limit the scope of any hearing on costs, I set out my provisional views.

43. Two provisions in GCR Order 62 appear particularly relevant. Firstly, GCR Order 62 rule 4 provides:

*“(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by successful party in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.”*

44. Secondly, Order 62 rule 11 provides as follows:

*“(1)...*

*(2) Where it appears to the Court in any proceedings that anything has been done or that any omission has been made improperly, unreasonably or negligently by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by that party to that other party.*

*(3) Subject to the following provisions of this rule, where it appears to the Court that costs have been incurred improperly, unreasonably or negligently in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the Court may order —*

*(a) the attorney whom it considers to be responsible (whether personally or through an employee or agent) to repay to that attorney’s client costs which the client has been ordered to pay to any other party to the proceedings; or*

*(b) the attorney personally to indemnify such other parties against costs payable by them.*

*(4) The amount payable under a wasted costs order made under paragraph 3(b) of this rule shall be taxed on the indemnity basis.”*

45. Having regard to my findings that the Plaintiff lacked capacity and that no responsible attorney would have commenced the present proceedings on the basis of the Plaintiff's instructions without addressing the obvious capacity concerns, it ought logically to follow that Chapmans should *prima facie* be ordered to indemnify the successful Defendants' in respect of their costs pursuant to GCR Order 62 rule 11 (3) (b).
46. However, it is still necessary to consider whether the Defendants have acted in a way which justifies displacing the usual costs follow the event rule having regard to the interaction between Order 62 rule 4 (2) and Order 62 rule 11 (2). Having concluded that it ought to have been obvious to the Plaintiff's attorney that proceedings could not be commenced without addressing the capacity issue, it ought logically to follow that:
- (a) it ought to have been obvious to the Defendants and their attorneys that the proceedings were from inception liable to be struck-out on standing grounds;
  - (b) the Defendants acted unreasonably in an uneconomical sense failing to apply to strike-out the action promptly after proceedings were served.
47. My provisional view therefore is that Defendants should not be entitled to recover any costs from the Plaintiff's attorneys up to the date of my directing that the preliminary issue should be tried. Further, it appears to me that the Defendants' attorneys are responsible for this wastage of costs and should indemnify their clients in this regard having regard to the unique factual matrix of the present case. As regards the costs after 21 April 2023 when I directed the determination of the present preliminary issue and expressed the essentially instinctive view that it appeared that the Plaintiff lacked standing to sue, my provisional view is that the Plaintiff's attorneys should pay the Defendants' costs on the indemnity basis.
48. These are only provisional views, but Mr Chapman quite fairly pointed out in the course of the 27 June 2023 hearing that his costs are not the only burden on the Award which was recovered for the Plaintiff's benefit and rightly emphasised the importance of the Court placing his interests its overarching concern. It would be very unbecoming indeed for the Award to be diminished by legal fees which could seemingly have been avoided had the parties and their attorneys had due regard to the overriding objective of the GCR costs regime in the context of a case concerning a patient whom the law must presume lacked the capacity to control those costs for himself.

49. The need for an economical approach in this case is particularly compelling because the Plaintiff himself expressed concern to the jointly instructed psychological expert that only the lawyers were benefitting from what he regarded as the unnecessary delays in the Main Action. I doubt those concerns were justified at the trial stage of a complicated and substantial case, but those same concerns would seem to be justified in the present context. It ought not to matter in these circumstances that the critical legal points could not be easily extracted from any relevant local authority or that I myself failed to identify the standing issue when I first dealt with this matter in December 2022.
50. The important point of principle appears to me to be the following. In the context of litigation the costs of which will potentially be paid out of a damages award recovered by party who lacks full capacity and whose interests the Court is positively obliged to protect, litigating reasonably and properly for the purposes of GCR Order 62 rule 4(2) pre-eminently required an economical approach on the part of counsel on all sides. This Court's jurisdiction in relation to costs appears to me to be sufficiently robust and flexible to enable this Court to do justice in the same way that the courts in England and Wales now do (under a more elaborate express procedural regime) in cases involving 'protected persons' to protect damages awards being 'gobbled up' (at worst) or 'nibbled up' (at best) by unreasonably incurred legal costs: see e.g. *JXC (by his Litigation Next Friend CXJ)* [2023]EWHC 1000 (SCCO) (Costs Judge Leonard, 21 April 2023).
51. In this context, the goals of procedural and substantive justice are closely aligned. Where costs are wasted, the default position ought not to be that the mentally incapacitated lay litigant is required to 'pick up the tab'. The goal of the Court, the litigants and their legal representatives in cases such as this should surely be to ensure that the injured lay claimant receives the maximum benefit from the damages award they have recovered. Apart from active case management during the course of a case, the most powerful case management tools available to the Court are those provided by the costs regime. Applying the overriding objective of the costs regime is not an abstract academic exercise. It is a central part of giving effect to the fundamental fair hearing rights of civil litigants under section 7 of the Bill of Rights.
52. It is important to acknowledge that the wasted costs provisions of GCR Order 62 rule 11 (3) may well be infrequently deployed in this and perhaps other small jurisdictions. However, current notions of equality before the law, in jurisdictions large and small, should leave no scope for the modern equivalent of mediaeval King Lear's fabled cynical retort: "*Through tattr'd clothes small vices do appear; Robes and furr'd gowns hide all.*" It is noteworthy in this respect that the Rules

themselves expressly contemplate that the Court can take the initiative in imposing wasted costs orders against attorneys without waiting for one attorney to ‘cast the first stone’ at another. The present case illustrates why, even where one party very properly seeks a wasted costs order, it may often potentially be a double-edged sword.

53. GCR Order 62 rule 12 provides:

*“(1) A wasted costs order may be made by the Court of its own motion if the attorney’s liability is plain and obvious and can fairly be determined without the need for extensive evidence or any extensive investigation of the circumstances giving rise to that liability.*

*(2) Subject to paragraph (3), before an order may be made under paragraph (1) of this rule the Court shall give the attorney a reasonable opportunity to appear and show cause why an order should not be made.*

*(3) The Court shall not be obliged to give the attorney a reasonable opportunity to appear and show cause where proceedings fail, cannot conveniently proceed or are adjourned without useful progress being made because the attorney —*

*(a) fails to attend in person or by a proper representative;*

*(b) fails to deliver any document for the use of the Court, which ought to have been delivered or to be prepared with any proper evidence or account, or*

*(c) otherwise fails to proceed.*

*(4) In any other case, an application for a wasted costs order shall be made by summons setting out the grounds of the application which shall be supported by an affidavit containing full particulars of all the facts and matters relied upon by the applicant.*

*(5) A copy of a summons issued under this rule and the supporting affidavit must be served —*

*(a) on the attorney personally; or*

*(b) in the case of an application against Crown Counsel or any other attorney acting on behalf of the Attorney General, on the Attorney General.*

*(6) The Court may direct that notice of any proceedings or order against an attorney under this rule be given to the attorney’s client in such manner as may be specified in the direction.*

*(7) The Court shall direct that notice of any proceedings or order under this rule against Crown Counsel shall be given to the Attorney General. “[Emphasis added]”*

54. In my judgment it is *prima facie* plain and obvious within GCR Order 62 rule 12(1) that (far more clearly as regards the Plaintiff’s attorneys) that the parties’ respective attorneys are at fault for costs

being wasted after the service of the Writ and before the capacity to sue issue was addressed as a preliminary issue. It bears repeating that I consider that the unprecedented and unique factual matrix of the present case imposed materially more onerous duties on them than would arise in the ordinary case to assist the Court to achieve the Overriding Objective. Costs justice is inevitably heavily infused with hindsight.

- 55. Counsel are accordingly invited to consider whether they wish to show cause why, as regards these discrete portions of the costs of this action (as regards the Plaintiff’s counsel, the costs of the preliminary issue, and regards the Defendants’ counsel, the costs before then), wasted costs orders should not be made against them. As regards the Defendants’ counsel, the proposed Order would of course be designed to indemnify their clients and to preserve the Plaintiff’s Award from further diminution.

**Summary**

- 56. For the above reasons, I find that the present action is liable to be dismissed or struck-out on the grounds that it was brought without authority because of the Plaintiff’s lack of capacity, and is bound to fail. I will hear counsel if required as to costs and the terms of the final Order.



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**THE HONOURABLE MR JUSTICE IAN RC KAWALEY  
JUDGE OF THE GRAND COURT**