Neutral Citation Number: **[2024] EWCOP 14**

Case No: 12872683 and 1230545T

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/02/2024

Before:

THE HONOURABLE MR JUSTICE HAYDEN

- -

Between:

PSG Trust Corporation Limited

Applicant

-and-

(1) CK
(2) NJ

Respondents

- -

Miss Fay Collinson (instructed by Price Slater Gawne Solicitors) **for the Applicant**
Mr Justin Holmes (instructed by the Official Solicitor) **acting as Advocate to the Court**

Hearing dates: 11th December 2023

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE HAYDEN
The judge has given leave for this version of the judgment to be published.

MR JUSTICE HAYDEN:

1. These linked cases raise an important point. How should a Property and Affairs Deputy approach the issue of whether to inform P of the value of their civil litigation settlement? I am told, on behalf of the Applicant, PSG Trust Corporation Limited, the Deputy appointed for both CK and NJ, that this is a predicament which deputies regularly face and in respect of which it is thought that there is no clear guidance. The hearing was originally listed on 4th May 2023 but it was adjourned to provide for updating evidence to be filed by the Applicant and for enquiries to be made of members of the Professional Deputies Forum, to evaluate the extent of the concern and, if it were possible, to identify current practice amongst professional deputies.

2. Because I was concerned to hear all relevant argument, I invited the Official Solicitor to act as Advocate to the Court. I am grateful to her for agreeing to do so. It is perhaps important to emphasise that the Official Solicitor does not act in the present applications as Litigation Friend for either CK or NJ. Her role in these proceedings is circumscribed by paragraphs 3 and 4 of Practice Direction 3F to the Civil Procedure Rules:

> *"3. A court may properly seek the assistance of an Advocate to the Court when there is a danger of an important and difficult point of law being decided without the court hearing relevant argument. In those circumstances the Attorney General may decide to appoint an Advocate to the Court.*
>
> *4. It is important to bear in mind that an Advocate to the Court represents no-one. Their function is to give to the court such assistance as they are able on the relevant law and its application to the facts of the case. An Advocate to the Court will not normally be instructed to lead evidence, cross-examine witnesses, or investigate the facts."*

3. It is important accurately to formulate the real question in issue. The phrase *"capacity to be told"* has been used. I am uncomfortable with this formulation. It does not seem to me to capture the matter with sufficient clarity. In many respects, we have no control over what people tell us and, it follows, no decision to take. The essence of this is whether CK or NJ have the capacity to understand the value of their personal injury funds and appreciate the extent to which wider knowledge of their assets may render them vulnerable. If not, a best interests decision requires to be taken as to whether they should be told the size of their funds.

4. Miss Collinson, on behalf of the Applicants, submits that there is presently no guidance from the Public Guardian on how a Property and Affairs Deputy should approach these issues and further, no "concrete" guidance, as she puts it, from the Court of Protection. Having reviewed both, I agree with her.

5. A pro forma enquiry document was sent to the Professional Deputies Forum. I have read those responses and I am grateful to Mr Holmes, who acts on behalf of the Official Solicitor, for his helpful and accurate summary of them. There were 11 responses in total, slightly under half of them indicated that this question arose

frequently, whilst the others encountered it only rarely. Most indicated that they would obtain medical evidence of capacity to request information about the size of the award, though three said that they would not normally do so. One deputy thought that the question of what information should be given was not within his/her authority. Most considered that the decision was and should be capable of being taken by the deputy, but the deputy should refer to the court in cases of obvious difficulty or controversy.

6. Commonly identified relevant factors relating to the best interests assessment included P's ability to resist the temptation to disclose the information; his/her vulnerability to exploitation; the likelihood of P making unrealistic demands and the potential for disruption to P's care. One respondent identified, as a relevant factor, the issue of whether disclosure to P would be necessary in order to facilitate the making of a will or a prenuptial agreement. Another said that not disclosing financial information to P, can result in there being "issues" with wills but added the important rider, *"they are not insurmountable"*. One respondent said that the High Court (i.e., King's Bench Division) should always consider whether to make an EXB type order when approving settlements. This is a reference to the decision of Foskett J in ***EXB v FDZ*** **[2018] EWHC 3456 (QB),** to which I shall return below. Finally, there was some support for Court of Protection guidance as likely to be beneficial.

The Legal Framework

7. Sections 1-3 of the Mental Capacity Act 2005 provide the statutory framework regulating the approach to assessment of capacity. This is so much a feature of the day-to-day work of the Court of Protection that it is unnecessary to set it out here. The case law, a good deal of it building upon the jurisprudence prior to the introduction of the Act can, in my view, also be regarded as providing a clear foundation for decision-making, in what is a highly fact-specific jurisdiction. The application of the law can, however, often be challenging. Given the sensitive ethical issues presented by these cases, it is useful to distil some central, non-exhaustive principles:

    i. All practicable steps must be taken to facilitate decision making and only when those have been exhausted or are manifestly not viable, is a person to be treated as unable to make a decision (Section 1(3) MCA 2005);

    ii. There is a presumption of capacity which is central to the philosophy of the MCA. It follows that the responsibility for establishing lack of capacity lies on the person or body asserting it. No individual is required to prove his or her capacity. The applicable test is the civil standard of proof;

    iii. Capacity assessments are always "decision-specific";

    iv. A person is unable to make a decision for himself if he is unable (a) to understand the information relevant to the decision (b) retain it (c) use or weigh it as part of the decision-making (d) communicate it by any means (Section 1(3) MCA);

v. A person lacks capacity in relation to a matter if, at the material time he is unable to make a decision for himself because of an impairment of, or a disturbance in the functioning of, the mind or brain. The question is whether the person is rendered unable to make the decision by reason thereof;

vi. The information relevant to the decision includes information about the reasonably foreseeable consequences of deciding one way or another (Mental Capacity Act 2005 s. 3(4)(a)).

8. In ***A Local Authority v JB*** **[2022] AC 1322**, the Supreme Court, per Lord Stephens (delivering the judgment of the Court) emphasised the following:

> *"The first question is whether P is unable to make a decision for himself in relation to the matter… The focus is on the capacity to make a specific decision so that the determination of capacity under Part 1 of the MCA 2005 is decision-specific … The only statutory test is in relation to the ability to decide" (para. 67).*
>
> *"As the assessment of capacity is decision-specific, the court is required to identify the correct formulation of "the matter" in respect of which it must evaluate whether P is unable to make a decision for himself…" (para. 68)*
>
> *The correct formulation of "the matter" then leads to a requirement to identify "the information relevant to the decision" under section 3(1)(a) which includes information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision: see section 3(4).*

The Case Law

9. The question before me has been considered on three separate occasions. Each of the decisions is at first instance in the Queen's Bench Division, Family Division and Court of Protection (Tier 3): ***EXB v FDZ*** **[2018] EWHC 3456 (QB)*; PBM v TGT*** **[2019] EWCOP 6*; DXW v PXL*** **[2019] EWHC 2579.** In *EXB and DXW,* approval was being sought under CPR 21.10 for the compromise of P's personal injury claim. Both Judges decided on the capacity question whilst sitting, concurrently, as Judges of the Court of Protection.

10. In *EXB*, Foskett J noted that EXB's mother and solicitor considered that it was not in his best interests to be told about the value of the settlement. EXB expressed the view, recorded by his solicitor, that he did not wish to know the amount. His reasoning was that he would *"probably end up spending it"* feeling like he had *"won the lottery or something"*. He added that knowing too much about his financial position would cause him stress. Foskett J made the following observations:

> *"[32] It will come as no surprise that the evidence that it would not be in the Claimant's best interests to know the amount of the award is overwhelming, certainly as the*

> *evidence stands at the moment. Concerns over the dissipation of the fund designed to fund his lifetime's needs is one consideration of importance, as is his inability fully to understand the value of money and the frustrations (leading to confrontations) to which this gives rise. As I have said, unless his condition changes significantly (which, on the evidence, is unlikely), it is likely that this will remain the position permanently. Nonetheless, as I have also said, his condition needs to be kept under periodic review for this purpose.*
>
> *[33] The primary question, however, is whether I can conclude, on the balance of probabilities, that the Claimant cannot make for himself the decision about whether he should be told the value of the award. As Ms Butler-Cole says, this is difficult in the present case because "by definition, the Claimant cannot be presented with the information relevant to the decision in order to assess his capacity, as that would make the entire exercise redundant." Nonetheless, the Claimant has expressed his views on the matter without the exact figure being known to him and there is evidence (particularly in his comment after he left the videoconference room after giving his evidence) that his ability to make this decision is variable and that he could not necessarily sustain over any meaningful period the making of such a decision given his inability to control his impulses and weigh up all the relevant considerations".*

11. Foskett J was also addressed on a jurisdictional issue. He records this in these terms:

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

12. However, Foskett J did not consider the facts of the case truly brought that issue into focus:

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

13. On compelling evidence, Foskett J considered a declaration as to incapacity in relation to this specific decision was justified and that the best interests decision was equally clear.

14. In *PBM*, Francis J was considering, amongst other matters, whether P had capacity to enter into a prenuptial agreement and whether he should be informed as to the extent of his assets. It had been argued, on behalf of the deputy, represented by Miss Deirdre Fottrell KC, that *EXB* should be *"distinguished"* because disclosure of information about PBM's estate was, in effect, a prerequisite to entry into the prenuptial agreement. Francis J did not engage with Miss Fottrell's invitation but instead concluded that it was unnecessary to know the value of one's assets before making a prenuptial agreement.

> *"[43] Mr Rees submits that a decision as to whether a person should be told about the value of his assets is a wholly artificial one. A capacitous person, he submits, does not ask themselves whether they should be made aware of the extent of their assets. If they do not have the relevant knowledge to hand, they have a right to obtain that information should they wish to obtain it.*
>
> *[44] Mr Rees asks me to go further still: he submits that where a person has capacity to take a decision and wishes to make that decision, that person must be entitled to any information belonging to them which they require to make that decision. I am not prepared to go so far as to say that Foskett J was wrong, nor am I prepared to say that I disagree with him. It is not necessary for me to do so for the purposes of this case. I do not accept that a valid prenuptial agreement cannot be made without knowledge of the value of one's assets. Accordingly, the premise of Mr Rees's submission falls away. I can readily envisage a situation where the judge could decide that somebody has the capacity to enter into a prenuptial agreement but does not have the capacity to know about the extent of their assets. I have already highlighted, above, the*

> *obvious disadvantages in this factual state of affairs which is, I suggest, one that we should strive to avoid if at all possible.*

15. I note that Francis J placed emphasis on the evidence of Dr Layton, who had assessed capacity.

> *"[40] Initially, Dr Layton concluded that PBM did not have capacity to enter into a prenuptial agreement but he changed his mind in his second report. Dr Layton addresses the question of whether PBM should know the extent of his assets. Dr Layton is of the view that PBM has capacity in the context of requiring knowledge of his assets in order to conclude a prenuptial agreement. Dr Layton maintained this view when questioned in writing.*
>
> *[41] The Deputy has concerns regarding PBM's welfare in the event that he has knowledge of his assets. The Deputy and the case manager, , have both raised issues as to PBM's financial vulnerability. Given how well they know PBM, and their long experience of working with him, their view is plainly of considerable importance. Dr Layton was keen to point out, however, the difference between lacking capacity and being vulnerable. Vulnerability is not enough to justify the withholding of the information".*

16. In *DXW*, the claimant's personal injury claim was compromised in the sum of £6.6 million. An application was made for approval of the settlement. In his judgment, Saini J records the following:

> "[4] *In the Application Notice seeking approval of the settlement, the Claimant also sought what has been called an "EXB Order" after the judgment of Foskett J in EXB v FDZ and others [2018] EWHC 3456 (QB). In that case, Foskett J made what was a novel form of order to the effect that it was not in the best interests of the claimant to know the amount of a settlement of his personal injuries action in circumstances where the court had also determined that the claimant lacked capacity to decide whether or not he should know the amount of the settlement. Foskett J's order was made administering the jurisdiction of the Court of Protection as well as the Queen's Bench Division. I am asked to make a similar order and to make a determination as to the "best interests" of the Claimant".*

17. It seems unlikely that Saini J was referred to the decision in *PBM*. In summary, *DXB's* parents and three experts considered that he lacked the capacity to decide whether he should know the settlement amount and that it was not in his best interests to be informed of the value. Saini J held that DXB did not have capacity to be told the

size of his personal injury award. He made three significant findings relating to DXB's impaired insight and cognitive difficulties:

> *"[12] Turning to the evidence in more detail, it is fair to say that both the expert medical evidence and the evidence from lay witnesses all goes one way. I have considered the evidence of the Claimant's Deputy, his parents and a number of experts including the treating neuropsychologist and a neuropsychiatrist and neuropsychologist in the claim. They all consider that the Claimant does not have the capacity to decide whether he should know the settlement amount and it would not be in the best interests of the Claimant to know of the amount. Of course, there has been no argument before me to challenge this evidence but I accept it is given in good faith and based upon detailed knowledge of the Claimant. I did not require any oral evidence because it did not seem to me that it was necessary in the circumstances before me".*

18. I note that Saini J was concerned that the claimant's view (P) was not canvassed. I share his apprehension:

> *"[16] As indicated above, I had a real concern that the Claimant's views should have been sought on the matter in issue before me. I have however been persuaded that undertaking this exercise is itself likely to be contrary to the Claimant's interests and make his rehabilitation all the more challenging. Evidence from a claimant would ordinarily be an absolute necessity. The evidence in this specific case however persuades me that this would not be appropriate. It will undermine the very protections which are being sought for the Claimant's longer-term benefit".*

19. If I may say so, I also consider that eliciting the views of the claimant/protected party should ordinarily be regarded as necessary when resolving this issue. This will serve to promote and protect P's personal autonomy, which is woven into the philosophy of the Mental Capacity Act. I do not discount however, that given the highly fact and person specific nature of the work of the Court of Protection, there may be some cases when such an enquiry would, as Saini J found to be the case here, be counterproductive and *"undermine the very protections which are being sought for the Claimant's longer-term benefit"*.

20. In *PBM*, Mr David Rees KC made the following submission, on behalf of the Official Solicitor, in that case acting as Litigation Friend:

> *"In the recent case of EXB v FDZ & Others [2018] EWHC 3456 (QB) Foskett J sitting as a judge of both the High Court and Court of Protection considered the question of whether an incapacitous claimant should be told the extent of his personal injury award. He approached the issue by considering:*

> *(1) Whether P had capacity to make a decision about whether he should be told the value of his award; and*
> *(2) On the basis that he did not, whether disclosure would be in his best interests.*
>
> *In the Official Solicitor's submission the approach taken by Foskett J is artificial and should not be followed; alternatively it should be distinguished in a case such as the present where (unlike in EXB) disclosure of the information in question is required in order to enable JDE to take a decision which he has the necessary capacity to undertake.*
>
> *The MCA 2005 section 16(2) enables the Court or a deputy to place themselves in P's shoes and make a decision on his behalf. However, a decision as to whether a person should be told about the value of his assets is a wholly artificial one. A capacitous person does not ask ever themselves whether they should be made aware of the extent of their assets. If they do not have the relevant knowledge to hand, they have a right to obtain that information should they wish to obtain it. As is clear from Foskett J's judgment (para [33]) he had difficulty in assessing EXB's capacity in that regard".*

21. Three central questions arise in considering this matter. Should disclosure to P be regarded as automatic and as of right; is disclosure a facet of management of P's property and affairs, already determined to be a sphere in which P lacks capacity, hence the appointment of the deputy, and how should the capacity test be framed where the focus of concern is on P's vulnerability.

22. Dealing with each of those issues in turn. A deputy is a creature of statute, arguably standing, in relation to P, in a position equivalent or at least similar to that of agent or trustee in relation to a principal or a beneficiary. Plainly, a principal and a beneficiary both have automatic rights to the provision of an account from their agent or trustee, stating what assets are being held on their behalf; ***Schmidt v Rosewood Trust Ltd*** **[2003] UKPC 26; [2003] 2 A.C. 709**. Restricting P's access to that information, on any grounds, might be said to discriminate against P by imposing constraints which do not exist for capacitous individuals in similar situations. Further, it is suggested that this has the potential to restrict the scrutiny by P, her family, friends, and advisers of the decisions taken by the deputy and, consequentially, contracts the opportunity for redress in law. Finally, restricting information to P might limit a wider range of other decisions such as the capacity to make a will or a prenuptial agreement.

23. Mr Rees in *PBM,* in the submissions recorded above (para. 20), took an absolutist position. He contended that the question of capacity identified by Foskett J was *"artificial"* or should be distinguished, in a case where disclosure of the information in question was required to enable P to take a decision for which he had the necessary capacity. However, as was discussed in exchanges with both Mr Holmes and Miss Collinson, there are various circumstances in which we all, as capacitous individuals, may have to decide about whether we want to know particularly challenging

information. Sometimes the decision will be further refined so that we may want to know some parts of it but not others. Paradigmatically, when receiving a challenging medical prognosis, a patient may want to know about likely pain, disability, medication but not life expectancy. Another example was that of a care leaver deciding whether to ask the Local Authority for their records. That decision would involve a variety of considerations: would I discover facts about my childhood that will upset me and remain with me? Will it affect my relationships with my adoptive parents or my biological parents? What am I likely to gain from reading the information? Other examples canvassed are decisions to take tests for inherited diseases or DNA tests perhaps to identify real parents.

24. It follows that an individual who has insight into their own impulsive, overly trusting, naïve, perhaps recklessly garrulous tendency to 'overshare' information might decide that they do not want to be told the amount of their estate in just the same way that capacitous individuals, in the scenarios identified above, will sometimes choose not to receive information. Though P may lack capacity across a gamut of decision making in relation to finances and property, she may nonetheless, be assessed as having capacity on decisions such as this. It is important to emphasise that P is perceived to have capacity in respect of every decision she may confront unless that is dislodged by the evidence. It strikes me that Mr Rees's superficially attractive submission risks subverting the autonomy of both the capacitous and the incapacitous, in an issue of this kind. It also collides with the presumption of capacity which is the cornerstone of the MCA.

25. It is very important, to my mind, to recognise that P's vulnerability to exploitation, which is a key concern in this matter, is not solely an issue requiring to be addressed in the context of an evaluation of best interests, it is also a facet of the decision itself i.e., does P have any or sufficient insight into her own vulnerability to recognise the potential consequences of being told the value of her award.

26. An alternative perspective on this issue is, as foreshadowed above, to recognise that the Court has already determined that the protected parties in these cases do not have capacity to manage their property and thus whether P should be told of the value of her estate could be regarded as a matter either for the deputy or alternatively, for the court in cases where there is a perceived difficulty. Mr Holmes addresses that in these terms:

> *"The difficulty with this argument is that some deputies may take the view that P's incapacity to make the decision about being told the amount of her funds has already been determined by the overarching decision that P does not have capacity to manage the totality of her property and affairs. In fact, however, deputies ought to be alive to the possibility that P will have capacity to make some decisions about their property and affairs, and should allow P to do so. It is common for deputies regularly to pay limited amounts of money into an account to which P has access to enable P to spend money for themselves; this respects P's dignity and autonomy and encourages co-operation between P and the deputy. Similarly, where P has capacity to decide whether or not she should be*

> *told the value of her award, the deputy should respect her request either to be told or not to be told".*

27. The prevailing danger is the conflation of the capacity test with a best interests decision. It is crucial to disentangle P's insight into how she might manage the knowledge of the size of the funds from any unwise decisions she might take when told the relevant figure. Vulnerability is not incapacity. Incapacity in this context is the inability to recognise vulnerability. Both Mr Holmes and Miss Collinson submit that this distinction is not sufficiently clear in *EXB*. I agree.

28. Both Counsel have converged on what they contend is the appropriate approach to these issues. Though I have modified some of their respective submissions, I am broadly in agreement with them. I consider that disclosure does present a separate question, in and of itself, in respect of which capacity must be determined. The starting point is that captured by Lord Stephens, *"…the court is required to identify the correct formulation of "the matter" in respect of which it must evaluate whether P is unable to make a decision for himself…"*, ***A Local Authority v JB*** (supra). The *'matter'* or decision is whether P wishes to request the value of her funds, and the factors relevant to her capacity to make that decision are likely to include her understanding of:

i. The nature of the information in question;
ii. The risks of obtaining it;
iii. The risks of not obtaining it;
iv. The benefits of obtaining it;
v. The benefits of not obtaining it.

29. When assessing P's capacity to take the decision, her ability, or the extent of her ability, to recognise, retain, and weigh the above questions and specifically to recognise, retain and weigh her own vulnerability and its potential consequences, will frame the scope of the decision. It follows that if she does recognise, retain and weigh these problems and vulnerabilities, it is likely that the presumption that her decision is capacitous has not been rebutted. Of course, none of this causes the identified vulnerabilities to evaporate, they remain and they are real. However, the fact that she may make unwise decisions, in the future, which cause her to fall prey to exploitation, is, ultimately, to expose her, as we all must be to some degree, to the vicissitudes of life and human transgression. But the role of this court is to protect and promote human autonomy not to repress it with misconceived paternalism. A life wrapped in cotton wool is a restricted and diminished one.

30. Where it is concluded that P lacks capacity then, inevitably, a 'best interests' decision must be taken. I do not consider that it is necessary for a deputy to make an application in every case. Sometimes, the decision will be clear, perhaps even just common sense. In some cases, however, it will be difficult and require resort to the court. In ***Re ACC*** **[2020] EWCOP 9**, Her Honour Judge Hilder was considering the authority to incur legal costs on behalf of P, conferred on a property and affairs deputy by the terms of a standard deputy order. At [**§52**], Judge Hilder considered to what extent a property and affairs deputy is authorised to incur costs on P's behalf in health and welfare proceedings. At **[§52.5**]:

> *"A property and affairs deputyship does not confer any authority in respect of welfare. If a welfare issues arises, there may be a body or institution more appropriately placed than the property and affairs deputy to make that application, at less cost to P".*

Judge Hilder went on to conclude that, as a property and affairs deputy's authority extends to only property and affairs matters, they are not authorised to conduct health and welfare proceedings on behalf of P. The Judge makes the converse point:

> *"In contrast, where the contemplated litigation is not in the realm of property and affairs, there is simply no line to be drawn. A property and affairs deputy's authority relates only to property and affairs; It extends no further than meeting the deputy's responsibility to draw to the court's attention that there is or may be a welfare issue for determination by seeking directions as to how such (potential) issue may be addressed. Without such application being made and granted, the deputy proceeds at risk as to costs".*

31. Miss Collinson submits that under the terms of the standard property and affairs property order (as here), the deputy has no power to make a decision that is one *"predominantly affecting welfare"*. This, she contends, is primarily a welfare decision. I do not agree with this analysis. What is in issue is communication of the exact sum of a damages award. That strikes me as a property and affairs matter. The fact that welfare considerations flow from it does not change the nature of the matter. Many financial issues have welfare implications, taking out mortgages, finance agreements, sustaining an extensive overdraft. This view seems to me to be entirely consistent with Judge Hilder's observations, indeed, she uses the term *"in the realm of property and affairs"* which implicitly recognises that decisions in that sphere will sometimes have welfare implications. I do not believe, therefore, that it is necessary to extend a deputy's authority in every case. Neither, however, do I wish to be prescriptive. Precisely because the Court of Protection is such a highly fact-specific jurisdiction, it is perfectly conceivable that what might appear on the surface to be a Property and Affairs issue, is on a proper construction, nothing of the kind and truly a welfare issue. In these cases, an application can be made and a deputy's authority extended where appropriate.

32. Mr Holmes raises an important point in relation to attorneys appointed under a Lasting Power of Attorney (LPA). Such an individual is an agent who owes a duty to account to P, his principal. A conflict of interest or a perceived conflict of interest might arise if the agent were to decide that the amount of P's funds under his control should not be disclosed to her. If an attorney under a Lasting Power considers that P should not be told the value of funds under his control, then the matter, Mr Holmes argues, requires to be referred to the Court for determination. I agree with this as, I understand, does the Official Solicitor. It has to be emphasised that the conflict of interest between the donor and donee of a Lasting Power of Attorney, identified above does not arise in the case of deputies who are appointed by the Court and not by P, required to submit annual accounts to the Public Guardian and subject to supervision.

33. I turn now to apply these principles to the two applications before me. They do not require extensive discussion.

CK

34. Dr Alistair Grey, Chartered Clinical Psychologist, has prepared a report, dated 26th January 2022. CK was involved as a passenger in a high-speed road traffic collision, which occurred nearly 10 years ago. She sustained extensive orthopaedic and internal injuries. The collision also resulted in a right internal carotid artery dissection, the consequence of which was a right middle cerebral artery infarction. There were also some ischemic changes in the right posterior section semivale (set out in the report of Dr LB Campbell, Neuropsychiatrist, dated 21st September 2015).

35. Dr Grey considers that CK presents, superficially, *"extremely well"* but this *"hides complex vulnerabilities"* which are *"the direct result of her injuries"*.

> *"In terms of more recent issues however, in talking with [CK] and her mum and dad, it became clear very quickly that [CK] can often find herself in situations where she is oblivious to the intentions of others and/or has placed herself in risky situation due to her own lack of insight and poor sense of self-preservation. [CK]'s parents described a number of events and circumstances over the years where friends, acquaintances, and ex-boyfriends have attempted to manipulate and exploit [CK]. Unfortunately due to her complex neuropsychological deficits, [CK] is either less aware or completely unaware of the risks that she faces when exposed to such individuals. Previous issues that have arisen have included attempted financial abuse and emotional abuse that sounded a lot like gaslighting. As you know, on more than a few occasions, [CK]'s parents have had to step in and it is fortunate that she has such a loving and supportive family"*.

36. Dr Grey considers that CK lacks insight into the actions and intentions of others and, in particular, lacks insight into the need to minimise the circumstances that would put her at risk of financial abuse in the first place. CK's mother has also signalled that she can sometimes be careless about what she posts on social media and how that increases her vulnerability to exploitation. Alongside this, CK is good with numbers, understands the value of money and would be able to comprehend the extent of her settlement if it were given to her. Indeed, she already has formed a strikingly accurate estimate of the award for herself. However, there is little doubt that she cannot organise her own financial affairs and has, for example, on a number of occasions unknowingly signed up to subscription services which have gone on to take money from her without her knowledge.

37. Applying the test I set out in paragraph 3 above, I have come to the conclusion that CK lacks the capacity to take this decision for herself. Her primary area of deficiency lies in her inability to recognise her own vulnerability. However, it is clear that she understands the size of the award and has expressed a consistent wish to have the

exact amount confirmed to her. She has some grasp of budgeting and recognises items of varying value. For example, I am told that she has a penchant for designer items and handbags. She also wishes to make a will and has expressed cogent reasons for this. It is illustrative of just how issue specific questions of capacity can be, that CK has been assessed as having testamentary capacity. CK also has the considerable benefit of a strong and protective family. This, along with the involvement of her Deputy provides significant, but not guaranteed, protection from exploitation. The Deputy considers that even if CK were to lack capacity in this sphere, as I have found, it, nonetheless considers it is in her best interests to do so. In coming to that conclusion it has emphasised a number of the factors I have set out above. In my view, knowledge of the exact amount of the settlement in this case is unlikely significantly to escalate CK's vulnerability. As I have said, she has formed a highly accurate assessment of her award and spoken of it. The benefit of informing her of the precise amount is that it affords respect to her in the execution of her own autonomy. From what I have read about her, she will, I am satisfied, recognise something of this and will appreciate it.

NJ

38. NJ was born prematurely at 30 weeks via emergency section following placental abruption. She required resuscitating on birth and experienced two intracerebral haemorrhages during the perinatal period. At 3 months of age, NJ was subjected to a severe shaking assault. She was diagnosed with cerebral palsy and has learning difficulties, right sided weakness and epilepsy which has not been containable on pharmacological intervention, although there appears to have been a relative improvement over the last 12 months. Dr Graeme Flaherty Jones, Consultant Clinical Psychologist and Clinical Director, makes the following observations in respect of NJ's cognitive function:

> *"Cognitive deficits associated with [NJ]'s cerebral palsy are expected to have affected her executive functioning e.g., insight, planning, judgement, impulsivity, emotional regulation), and perceptual organisation (e.g., spatial awareness). These difficulties area likely further compounded by the presence of epilepsy, which can lead to problems with attention, memory, and the speed at which information can be processed. The severity of the latter cognitive difficulties will inevitably vary depending on the stability of epilepsy symptoms and any comorbid sleep related difficulties".*

39. Though she is now 29 years old, NJ functions at a much lower level (circa 6-7 years). Dr Flaherty Jones notes that NJ struggles to divide her attention when confronted by multiple stimuli which leads to heightened emotional frustration and, in turn, compromises her cognitive abilities. She has had a very difficult childhood. Her medical records include anxiety, anorexia, suicidal ideation, emotionally unstable personality disorder (borderline type). She has twice been detained under the Mental Health Act. I regard it as significant in my evaluation of the issues in this hearing that NJ has experienced significant traumatic events within relationships and struggles to form and maintain trusting relationships.

40. It is unnecessary for me to import the detail of Dr Flaherty Jones' report into this judgment, safe to say that it reaches the clear conclusion, on a compelling body of material, that NJ has profound difficulties with comprehending figures, understanding the relative value of money and in concentrating generally. She seems either unable to recognise the full extent of her disability in this sphere or indeed, may have no awareness of it at all. Her Deputy considers that she is unable to weigh or retain information pertinent to this decision but highlights that she does not want her brother to find out about the value of the award. However, when asked why, she struggles to identify the risk. She has *"an activity budget"* the primary purpose of which is to afford her the opportunity to exercise some personal autonomy. The purpose of this has required regular work and reinforcement. At the time of drafting his report, Dr Flaherty Jones noted that there was no current care support package in place. When discussing how any financial award from her litigation may be used in the future, NJ was able to say *"it would be used to make sure I am supported"* and *"to make sure I am settled"*. She has also expressed a desire to have *"land to keep horses"* and *"space for her dogs"*.

41. Whilst there has been some relative improvement in NJ's recent mental stability, the prognosis is that there is unlikely to be any fundamental change. She is noted to subjugate her own needs and focus on others. There is a history of financial abuse where money appears to have been taken from her, probably by her brother who is described as having an addiction to heroin. In my judgement, she is strikingly vulnerable to exploitation. Again, addressing the decision making criteria, I consider NJ lacks any insight into her own vulnerability. Further, it is unlikely that she will understand the size and value of the award if she were to be told of it. On a practical level, her deputy considers that it will be very difficult to manage her expectations of expenditure especially considering her very limited grasp of understanding the value of money. It is highly unlikely that NJ has or will develop testamentary capacity. I note that if a statutory will is required, it should be something which the Court would be able to order pursuant to Section 18(1)(i) of the Mental Capacity Act 2005. Sadly, but inevitably, I have come to the conclusion that NJ does not have the capacity to understand or weigh the risk to herself if the sum of the award was disclosed to her. Moreover, the significance of the sum is not something she will be able to appreciate. I also consider that for all of the reasons discussed above, it is not in NJ's best interests for the amount of the award to be disclosed to her.