Neutral Citation Number: [2020] EWHC 3550 (QB)

Case No: QB 2019-002742

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2020

Before :

THE HON. MRS JUSTICE THORNTON DBE

- -

Between :

Surrey County Council	**Claimant**
- and -	
NHS Lincolnshire Clinical Commissioning Group	**Defendant**

- -
- -

Mr Patel QC (instructed by **Weightmans**) for the **Claimant**
Mr Lock QC and **Ms Gibbs** (instructed by **Brown Jacobson**) for the **Defendant**

Hearing dates: 24 - 25 November 2020

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JUDGMENT

(Approved by the court)

The Hon. Mrs Justice Thornton

Introduction

1. Surrey County Council brings a private law claim in restitution against the Defendant, NHS Lincolnshire Clinical Commissioning Group ("Lincolnshire NHS CCG"), to recover sums paid by the Council for the costs of accommodation and care of JD, a young man with autism spectrum disorder. JD was born in Surrey but accommodated in specialist autism care in Lincolnshire at the age of 17 years.
2. Surrey Council's claim was originally to recover sums paid for JD's care and accommodation during the period 01 August 2008 to 31 January 2015 in the sum of £1,571,431.47 plus interest. By the time of the hearing the Council had accepted that by virtue of limitation, its claim was restricted to restitution of sums paid after 31 July 2013, amounting to £310,587.25 plus interest.
3. It is common ground that the predecessor to the Defendant, the Lincolnshire Primary Care Trust ("Lincolnshire PCT") made an error of public law in 2008 when it declined to assess whether JD was eligible for NHS care on the basis that, even if JD were eligible for such care, it was not responsible for commissioning services for JD. The public law error was repeated in 2010 when the PCT reaffirmed its earlier position. Its errors meant that Surrey Council continued to pay for JD's care in Lincolnshire until the Defendant accepted responsibility, with effect from 1 February 2015.
4. It is also common ground that the claim in restitution is novel. It is a claim by one public body against another, in relation to care services provided to a third party, where both public bodies have distinct statutory caring responsibilities and where the basis of the claim is said to be an unlawful public law decision to refuse to accept responsibility for the care of the third party.
5. On behalf of Surrey Council, it is said that a claim in restitution is established on the facts. Lincolnshire PCT accepts it acted unlawfully in refusing to accept commissioning responsibility for JD and thereby declining to assess JD's eligibility for continuing NHS care. As a result, the Council was left to fund the care of JD leaving the NHS Trust unjustly enriched.
6. On behalf of the CCG, the claim is said to be an entirely novel and unmeritorious private law claim. It is fundamentally misconceived, being a private law challenge to public law decisions by the NHS Trust. In any event, there cannot be a viable claim in restitution because the PCT did not benefit from its public law error and the defence of change of position applies. Any money 'saved' on the costs of JD's care was spent on other patients and no money was retained by the PCT.

Issues

7. The parties were agreed on the issues which arise for consideration by the Court:
    1) Is the Council barred from advancing a private law claim given the public law issues which arise? If not;
    2) Is any claim barred by reason of section 5 of the Limitation Act 1980 on the grounds that the cause of action accrued more than 6 years before proceedings were issued? If not:
    3) Do the facts of this claim fall within an established category of restitution claims? If not, should the court permit the establishment of a new category of restitution claim? If so:

4) Are all the necessary elements of the cause of action of unjust enrichment made out on the facts of this case. In particular: was the PCT enriched? If so:
5) Is the defence of change of position available to the Defendant?

Unjust enrichment

8. The concept of unjust enrichment lies at the heart of and is the principle underlying the instance in which the law gives a right of recovery in restitution (Lipkin Gorman (a firm) v Karpnale Ltd [1992] 4 All ER 512 Lord Goff at §532)
9. When determining whether the elements of an unjust enrichment claim are made out, it is necessary to address the following four questions. Each part of the test must be satisfied:
    a. Has the defendant been benefited, in the sense of being enriched?
    b. Was the enrichment at the claimant's expense?
    c. Was the enrichment unjust?
    d. Are there no defences?

    (Lord Steyn in Banque Financière de la Cité v Parc (Battersea) Ltd [1999] 1 AC 221, 227)
10. The following general principles set out by Lord Reed in the recent Supreme Court authority of HMRC v The Investment Trust Companies [2017] UKSC 29 are instructive:

> *"39. First, it is important, when dealing with personal claims based on unjust enrichment, to bear in mind what was said by Lord Goff of Chieveley in Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548, 578, when rejecting a submission that, when dealing with a claim to restitution based on unjust enrichment, it was for the court to consider the question of injustice or unfairness on broad grounds, and that it should deny recovery if it thought that it would be unjust or unfair to hold the defendant liable:*
>
> > *"The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle."*
>
> *As Lord Steyn remarked in Banque Financière, unjust enrichment ranks next to contract and tort as part of the law of obligations (p 227). A claim based on unjust enrichment does not create a judicial licence to meet the perceived requirements of fairness on a case-by-case basis…"*

11. English law does not have a unified theory of restitution. Its legal principles have developed incrementally:

> *"246 English law does not have a unified theory of restitution……For the moment, therefore, as Lord Hoffmann observed in Deutsche Morgan Grenfell Group plc v Inland Revenue Comrs [2007] 1AC 558, para 21, the claimant has to prove that the circumstances in which the payment was made come within one of the categories which the law recognises as sufficient to make retention by the recipient unjust."* (Patel v Mirza [2017] AC 467 (Lord Sumption)).

12. In Gibb v Maidstone & Tunbridge Wells NHS Trust [2010] EWCA Civ 67, Laws LJ acknowledged the tension inherent in the development of the law and considered that clear reasoning was necessary for any extension of unjust enrichment.

> *"…There is, I think, something of a tension underneath this reasoning. It is between these two propositions. (1) The categories of unjust enrichment claims cannot be closed, for if they were this branch of the law would be condemned to ossify for no apparent reason; and nothing could be further from the common law's incremental method. But (2) such a claim must fall "within one of the hitherto established categories of unjust enrichment" which suggests (at least) that the categories rather than any overriding principle are paramount. The authorities' reluctance to assert first principles may be ascribed to the justified fear of the palm tree: if the principle of unjust enrichment does no more than to invite one judge after another, case by case, to declare that this or that enrichment is inherently just or unjust, it is not much of a principle. That is why, with all due deference, I wonder whether Lord Hoffmann's formulation in Banque Financière de la Cité v Parc (Battersea) Limited [1999] 1 AC 221 at 234C – D has not too much of a broad-brush or legislative flavour…*
>
> *27. If one looks at the matter from what is perhaps a more modest standpoint, we may see at once that clear reasoning is at least required for the elaboration of any extension of unjust enrichment. Clear reasoning, if it allows a claim in seemingly new circumstances, will provide clear analogues with other cases. No doubt this is what Mann J had in mind when he qualified his reference to established categories by the phrase "or some justifiable extension thereof.*
>
> *28. I make these points only to show, with respect, that Miss McNeill's forceful plea that this case lies outside the established categories of unjust enrichment may do less than justice to the subtleties of the way the law develops."*

Chronology

13. The chronology of events giving rise to the claim was as follows:

Date	Event
30 March 1989	JD's Date of Birth
9 August 2006	JD is placed by Surrey Council at Broughton House College, Lincolnshire in discharge of the Council's statutory duties to JD under the Children Act 1989. Placed there whilst a child
30 March 2007	JD turns 18 and becomes an adult
30 March 2007 onwards	The Council funds accommodation and care services for JD pursuant to its duties to him under section 21 of the National Assistance Act 1948 as continued under the Care Act 2014
30 October 2007	The Council invites Lincoln NHS Trust to undertake an assessment for JD's eligibility for NHS Continuing Healthcare (CHC). There does not appear to be substantive response to this request from Lincolnshire PCT
19 March 2008	The Council makes further request to Lincoln NHS Trust to undertake a CHC assessment in relation to JD
26 March 2008	Lincoln NHS Trust confirms that JD's case is being considered
14 May 2008	Lincoln NHS Trust seeks information about details of JD's case, including his original place of residence and the circumstances in which he had been placed in Lincolnshire
24 September 2008	Lincoln NHS Trust informs the Council that it will not undertake a CHC assessment in relation to JD because it considers that, even if JD were eligible for CHC, it would not be the responsible NHS commissioner for care for JD. The PCT suggests that, according to its understanding of relevant statutory framework and its interpretation of the "Who Pays" guidance, Surrey Primary Care Trust would be the responsible NHS commissioner and thus Surrey PCT should undertake any CHC assessment *The Defendant accepts that Lincoln PCT made an error of public law in this decision*
21 July 2009	The Council makes a further request for Lincoln NHS Trust to assess JD's eligibility for CHC. There

	does not appear to be a substantive response to this request from the PCT
7 April 2010	Surrey Council makes further request for CHC assessment of JD to Lincolnshire PCT
13 May 2010	Lincolnshire PCT reaffirms its position of 24 September 2008 that it believes that it is not the responsible commissioner for NHS services for JD and so will not undertake a CHC assessment in relation to JD *The Defendant accepts that Lincolnshire PCT made an error of public law in this decision*
28 July 2011	The Council asks Surrey PCT to assess eligibility for CHC
28 July 2011	Decision Support Tool (DST) completed by Surrey PCT
6 October 2011	Surrey PCT Panel decides that, on the basis of a clinical assessment of the evidence presented in the DST, JD would be eligible for CHC. However, Surrey PCT declines to fund CHC for JD on the basis that it believes that Surrey PCT is not the responsible NHS commissioner for services for JD
20 October 2011	Surrey PCT CHC Panel meeting. Surrey Council seeks to persuade Surrey PCT to take over responsibility for JD and liaise with Lincolnshire PCT. It is unclear what happens but Surrey PCT does not contact Lincolnshire PCT.
October 2011 to March 2014	The Council continues to discharge its duties to JD under the National Assistance Act 1948 by funding accommodation and care services for JD
31 March 2013	Lincolnshire PCT is abolished and its NHS commissioning responsibilities transferred to Lincolnshire NHS Clinical Commissioning Group NHS England created on 1 April 2013
18 March 2014	The Council contacts Lincolnshire NHS Clinical Commissioning Group, copying in NHS England, in relation to what it described as the *"historical unresolved Responsible Commissioner (RC) dispute"* concerning JD This email and action taken by the Council at this point appears to be precipitated by the fact that, as set out in the email, *"the accommodation that Jamie is living in is only registered for him to remain there until he is 25 and because of his age (25 this week!) and his needs, an accommodation*

	move is now inevitable… It will fall to his responsible commissioner to commission alternative accommodation arrangements."
March 2014 to July 2014	The Council and Lincolnshire NHS CCG exchange emails regarding who is the responsible NHS commissioner for JD, including a request for further information about JD's placement so that Lincolnshire NHS CCG could fully consider the matter
2 April 2014	A meeting takes place between representatives of the Council and Lincolnshire NHS CCG at Broughton House regarding JD's case
28 July 2014	The Council requests the intervention of NHS England in resolving the dispute
1 August to 28 August 2014	Various representatives of Lincolnshire NHS CCG communicate with NHS England about the matter
29 August 2014	NHS England confirms by email its view that Lincolnshire NHS CCG is the responsible commissioner for JD
29 August 2014	Lincolnshire NHS CCG responds by email confirming that it will *"arrange to contact Surrey [i.e. the Council] to undertake a DST"*
December 2014 to February 2015	Steps taken to progress JD's CHC assessment
10 February 2015	Decision taken by Lincolnshire NHS CCG that JD is eligible for CHC. Lincolnshire NHS CCG confirms that it will be responsible for a fully funded care package for JD with effect from 1 February 2015
11 March 2016	First letter from the Council to Lincolnshire NHS CCG requesting payment for period 1 August 2008 to 31 January 2015
31 July 2019	Proceedings issued

The regulatory framework

14. The legal framework set out below is that which was in place at the time of the relevant decision making in 2008/2010, save where an update is necessary, to explain relevant subsequent developments, including the parties to the present proceedings.

The duty on Primary Care Trusts/ Clinical Commissioning Groups to provide healthcare

15. Sections 1 to 3 of the National Health Service Act 2006, as they then were, required the Secretary of State to continue to promote a comprehensive health service designed to secure improvement in the physical and mental health of people in England, and in preventing, diagnosing and treating illness. With some exceptions, the services so provided must be free of charge. The introductory words of section 3(1) provided:

> *"(1) The Secretary of State must provide throughout England, to such extent as he considers necessary to meet all reasonable requirements– …"*

16. By section 3(1)(e), the Secretary of State was required to provide, in addition to hospital accommodation and other services which are obviously health care, such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service.
17. Thus expressed, the Secretary of State is granted a degree of judgment as to what he considers necessary, reasonable and appropriate. Until 1 April 2013, the Secretary of State's duty was delegated to local NHS commissioners called Primary Care Trusts. As a result of the changes to the National Health Service Act 2006 caused by the Health and Social Care Act 2012, from 1 April 2013 the duty under section 3(1) transferred from the Secretary of State to a new form of local NHS commissioner, Clinical Commissioning Groups. As part of those changes, Lincolnshire PCT was abolished and Lincolnshire NHS CCG came into existence. Responsibility for commissioning acute and community services (outside primary care) for NHS patients for patients who were registered at GP practices in Lincolnshire West CCG area became the responsibility of Lincolnshire NHS CCG. Accordingly the Court gave permission at the hearing for the Defendant in the proceedings to be renamed as Lincolnshire NHS CCG.

The duty of Local Authorities to provide community care services

18. 'Community care services' were then to be provided by a local authority, pursuant to a range of statutes imposing duties to provide social care services including the National Assistance Act 1948. These statutes have since been replaced by the Care Act 2014.
19. Section 47(1) of the National Health Service and Community Care Act 1990 Act required a local authority to carry out an assessment of a person's need for community care services and in the light of that assessment to decide whether his needs call for the provision of such services.
20. In appropriate circumstances (as defined by the Secretary of State) section 21 of the National Assistance Act 1948 obliged a local authority to provide not only residential accommodation, but care within that accommodation. Care within a person's home was arranged under different statutory provisions.
21. There are two key differences between NHS services and social care services, namely:
    a. NHS services are services which are not means tested and attract no charges for the patient/service user whereas social care services are means tested.

b. The commissioning body for such services is usually the CCG under the National Health Service Act 2006 ("the NHS Act") as opposed to a local authority under the Care Act 2014.

Separate statutory duties

22. The statutory duties on NHS bodies and local authorities are separate. They are duties to fund the services identified by their particular statutory duty. Thus, as Mr Justice Charles recognised in R (Grogan) v Bexley NHS Care Trust & Ors [2006] EWHC 44 (Admin) at §39 the extent of the Secretary of State's duties to provide health services is governed by the health legislation and not by the limits of the duties of local authorities. As the judge observed "there is potential for a gap between what the Secretary of State (through the relevant health bodies) provides, or is under a duty to provide, as part of the NHS, and 'health services' that could lawfully be supplied by local authorities".
23. Guidance provides that there should in practice be no gap between the provision of health care funded now by the CCG (or, pre-2013, by a Primary Care Trust) and community care services provided by the local social services authority. There is however a dividing line between them (R(St Helens Borough Council) v Manchester Primary Care Trust [2009] PTSR 105).

The dividing line – NHS Continuing healthcare

24. The legal dividing line between health care and community care services cannot be precisely drawn. It will depend on the facts of the particular case, including on whether the person's care needs are primarily health care needs, and by contrast whether they are of a nature which a local authority, whose primary responsibility is to provide social services, could be expected to provide (R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213). This is consistent with the long standing role of local authorities as providing assistance as a last resort.
25. The distinction between the two is one of degree depending on the facts of an individual case with consideration being given to both the quantity and quality of the services provided (St Helens (above)).
26. In practice, the dividing line is determined by the concept of NHS Continuing Healthcare ("CHC"). CHC is a term of art in healthcare law, used to determine the category of patients for whom the NHS is responsible for funding accommodation and social care services under section 3(1)(e), in addition to providing healthcare services to a person under section 3(1)(a) to (c). Deciding that the patient has a primary health need leads to that responsibility. For all other NHS patients outside hospital, the NHS only provides healthcare services, which is predominantly the professional services of healthcare staff such as doctors and nurses.
27. The test to determine whether it is appropriate for the NHS to fund such additional services is whether an individual has a "primary health need": see Vos LJ at §46 of R(Whapples) v Birmingham Crosscity Clinical Commissioning Group & Anor [2015] EWCA Civ 435.
28. The meaning of CHC is explained in the 2012 version of the National Framework as follows:

> *"'NHS continuing healthcare' means a package of ongoing care that is arranged and funded solely by the*

> *NHS where the individual has been found to have a 'primary health need' as set out in this guidance. Such care is provided to an individual aged 18 or over, to meet needs that have arisen as a result of disability, accident or illness. The actual services provided as part of the package should be seen in the wider context of best practice and service development for each client group. Eligibility for NHS continuing healthcare places no limits on the settings in which the package of support can be offered or on the type of service delivery"*

Decision making concerning Continuing Health Care

29. Decisions about who is and who is not eligible for CHC are solely decisions taken by NHS bodies. They are not joint decisions taken between NHS bodies and local authorities (see St Helens above).
30. In 2008 (the relevant time frame for the decision making in this case) decision-making by Primary Care Trusts concerning the eligibility of patients for CHC was governed by a combination of the Continuing Care (National Health Service Responsibilities) Directions 2007 ("the 2007 Directions") and the National Framework for NHS Continuing Healthcare ("NF") 2007.
31. The NF was first published by the Department of Health in 2007, and has expanded considerably since then with new editions in 2009, 2010, 2012 and 2018. However, the essential structure of decision making has remained largely unchanged throughout that period. The NHS assumes no duty to fund accommodation and care services for a person until an NHS body has made a decision that a person has a primary health need. The clearest explanation is at paragraph 2 of Annex E of the 2012 NF which provides:

> *"A person only becomes eligible for NHS continuing healthcare once a decision on eligibility has been made by a CCG, informed by a completed Decision Support Tool or Fast Track Pathway Tool. Prior to that decision being made, any existing arrangements for the provision and funding of care should continue, unless there is an urgent need for adjustment."*

32. It follows that, unless and until, the evaluative decision is made by an NHS body that a person has a primary health need, a person is not "eligible for NHS continuing healthcare". Outside of CHC, eligibility criteria for access to NHS services are set by CCGs and eligibility criteria for access to social care services are set by Guidance published by the Secretary of State under the Care Act 2014. Prior to the Care Act 2014, eligibility criteria for access to social care services were set by a combination of directions made by the Secretary of State and local eligibility policies.
33. There is a single assessment process for CHC. The responsibility for operating the assessment and decision making processes in order to apply the eligibility criteria for CHC set out in the National Framework rested with PCTs in 2008 and now rests with CCGs. In operating these decision making processes, PCTs and now CCGs are required to consult local authorities. PCTs were (and now CCGs are) required to act in accordance with the criteria and to take reasonable

steps to ensure that an appropriate assessment is carried out in all cases where it appears to the PCT or CCG that there may be a need for CHC which they would be obliged to fund. In operating these decision making processes, PCTs and CCGs should ensure that a local authority is not required to provide services of a type or nature which are beyond those they have power to provide as part of their duties as a social care authority, including when providing care services under section 21 of the 1948 Act. The location of care should not be the sole or main determinant.

Dispute resolution

34. The NHS Continuing Healthcare (Responsibilities) Directions 2007 provided, at section 3(4):

> *"Any dispute between a Primary Care Trust and the relevant social services authority about –*
> *(a) a decision as to eligibility for NHS Continuing Healthcare; or*
> *(b) where a person is not eligible for NHS Continuing Healthcare, the contribution of the Primary Care Trust or social services authority to a joint package of care for that person,*
>
> *shall be resolved in accordance with a dispute resolution procedure agreed between the two bodies concerned."*

35. A framework document titled "The National Framework for NHS Continuing Healthcare and NHS Funded Healthcare" (NF 2007) gave guidance to bodies such as the Council and Lincolnshire PCT about NHS continuing health care. Regarding disputes it provided simply that:

> *"If there is a disagreement about a decision, or who pays for necessary care, the PCT's "local resolution" process will usually be the first step… (executive summary)*
>
> *For cases where there is a dispute between NHS bodies, or between LA and PCT about responsibility, the bodies should put in place a local dispute resolution process, which proceeds in a robust and timely manner. Disputes should not delay the provision of the care package and the protocol should make clear how funding will be handled during the dispute."* (para 98)

36. The position in the directions/guidance set out above was elaborated by the 2009 NF:

> *"We set out the processes to follow when there is a disagreement concerning an eligibility decision (executive decision).*"

37. At §161, disputes regarding the responsible body:

> *"Directions state that PCTs and Las in each local area should agree a local dispute resolution process to resolve cases where there is a dispute between NHS bodies, or*

> *between LA and a PCT, about eligibility for NHS continuing healthcare and/or about the apportionment of funding in joint funded care/support packages. Disputes should not delay the provision of the care package, and the protocol should make clear how funding will be provided pending resolution of the dispute. Where disputes relate to LAs and PCTs in different geographical areas, the relevant LA and PCT should agree a dispute resolution process to ensure resolution in a robust and timely manner. This should include agreement on how funding will be provided during the dispute, and arrangements for reimbursement to the agencies involved once the dispute is resolved."*

38. And at §162 provided:

> *"Who Pays? sets out the expectations for when there is a dispute between PCTs as to responsibility?"*

39. Separate guidance titled "Who Pays? Establishing the Responsible Commissioner" produced by the Department of Health (September 2007) set out the position as between NHS bodies as to who was responsible where an NHS body, not the local authority was responsible for providing, and funding, a person's care. Relevant extracts provide that:

> *"…The NHS is expected to act in the best interests of the patient at all times and work together in the spirit of partnership.* ***Ministers have specifically asked to be advised of NHS bodies who are unable to reach local resolution to any disputes between themselves...****"* (emphasis as in the document).
>
> *"Resolving disputes*
> *The Department expects that all disputes will be resolved locally, ideally at PCT level, using the general principles above to come to pragmatic solutions...*
>
> *If, in exceptional circumstances, disputes cannot be resolved at [Strategic Health Authority] level, the SHA's) involved should send a report on the case to the Department of Health ...contact with the Department for Health should only be considered as a very last resort."*

The public law error by Lincolnshire PCT - Commissioning responsibility

40. It is common ground that Lincolnshire PCT made an error of public law in its decision of 24 September 2008 informing the Council that it would not assess JD for eligibility for NHS Continuing Health Care because it was not responsible for commissioning services for JD. Lincolnshire PCT suggested that, according to its understanding of relevant statutory framework Surrey PCT would be the responsible NHS commissioner and thus should undertake any CHC assessment. The error was repeated in its decision of 13 May 2010 confirming its earlier decision.

41. It is common ground that its error arose because in 2008 the legal rules as to which Primary Care Trust had commissioning responsibility for various categories of individuals who had been placed in their area by other organisations were complex and had recently been changed.
42. In summary, a Primary Care Trust must arrange for the provision of services for the cohort of persons for which it has responsibility (s3 NHS Act 2006). It acts lawfully if it does so. It acts unlawfully if it provides for those outside the cohort, since it has no vires to provide services for anyone for whom it does not have commissioning responsibility.
43. The primary rule for identifying those for whom the primary care trust has responsibility is by reference to the GP practice where a patient is registered. Under Regulation 3 of the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations 2002/2375 ("the 2002 Regulations") the relevant NHS commissioning body was identified by reference to the PCT which was local to the GP practice where the patient was registered. However, by October 2007 there were two relevant exceptions to this rule. First, by Regulation 3(7A) in respect of adults, a "placing PCT" was required to continue to discharge the Secretary of State's functions under section 3 of the NHS Act. Secondly, under Regulation 3(7E), where a child in the care of a local authority was placed by a local authority in the area of another PCT, the original PCT remained the responsible commissioner for NHS services for the child. The latter rule was effective from 1 April 2007.
44. Regulation 3(7A) was inserted by regulation 3(3) of National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) (Amendment) Regulations 2006/359, regulation 3(3), which came into force on 1 April 2006. Regulation 3(7C-7E) were inserted by regulation 3(6) of the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) (Amendment) Regulations 2007/559, which came into force on 1 April 1, 2007.
45. At the time, neither the wording of the Regulations nor the Guidance published by the Department of Health made it clear that the Regulations regarding child placements by a local authority only applied to children who were placed by a local authority after 1 April 2007. In contrast, the placement rules relating to adults applied from 1 April 2006. JD was placed as a child on 9 August 2006.

Witness evidence

46. The Court heard evidence from Paul Morgan, Head of Continuing Care in the Department of Adult Social Care at Surrey Council.
47. Mr Morgan gave evidence that he joined the Council in 2015 and inherited the present case as an unresolved matter. The Council had been trying to get Lincolnshire PCT to make a decision that that JD was eligible for continuing care for some time. The dispute was protracted. Eventually, the Council had sought the intervention of NHS England. The legal claim was only launched when the Council considered it had come to the end of the road. Mr Morgan rejected the suggestion that the Council's contemporaneous correspondence had not made clear that the Council disputed the PCT's decision that it was not the responsible commissioner. Whilst the correspondence was not explicit it must

have been apparent to the PCT that the Council did not accept it should be funding JD. He did not accept the suggestion that the Council had been dilatory in pursuing the claim. Once Lincolnshire PCT had indicated it was not the responsible commissioning authority, the Council had approached Surrey Primary Care Trust but it too had rejected responsibility. From the Council's perspective this was essentially a dispute between two Primary Care Trusts which the Council found itself in the middle of.

48. Mr Morgan explained he had wider experience of dispute resolution through his involvement with the House of Commons Select Committee hearings into the 2007 National Framework and in assisting civil servants with the drafting of the framework. At the relevant time there was a lack of clarity in the national guidelines over resolution of disputes as to the identity of the responsible commissioner which was primarily a dispute between two NHS Trusts. As a result the dispute resolution procedures available under national guidance had not worked in this case. There was no mechanism to seek the intervention of NHS England which only happened in 2014. It was unrealistic of the Defendant suggest otherwise.
49. The Administrative Court and Court of Appeal have made clear their hostility to public law authorities arguing with each other over allocation of scarce resources in public law claims, as in St Helens and Richards v Worcestershire County Council [2017] EWCA Civ 1998. He was therefore shocked by the Defendant's suggestion that judicial review should have been the first port of call for the Council.
50. Eligibility for NHS Continuing Care is a matter of professional judgment. In principle, it was perfectly legitimate and common for different professionals to reach different views all applying the same professional criteria because of the element of judgment. However, in the case of JD, Surrey Primary Care Trust had concluded in 2011 that he was eligible for Continuing Health Care on grounds of his challenging behaviour and cognition. In 2015 Lincolnshire [West] CCG reached the same conclusion on the same grounds. The criteria by which the decision was made in both cases was the same because the decision making had been standardised by the 2007 Guidance. Further, he had discussed JD's case with the social worker at the Council with responsibility for JD, who was of the view that JD's needs did not change between 2008 – 2015.
51. The Court heard evidence from Timothy Fowler, Director of Commissioning and Contracting for the Defendant.
52. Mr Fowler gave evidence that he had 23 years of experience in the NHS before joining the Defendant on 1 April 2020. He had no personal knowledge of the case but had reviewed the paperwork and was familiar with the relevant framework.
53. He accepted that the 2008/10 decisions were not correct in law. However, Lincolnshire PCT had not been aware that the Council disputed the PCT's decisions. The correspondence in question had focussed on eligibility for CHC. The decision by the PCT in 2008 that it was not the responsible commissioning authority thus stood and would not have been changed unless the PCT was told to change it.
54. Whilst, strictly speaking, the "Who Pays" guidance in place at the relevant time did not apply to local authorities because it concerned responsibility between NHS bodies, Local Authorities should have had regard to it and did rely on it,

in his experience. He accepted that the 2009 Framework suggested there was a responsibility on both sides to settle disputes without delay.

55. In practice, the dispute resolution process was not a particularly formal process. It relied on email and dialogue and tended to be ad hoc. Unresolved matters would be escalated. There was no specified timescale for resolution in the relevant guidance. Surrey Council may have taken time to escalate the matter because of its complexity.
56. NHS Continuing Care is an evaluative judgement made by clinicians. The process is standardised as much as possible in the national guidance. The decision making proceeds by a Decision Support Tool (DST). The care domains are standard. The DST used in Surrey would be the same as that used in Lincolnshire. The framework followed by Lincolnshire PCT in 2015 when assessing JD was the same as the framework used for by Surrey NHS Trust for its assessment in 2011. Beyond these general comments, he could not make an assessment of clinical matters relating to JD. He is a professional manager not a clinician.
57. Mr Fowler addressed budgetary matters as follows in his witness statement which stood as his evidence in chief:

> *"41. For as long as I can recall, NHS bodies have worked under very considerable financial pressure. The demands on our resources are always far greater than our ability to fund services. Without getting into the complexities of NHS financing, I can assure the court that the practical consequences of the mistake made by LPCT and then SWLCCG in not providing funding over many years was not that the NHS body ended the year with a profit. On the contrary, failing to fund services for JD would have reduced any overspend which the NHS body was facing or, if there was no overspend, would have enabled the NHS body to fund services for other patients.*
> *42. It is not possible to go back over so many years in order to determine the precise financial position for either LPCT or SWLCCG in any of the relevant years where the Council is making its claim. If, as it appears, an understandable and honest mistake was made in that funding responsibility was not accepted by these NHS bodies and if, which is a matter of speculation, an evaluative judgment had been made that JD was eligible for CHC, those NHS bodies would have been obliged to commission a package of services for JD. It is impossible to say whether either of these bodies would have taken the decision to continue commissioning services for him at Broughton House or would have arranged services for him in a different way, potentially at a lower cost.*
> *43. However, the only beneficiaries of this honest mistake were other patients who had services funded for them when those services would not have been provided if the same money had been used to fund services for JD. Given that resources are and have always been so tight within the NHS, I can say it is certain that neither LPCT or*

> *LWCCG benefited from this mistake, in the sense that it banked the money which would have been spent on funding JD and retained that as a "profit". The people who benefited from the mistake were other patients who got services which may not have otherwise been provided to them. Given that the resources which would have been spent funding services for JD were spent supporting other patients, I fail to see how it can be said that any NHS body has become enriched as a result of this mistake."*

58. Mr Fowler was cross examined by Mr Patel on his evidence in this respect. He accepted that once an NHS Trust or Clinical Commissioning Group is responsible for care and accommodation it cannot point to a lack of money in its budget as a reason not to fund the necessary care. That was the same for all those for which it was responsible for. The issue, he said, is how the organisation balances conflicting need. Had it been necessary, the money would have been found for JD but it might have been to the detriment of the needs of other people because resources were always scarce. He accepted that he could not point to how the money saved was spent specifically but said that Lincolnshire PCT did not have a direct benefit from not spending the money as the money all went on care for patients. He rejected Mr Patel's suggestion that juggling money was inherent in many budgets, pointing in response to the NHS' statutory responsibility to fund patients. Any benefit from the money "saved" on JD's care was a benefit to the patients, not the PCT.
59. In re-examination he explained that Primary Care Trusts were under a statutory duty to break even. The budget must cover a large number of areas of commissioning activity of the PCT. In order to discharge the duty to break even it is necessary to constantly borrow from one budget to another. There are a number of uncertainties when budgets are set and around the number of activities that happen during the year. The budget is set for the year ahead so the PCT/CCG has constantly to rebalance the books and reset and review. If the PCT had to pay for JD it might have had to remove a discretionary service from another patient like transport to kidney dialysis.

The Court's findings on the evidence

60. Neither Mr Morgan or Mr Fowler had any personal knowledge of JD's case during the relevant period between 2008 – 2015. Both were reliant on a reading of the files and general experience although Mr Morgan gave evidence that he had discussed JD's needs during the period 2008 – 2015 with JD's social worker at the time. Both witnesses did their best to help the Court.
61. Mr Morgan had an in-depth knowledge of the development of the National Framework for Continuing Care through his involvement in its drafting in 2007 and subsequent iterations and by virtue of his strategic county and national roles in adult social care since 2004. He was able to speak from experience about the development of dispute resolution procedures since 2007.
62. The dispute resolution process between Surrey Council and the NHS Trust, was protracted but I accept Mr Morgan's explanation for the slow progress of matters. Once Lincolnshire PCT had indicated it was not the responsible commissioning authority, the Council approached Surrey NHS Trust but it too had rejected responsibility and matters stalled. This was essentially a dispute

between two Primary Care Trusts which the Council found itself in the middle of by virtue of its residual funding role. I accept Mr Morgan's evidence that there was a lack of clarity over resolution of disputes of this nature at the time. On the information provided to the Court, it must have been apparent to Lincolnshire PCT by August 2009 that the Council did not accept it should be funding JD, even if the specific reasoning for the Council's position was unclear. Mr Lock's attempts to portray Surrey's conduct between 2008 – 2011 as dilatory must be seen in the context of Mr Fowler's acknowledgement that the 2009 Guidance on dispute resolution suggested both sides had responsibility for dispute resolution. It must also be seen in the context of the eventual outcome being that Lincolnshire NHS CCG accepted responsibility for JD's care after the intervention of NHS England.

63. On the basis of the evidence before the Court, I consider it highly likely that Lincolnshire PCT would have decided that JD was eligible for continuing health care between 2011 and February 2015 had it undertaken an assessment during this period. In making this finding I have not found it necessary to trespass into areas of judgment on the part of a specialist decision maker. In 2011 Surrey Primary Care Trust conducted an assessment which concluded that JD was entitled to continuing care, on grounds of behaviour and cognition. In 2015 Lincolnshire PCT conducted an assessment which concluded that JD was entitled to continuing care on the same grounds of behaviour and cognition. Both assessments were conducted on the basis of a standardised national framework and standardised criteria. Mr Morgan gave unchallenged evidence that he had discussed JD's needs during 2008 – 2015 with JD's social worker at the time who was of the view they had not changed.
64. The Court was not provided with evidence of budgets or expenditure during the period from 2011 – 2015. Mr Fowler gave evidence that it was not possible to go back over so many years in order to determine the precise financial position for the PCT in any of the relevant claim years. The most that Mr Fowler, who was doing his best to assist the Court, could do was to explain in general terms that the PCT might have faced difficult choices about discretionary services provided to other patients had it been necessary to fund JD during this period, given the general scarcity of NHS resources.

Submissions of the parties

65. On behalf of the Council, Mr Patel submitted that the Council's private law claim in restitution rests upon establishing the elements of the cause of action of unjust enrichment which are that the PCT was enriched by the receipt of a benefit at the expense of the Council. Properly analysed, the Council paid for the costs of JD's accommodation and care which the PCT was legally responsible for. The retention of the enrichment is unjust. The Council's case does not involve an unjustified extension of the categories of unjust enrichment as is apparent from the Canadian case of Corporation of the County of Carleton v. Corporation of the City of Ottawa [[1965] 52 DLR (2d) 220. In that case the Supreme Court of Canada allowed a claim for restitution, concluding that it would be "against conscience" for one public body to escape its funding responsibilities for an individual's care at the expense of another public body. The Defendant cannot establish any defence. It relies upon a change of position defence by asserting that it has not retained any public money and that the

resources which would have been used to fund services for JD have not been expended supporting other patients. But that cannot amount to a change of position. Lincolnshire NHS CCG must show that the specific enrichment was spent on a specific outgoing that would not have been paid were it not for the enrichment. Lincolnshire NHS CCG has a statutory duty to fund those other service users' care, and would have spent the monies on them in any event.

66. It is therefore improper, and would lead to an injustice to the Council, to strike out any such claim on the basis that the Council did not bring proceedings for judicial review of the legally defective decisions and/or did not utilise any other dispute resolution mechanism for resolving the disputes between the public bodies caused by the legally defective decisions.
67. On behalf of Lincolnshire NHS Clinical Commissioning Group, Mr Lock submitted that the challenge by the Council in private law proceedings to public law decisions made by Lincolnshire PCT was fundamentally misconceived. Administrative decisions made by public bodies are assumed conclusively to be lawful unless those decisions are challenged by judicial review. Such decisions can only be challenged by way of judicial review, not in private law proceedings. No judicial review challenge was ever made by the Council to the decisions by Lincolnshire PCT. Accordingly, it made final and unchallenged decisions in 2008/10 that it was not the NHS responsible commissioner for services for JD which stood as lawful decisions, irrespective of whether those decisions could have been challenged successfully by way of judicial review when they were made. This Court cannot now review the lawfulness of those decisions since their lawfulness could only have been examined within judicial review proceedings brought within 3 months of the relevant decision. There cannot be a viable claim in restitution because none of the tests which have to be met to establish a claim in restitution are met on the facts of this case, and in particular (a) Lincolnshire NHS CCG has not benefitted from any error made by Lincolnshire PCT and/or (b) both Lincolnshire PCT and Lincolnshire NHS CCG have changed their positions because the money has been spent on other patients and no money has been retained by Lincolnshire NHS CCG.

Discussion

Introduction

68. It is common ground that Lincolnshire PCT erred in law when in 2008 and 2010 it declined Surrey Council's invitation to assess JD's eligibility for NHS continuing healthcare on the basis that it was not the relevant NHS commissioning body for JD. It did so on an erroneous application of Regulation 3(7E) of the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations 2002/2375 (as amended). The error arose from the complexities around changes in commissioning and implementation dates. No suggestion is made that the PCT acted in bad faith in this regard.
69. Decisions about who is and who is not eligible for NHS Continuing Care are solely decisions taken by NHS bodies. They are not joint decisions taken between NHS bodies and local authorities (St Helens Borough Council v Manchester Primary Care Trust [2009] PTSR 105). The NHS assumes no duty to fund accommodation and care services for a person until an NHS body has

made a decision that a person has a primary health need. It follows that, unless and until an evaluative decision is made by an NHS body that a person has a primary health need, a person is not "eligible for NHS continuing healthcare" (R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213).

70. An NHS Trust/Clinical Commissioning Group must arrange for the provision of services for the cohort of persons for which it has responsibility to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility (s3 NHS Act 2006). It acts lawfully if it does so and it acts unlawfully if it provides for those outside the cohort, since it has no vires to provide services for anyone for whom it does not have commissioning responsibility.
71. As applied to the facts of the present case, the effect of the PCT's decisions in 2008/2010 that it was not the responsible commissioning body for JD was that Surrey Council remained responsible for providing JD with community care services pursuant to a range of statutes at the time, including the National Assistance Act 1948. This is consistent with the long standing role of local authorities as providing assistance as a last resort. Lincolnshire PCT had no vires to fund JD unless and until it decided it was the responsible commissioning authority and JD was eligible for continuing health care.

1) Should the claim have proceeded by way of judicial review?

72. Mr Lock's primary case was that this claim should have proceeded by way of judicial review. He relied on the principle laid down in O'Reilly v Mackman [1983] 2 AC 237 and, in particular, on the decision in Jones v Powys Local Health Board & Anor [2008] EWHC 2562 (Admin) which he described as the only High Court Authority to consider whether a restitution claim can be advanced where it is alleged that an NHS body erred in a decision on continuing care.
73. Counsel were agreed that the case of O'Reilly v Mackman, established that, as a general rule, it would be contrary to public policy and an abuse of the process of the court for a Claimant complaining of a public authority's infringement of his public law rights to seek redress by a private law claim (the exclusivity principle). Counsel were also agreed that a number of exceptions have developed, to the extent that an inflexible procedural divide between public and private law claims is no longer applied. In this respect, Mr Patel relied on the Court of Appeal decision in Richards v Worcestershire County Council [2017] EWCA Civ 1998, a claim for restitution of care home fees in the context of an agreement by the Defendant to provide after care services for the Claimant who had been injured in a road accident pursuant to section 117 Mental Health Act. Having considered, in his words, the 'numerous' exceptions to the exclusivity principle, Lord Justice Jackson identified two propositions which, the Judge said, were established by the authorities:

> *"a. The exclusivity principle applies where the claimant is challenging a public law decision or action and a) his claim affects the public generally or b) justice requires for some other reason that the Claimant should proceed by way of judicial review;*
> *b. The exclusivity principle should be kept in its proper box. It should not become a general barrier to citizens*

> *bring private law claims in which the breach of a public law duty is one ingredient."*

74. Applying the proposition to the facts of the case before the Court, Lord Justice Jackson concluded as follows:

> *"66. Let me now turn to the present case. The claimant's claim is based upon the allegation that the defendants delivered to him after-care services pursuant to section 117 of the 1983 Act but failed to make payment for those services as was their duty.*
>
> *67. The defendants raise some formidable defences to that claim, but they can have no legitimate objection to the claimant proceeding under Part 7 of the CPR. This is a private law claim, even though based upon section 117 of the 1983 Act. It has no wider public impact. Justice does not require for any other reason that the claimant should proceed by way of judicial review. If the exclusivity principle is allowed to block this claim, it will become an instrument of injustice.*
>
> *68. In the result, therefore, I dismiss the first ground of appeal."*

75. Mr Patel submitted that the two propositions should govern this Court's assessment of matters. This, he said, is a case where the exclusivity principle should be kept in its proper box. Allowing it to apply under this particular regulatory scheme will create a perverse incentive for health bodies to (unlawfully) delay the carrying out of assessments/eligibility decisions to protect their own budgets by allowing local authorities to carry on picking up the bill for the care of individuals who are properly the legal responsibility of the NHS, in the knowledge that local authorities have no financial redress in law. There was he, said, no wider principle engaged by the case or any other reason why justice required the claim to be brought by way of judicial review.
76. Mr Lock emphasised Lord Justice Jackson's reference to exclusivity not being a barrier to a private law claim "in which the breach of public law duty is one ingredient". In the present case, he said, the public law duty was centre stage. Mr Lock pointed to the facts in Jones v Powys Local Health Board. In that case the Claimant sought restitution of the sums paid by the Claimant's father to a nursing home in the final six years of his life on the basis that his father was entitled to free home care and accommodation during this period. It was said that the Local Health Board should have conducted a multi disciplinary assessment, which, if done, would have found that the deceased was so entitled. Powys Health Board denied that the deceased was entitled to receive free care before 2005 and relied on a decision by the relevant review panel (the All Wales Special Review Panel) recommending that the Claimant receive care from 2005 but not before. Mr Justice Plender first considered the statutory context, which is similar in this case, before stating at §22:

> *"I must determine on proper analysis whether the Claimant's case amounts to a challenge to public law action or decision, rather than an attempt to assert some private right which cannot be determined without an examination of the validity of a public law decision".*

77. The Judge went on to assess the 'dominant issue' in the claim, concluding that it was, on the facts, an attack on the decision of the review panel that the Claimant was not entitled to Continuing Health Care:

> "*The complaints made of the All Wales Special Review Panel) (AWSRP) in the Particulars of Claim are central, explicit and suitable for determination by judicial review. For instance… the Claimant submits that the AWSRP applied irrelevant criteria…"*
>
> *…*
> *I am far from persuaded that a civil action in the High Court is the optimum way of resolving such disputes...*
>
> *…*
>
> *The AWSRP is a specialist body, experienced in the determination of the needs of a patient for continuing health care. ... By contrast the High Court exercises a general jurisdiction and when confronted with a case such as the present it must choose between the opinions of experts.* He was *therefore 'satisfied that the institution of the present proceedings by writ rather than by application for judicial review deprives the LHBs of protection that they would otherwise have enjoyed and is inconsistent with the just conduct of the proceedings."*

Discussion

78. I accept Mr Patel's submissions as to the distinctions between the present case and the case of Jones, which was decided before the case of Richards. Whilst the regulatory framework may be similar, resolution of the private law claim in Jones would have required the Court to examine a public law decision by a specialist tribunal which the Court was not equipped to do. The context here is different. It is common ground that the decisions in 2008/2010 were unlawful. Further, on the strength of the evidence available, I have made a finding that it was highly likely that Lincolnshire PCT would have concluded that JD had a primary health care need had it gone on to assess his needs. The available evidence is such that the Court does not need to trespass into the realms of specialist decision. In the language of paragraph 22 of Jones, on proper analysis, the dominant issue in the Claimant's case is an attempt to assert a private right which can be determined without an examination of the validity of the two public law decisions in play.
79. In any event, in obiter comments in R(Hemming t/a Simply Pleasure Ltd and others) v Lord Mayor and Citizens of Westminster [2013] EWCA Civ 591 Lord Justice Beatson disapproved of the decision in Jones v Powys:

> *"[138] Before leaving the question of restitution, I note that the judge considered (first judgment 10-12) that the time limit for claims for judicial review in CPR Pt 54.5 applied to the claim for restitution because he regarded its primary focus to be a challenge to the Council's failure to determine the licence fee for the relevant years, a public law act or decision. He relied in part on the decision of Plender J in Jones v Powys Local Health Board [2008] EWHC 2562 (Admin). As the judge extended time, it is not necessary to decide whether he was correct, but I do not consider that he was. The factor making the payee's enrichment unjust is rooted in public law, but the right to restitution and the obligation to make restitution are part of the private law of obligations. Just as there is no requirement that the time limit for judicial review applies to the tort of misfeasance in public office, so also it should not apply to claims seeking restitution against public bodies: see the discussion and the decisions cited in Williams, Unjust Enrichment and Public Law (2010) 49-52, and Burrows, A Restatement of the English Law of Unjust Enrichment (2012), para 21(4) and the commentary at 113."*

80. Accordingly; I turn to apply Lord Justice Jackson's two propositions in Richards. Firstly, the highly specific facts of this claim about the costs of care for a particular individual does not give rise to wider issues or wider public impact. I turn then to the question of whether justice otherwise require requires for some other reason that the Council should proceed by way of judicial review. During the course of his analysis of the authorities in Richards Lord Justice Jackson quoted from the judgment of Lord Woolf MR in Clark v University of Lincolnshire and Humberside [2001] 1 WLR 1988:

> *"39. The emphasis can therefore be said to have changed since O'Reilly v Mackman [1983] 2 AC 237. What is likely to be important when proceedings are not brought by a student against a new university under Order 53, will not be whether the right procedure has been adopted but whether the protection provided by Order 53 has been flouted in circumstances which are inconsistent with the proceedings being able to be conducted justly in accordance with the general principles contained in Part 1. Those principles are now central to determining what is due process."*

81. I am not persuaded that this is a case where Surrey Council has 'flouted' the protection provided by the stringent time limits for judicial review. I have found that there was a lack of clarity over resolution of disputes of this nature at the relevant time and that both parties bear responsibility for the protracted dispute resolution process. I accept Mr Patel's submission that barring the Council's claim might create a perverse incentive for health bodies to (unlawfully) delay the carrying out of assessments/eligibility decisions to protect their own budgets

by allowing local authorities to carry on picking up the bill for the care of individuals who are properly the legal responsibility of the NHS, in the knowledge that local authorities have no financial redress in law.

82. Mr Lock also sought to advance other arguments as to why the private law claim should be barred. He relied on caselaw in which the Courts have held that breaches of statutory duty are not actionable in tort. He relied, in particular, on the House of Lord's decision in O'Rourke v Camden LBC [1998] AC 188 in which the Court held that section 63(1) of the Housing Act did not create a duty to Mr. O'Rourke which is actionable in tort, albeit it created a duty which is enforceable by proceedings for judicial review. Mr Lock also relied on the case of Clunis v Camden and Islington HA [1998] QB 978 where the Court of Appeal held that a breach of the duty to a mental health patient under section 117 of the Mental Health Act 1983 was not actionable in damages. Mr Lock's analysis of the caselaw in this respect appeared to be a repeat of submissions he advanced before the Court of Appeal in Richards [2018] PTSR 1563, which was rejected by the Court on the basis that the Claimant in that case was not saying the defendant failed to deliver services or delivered them badly. The services were delivered and the question was who should pay for them. This is the position here. Mr Lock sought to distinguish Richards in this regard on the basis that Richards concerned a promise and was in any event of limited weight because it was an application to strike out so no final decisions were made on the merits of the claim and because the Claimant abandoned the case after the Court of Appeal judgment so the case never progressed. However, I do not see that these points change the essential analysis that the claim is about who pays for services delivered, not a complaint about the quality of the services.
83. Mr Lock also raised the proposition (which was common ground) that a decision of a public body in exercise of its publish law functions is treated as a lawful decision unless and until it is quashed by a Court in judicial proceedings. Accordingly, pursuant to the regulatory regime in play here, unless and until Lincolnshire PCT took the decision that JD was eligible for continuing care it had no vires to fund JD's care and the Council had statutory responsibility to fund. In my view, properly analysed this is an argument that the Council was under a statutory obligation to make payment so there can be no enrichment and falls to be addressed in the context of the unjust enrichment claim which I consider further below.
84. Accordingly I conclude that there is no bar to the Council pursuing a private law claim in restitution.

2) Is any claim barred by Limitation

85. Proceedings were issued on 31 July 2019. It was common ground that the claim is subject to a 6 year limitation period by virtue of section 5 of the Limitation Act. In his skeleton argument Mr Patel accepted on behalf of the Council that its claim was limited to restitution of sums paid after 31 July 2013, amounting to £310,587.25 plus interest.
86. Neither Counsel addressed the Court in any detail on limitation during the hearing.
87. Mr Patel contended, briefly, that a cause of action accrued each month when the Council paid the care home fees and thus were unjustly deprived of their benefit. After the hearing he provided the Court with extracts from Goff and Jones on Limitation.

88. Mr Lock submitted that the cause of action accrued in 2008 and then 2010, when the PCT decided that it was not the responsible commissioner for JD's care. The claim had not been issued within 6 years and, accordingly, limitation operated as a complete defence. Mr Lock did not take the Court to any authorities to support his submission in this regard. He did not dispute Mr Patel's suggestion that the care home fees were paid by the Council on a monthly basis.
89. Goff & Jones provides at 33.11 that:

> *"Limitation periods generally run from the date when the claimant's cause of action accrues, and a cause of action in unjust enrichment normally accrues at the date when the defendant receives a benefit from the claimant".*

90. On this basis a cause of action accrued each month on date of payment by the Council to the care home. This was the date when all the ingredients of the claim were in place (assuming I find this to be the case), namely enrichment by the saving of an expense that the PCT would otherwise have incurred, which was gained at the Council's expense, in circumstances that made the PCT's enrichment unjust.
91. In the absence of any material submissions or legal authority to the contrary, I proceed on the basis that limitation is a partial but not a complete defence and the Council is not barred by limitation from seeking restitution of sums paid after 31 July 2013, amounting to £310,587.25 plus interest.

3) Should the Court extend the categories of unjust enrichment?

92. It was common ground between Counsel that the claim in restitution is novel. It is a claim by one public body against another, in relation to care services provided to a third party, where both public bodies have distinct statutory caring responsibilities and where the basis of the claim is said to be an unlawful public law decision to refuse to accept responsibility for the care of the third party.
93. Mr Lock pointed to the analysis by Lord Reed in Investment Trust Companies v Revenue and Customs Commissioners [2018] AC 275 at para 39 to the effect that the recovery of money in restitution is not, as a general rule, a matter of discretion for the Court and a claim based on unjust enrichment does not create a judicial licence to meet the perceived requirements of fairness on a case-by-case basis. Legal rights arising from unjust enrichment should be determined by rules of law which are ascertainable and consistently applied. Mr Lock submitted that the facts of this case are far from exceptional, and that disputes of this manner arise frequently between NHS bodies and between NHS bodies and local authorities. These can be resolved outside of litigation using the arrangements set out in the National Framework. As per the stipulation by Laws LJ in Gibb v Maidstone any extension of unjust enrichment must be a principled one and proceed by way of explanation.
94. Mr Lock raised six policy reasons why this Court should not extend the categories of unjust enrichment to the facts of this claim. Firstly; no good reason had been advanced by the Claimant for an extension. Secondly; there was no need for the extension. There are well established dispute resolution procedures or public law mechanisms available for disputes of this nature. Thirdly, an extension would lead to an explosion of litigation in order to 'cost shift' between

public bodies and would divert scarce resources to lawyers. Fourthly; allowing a public body to advance a claim in restitution against another public body whilst both were in acting in accordance with statute is wrong in principle. Neither Surrey Council or Lincolnshire PCT were acting beyond their statutory powers. Fifthly, restitution is a last resort. The time limits of judicial review require claims to be brought promptly whereas the 6 year limitation period in restitution results in public law decisions being challenged long after relevant budgets have been expended. Finally, in order to decide the claim this Court will inevitably have to second guess a specialist decision maker and make a clinical decision as to JD's eligibility for continuing care.

95. Mr Patel did not accept an extension of the principles of unjust enrichment would be as significant as Mr Lock sought to portray. Any extension was, in any event, justified on the exceptional facts of the case. Mr Lock's policy reasons for denying any extension do not stand up to scrutiny. There will not be an explosion of litigation. The statutory dispute resolution should ordinarily work. The facts of this case are exceptional in the admitted public law breaches and the strength of the evidence in relation to JD's eligibility for continuing health care. Mr Lock's concerns about restitution claims long after budgets have been spent can be addressed through the change of position defence.

Discussion

96. In Woolwich Equitable Building Society v Inland Revenue Commissioners [1993] AC 70, the Claimant building society paid money in response to a tax demand that was later held in judicial review proceedings to have been ultra vires and void. A majority of the House of Lords held that the law should be reformulated to allow recovery of money paid as tax pursuant to an ultra vires demand.
97. The present claim does not fall squarely within the 'Woolwich principle'. Any benefit to Lincolnshire PCT was not in the form of money but the discharge of a liability said to be otherwise owed by the PCT to a third party (JD). In addition, this is not a case where Lincolnshire PCT can be said to have made any demand for payment from Surrey Council. The position may be characterised as Lincolnshire PCT unlawfully failing to take legal responsibility for the care of a third party in circumstances where Surrey Council remained responsible, pursuant to statute, for the care of the third party.
98. Mr Lock submitted that the scope of the so called 'Woolwich principle' was strictly limited. He relied on Lord Goff's analysis in the case that the principle applies to "money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority" (177E/F).
99. Counsel supplied the Court with relevant extracts from Goff and Jones, which cited a number of potentially relevant cases which Counsel had not addressed me on during the hearing and upon some of which I sought written submissions from Counsel after the hearing. I am grateful for the helpful and comprehensive written submissions provided by Mr Lock and Ms Gibbs in response to my request, and more generally.
100. Cases cited by Goff and Jones include a reference to British Steel Plc v Customs and Excise Commissions (No 1) [1997] 2 All ER 336 as authority for the proposition that the Woolwich principles applies where a valid statute has

been misconstrued or misapplied. Scott V-C held that restitution would be awarded because:

> *"…whether the demand is based on ultra vires regulations, or on a mistaken view of the facts of the case, it will… be a demand outside the taxing power conferred by the empowering legislation."* (§22-23)

101. In the present case the PCT misapplied Regulation 3(7)(E) of the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements (England) Regulations 2002/2375.

102. Goff and Jones query how far the Woolwich principle extends beyond the core case of money paid but suggest the principle should extend to any other public authority which has acted beyond its power to exact duties, fees or levies:

> *"At present, it is unclear how far the Woolwich principle extends beyond the core case of money paid as tax that his not due. But if the rule in Woolwich is underpinned by broadly conceived rule of law considerations that extend beyond the "no taxation without Parliament" principle, this suggests that claims should lie not only against revenue authorities to whom money has been paid as tax but also against any other sort of public authority which has acted beyond its powers to exact duties, fees and other levies. It also suggests that the concept of a "public authority" should be given a wide connotation in this context to embrace not only governmental bodies but also bodies such as public service providers and universities whose authority to charge consumers of their services is subject to and limited by public law principles* (§22-21)

103. As for the requirement for a demand for payment: Goff and Jones cite the case of Test Claimants in the FII Group litigation v HMRC (No 1) [2012] 2AC 337 where Lords Walker and Sumption held that a demand need not have been made for the Woolwich principle to be engaged, although they thought that it must at least have been communicated to the tax payer that a payment was required (see analysis at 22-19).

Ultra vires payments by public authorities – Auckland Harbour Board

104. The 'Woolwich principle' is concerned with the situation where a claimant pays money to a public authority in the form of a demand which it transpires is unlawful. The decision of the Privy Council in Auckland Harbour Board v R [1924] A C 318 (PC) considers the opposite situation where a public authority makes an ultra vires payment to a defendant. It establishes that payments made out of public funds without lawful authority are recoverable as of right by virtue of their ultra vires nature (Goff and Jones (23-01)).

105. At first instance, in Charles Terence Estates Limited v Cornwall Council [2011] EWHC 2542, Mr Justice Cranston accepted the principle as applying to rent payments made by a local authority under an ultra vires view tenancy agreement [97]. The issue did not arise for consideration by the Court of Appeal. Goff and Jones consider that the rationale underlying the rule in Auckland

Harbour Board applies to local authorities just as forcefully as it does to central government bodies (23-36).

106. Counsel provided the Court with extracts from Burrows 'A Restatement of the English Law of Unjust Enrichment' which treats the principles laid down in the Woolwich and Auckland Harbour Board cases as aspects of a broader principle of recovery for the unlawful obtaining or conferral of a benefit by a public authority:

> *"21. Unlawful obtaining or conferral of a benefit by a public authority*
> *(1) The defendant's enrichment is unjust if the defendant is a public authority which unlawfully obtained the benefit from the claimant.*
> *(2) The obtaining of the benefit need not be preceded by a demand.*
> *(3) The defendant's enrichment is unjust if the claimant is a public authority which unlawfully conferred the benefit on the defendant.*
> *(4) The question whether the obtaining or conferral of the benefit was unlawful is to be decided by applying the principles of public law; but there is no requirement that the claimant must proceed by first seeking judicial review.*
> *(5) There are statutory provisions, especially in the context of tax and social security, that govern the right to restitution from or for a public authority."*

107. In his submissions, Mr Patel relied, in particular on 21(3), (the unlawful conferring of a benefit by the public authority).

108. The Restatement analyses the controlling concept underlying recovery as 'public law unlawfulness':

> *"21(1) The controlling concept which determines the types of situations, bodies and payments (or in principle other enrichments) to which the Woolwich principle applies, is public law unlawfulness. As developed in cases subsequent to the Woolwich case this can cover the misconstruction or misapplication of a relevant statute or regulation as well as where the relevant regulation is ultra vires and invalid...*
> *……*
> *21(3) A public authority that makes a payment to (or in principle confers any other enrichment on) the defendant unlawfully has a right to restitution. The reason for the restitution lies in the desire to protect the public generally from the spending of funds by a public authority unlawfully. Put shortly, like the Woolwich principle, one is concerned with protecting against the State unlawfulness, although here the unlawfulness is the mirror image of that in Woolwich (i.e. one is concerned with payment out, not payment in). …*

> *Restitution for a public authority was recognised to be 'well-established' in the speech of Lord Goff in the Woolwich case [1993] Ac 70 at 177, with his Lordship there relying on the Privy Council decision, given by Lord Haldane, granting restitution in Auckland Harbour Board v R [1924] AC 318, PC. Although both Lord Goff and Lord Haldane confined the principle to the recovery of moneys paid out of the consolidated fund, in principle the unjust factor extends to all payments made ultra vires or otherwise unlawfully by public authorities. This is now borne out by Charles Terence Estates Ltd v The Cornwall Council [2011] EWHC 2542 (QB), [2012] 1 P & CR 2, in which it was held that a local authority was entitled to restitution by reason of its own ultra vires conduct (albeit, on the facts, restitution was refused in respect of the rents paid by the public authority because the defendant had a change of position defence)."*

109. In the present case, Surrey Council conferred a benefit on the NHS Trust by discharging its liability to the care home. However, the present case does not fall squarely within the principle because the payments by Surrey Council to the care home were not unlawful. They were paid entirely lawfully under statute. It is to this element of the claim that I now turn.

The Council's statutory responsibility to make the payments

110. In the present case, in the absence of a determination by Lincolnshire PCT as to JD's eligibility for continuing care, Surrey Council was statutorily obliged to fund the costs of his care, consistent with the long standing statutory role of local authorities as providing assistance as a last resort. Mr Lock placed considerable emphasis on this point in his submissions.

111. This outcome follows from the regulatory framework, which was common ground. In particular NHS bodies and local authorities have separate statutory duties to fund the services identified by their particular statutory duty. Decisions about who is and who is not eligible for CHC are solely decisions taken by NHS bodies. They are not joint decisions taken between NHS bodies and local authorities (see R (St Helens Borough Council) v Manchester Primary Care Trust & Anor [2009] PTSR 105.

112. This scenario presents difficulties for recovery in unjust enrichment:

> *"an often overlooked but crucial element...is that an unjust factor does not normally override a legal obligation of the claimant to confer the benefit on the defendant. The existence of the legal obligation means that the unjust factor is nullified so that the enrichment at the claimant's expense is not unjust..."* (Burrows Restatement at 3(6) (page 32))

113. Nonetheless, the Restatement suggests there are limited exceptions where the unjust factor overrides the Claimant's legal obligations.

> *"However there are some limited exceptions where the unjust factor overrides the claimant's legal obligation to the defendant so as to allow restitution. The explanation for these exceptions is not easy to pinpoint but one might say that they are situations where there is no underlying conflict between the reason for allowing restitution and the defendant's legal entitlement ...*
> *It might help to link of the legal entitlement as being easily outweighed by the unjust factors." (page 33/34)*

114. Although the factual context is different, a similar point arose in the case of Deutsche Morgan Grenfell v IRC [2007] 1 AC 558. The facts are complex but the essential point for present purposes is summarised in the Restatement as follows:

> *"Example 7*
> *C pays advance corporation tax under a statutory scheme that is ultra vires the Revenue (D) because contrary to EU law, it does not give C an option to avoid paying the tax by making a group income election. C is entitled to restitution from D (for mistake or under the Woolwich principle) even though (on one technical sense) D was legally entitled to the tax because C had a statutory duty to pay it unless and until it validly exercised a group income election (this fact situation is exemplified by Deutsche Morgan Grenfell v PLC v IC [2006] UKHL [2007] 1 AC 558)" (page 34)*

115. By analogy, in the present case, Surrey Council only found itself with statutory responsibility for JD's care because of Lincolnshire PCT's unlawful decision that it was not responsible for commissioning care services for JD and its consequent failure to assess JD's eligibility for continuing care. This occurred in circumstances where the Court has found it highly likely that the PCT would have been responsible for JD's care had it not acted unlawfully. On this basis I consider that the Council's legal obligations to JD during the relevant period are outweighed by the unjust factors at play in this case.

4) Are the elements of a cause of action in unjust enrichment satisfied?

116. Mr Lock's submissions on the elements of the cause of action focussed on the requirement for enrichment. He submitted that Lincolnshire PCT (or the CCG) could not be said to have been enriched because the PCT did not retain any money saved on JD's care. Any money saved would have gone to other patients. The position of the PCT was therefore to be distinguished from that of a bank or the Inland Revenue following an unlawful demand for payment. He relied, in this regard, on the Canadian case of Skibinski v Community Living British Columbia [2012] BCCA 17. Ms Skibinsi, a full time carer for a severely disabled adult, brought a restitution claim against Community Living British Columbia, a statutory body funding the care of disabled adults. The trial judge found she was entitled to compensation on the basis of unjust enrichment, but this was overturned by the Appeal Court on grounds that the public body did not obtain a benefit as a result of the care provided:

> *"[62] I am unable to agree that CLBC obtained a benefit as a result of the care Ms. Skibinski provided to Lynn following termination of the contract negotiations. Ms. Skibinski did not provide the care to CLBC. Although Peel and Garland establish that a benefit may be negative (such as an avoidance of an expense that might otherwise have been incurred), this principle is not applicable to the present case. The evidence is that CLBC operates under a budget fixed by government. At the relevant time, there was a waiting list of approximately 40 adults in the Upper Fraser Region in need of various services. It was Mr. Birdi's evidence that "wait lists are necessary because of funding restraints."*
> *[63] It follows that CLBC's not paying for Lynn's care did not increase the amount of money in its coffers, except perhaps temporarily within the current fiscal year. Within its budget, it merely applied elsewhere the money it might have paid for Lynn's care. For this simple reason, it cannot be said that CLBC was enriched by the service given to Lynn by Ms. Skibinski."*

117. In turn; Mr Patel relied on a decision by the Supreme Court of Canada in County of Carleton v City of Ottawa SCR 1965 663. There, the County of Carleton was under a statutory duty to provide care for its residents who were insane. Not having its own home it sent them to Lanark and paid Lanark for providing for them. When Ottawa annexed part of Carleton, Ottawa should have taken over payment to Lanark for Norah Baker who was an insane resident of one of the annexed areas. By an oversight her name was missed off the list of those for whom Ottawa would be responsible and Carleton mistakenly carried on paying for her. When Carleton discovered its mistake it sought reimbursement from Ottawa of the payments it had made to Lanark for her care. The Court held it was entitled to reimbursement on the grounds of unjust enrichment:

> "*Norah Baker was an indigent for whose care the appellant was responsible prior to Jan 1 1950 when the area in question was annexed by the respondent. The respondent by the act and fact of annexation and by the terms of said Exhibit 11 para 10 assumed responsibility for the social service obligations of the appellant to the residents of the area annexed and the fact that one welfare case was inadvertently omitted from the list cannot permit the respondent to escape the responsibility for that case. To paraphrase Lord Wright it is against conscience that it should do so"*

118. Mr Lock sought to distinguish the case from the present case. Unlike the present case, it was apparent that the County of Carleton, had a private law arrangement with Ottawa under which responsibility for Ms Baker should have transferred. He pointed to the analysis of the case in the Restatement:

> *"Unfortunately it was not made clear exactly why there was thought to be an unjust enrichment. Although the unjust factor was obvious – the claimant had made a mistake of fact – the establishment of the benefit is more problematic. The most straightforward view is that Ottawa was under a statutory duty to provide for Norah Baker so that it was incontrovertibly benefited by having that duty fulfilled by Carleton, But the Ontario Court of Appeal had specifically rejected the trial judges view that Ottawa had such a duty. Ottaway's duty may therefore have been a contractual one owed to Lanark..."*

119. Mr Lock submitted that the case was elderly; had never been followed and appeared to be an example of the Court following its conscience, which later cases have warned against (Lord Reed in Investment Trust Companies v Revenue and Customs Commissioners (supra above)).

120. Closer to home, Mr Patel pointed to the Case of Richards v Worcestershire County Council as a restitution claim and similar, in essential respects, to the present claim. Mr Lock submitted in response that Richards was a strike out application so the Court had not addressed the factual question of benefit and the claim was premised, in part at least, on an agreement between the parties, unlike the present case.

121. In my view, Surrey Council discharged a liability to JD, which but for the PCT's unlawful decision, would have been owed by the PCT. In doing so the PCT was enriched to the extent of the cost of the care fees paid by the Council to JD's care home. The PCT was freed to spend an equivalent sum on other patients. In Gibb v Maidstone and Tunbridge Wells NHS the Court held that in principle a claim in unjust enrichment would lie to recover the value of a legal right foregone in a void compromise agreement. Laws LJ stated that there is 'no difference between a benefit consisting in money paid and a benefit consisting in a claim foregone" [30]. The Court in Skinbinski did not address the benefit in terms of the Defendant being freed up to spend the money saved on other patients. However, the fact that the money was spent on others would seem to give rise to a potential defence of change of position, to which I now turn.

6) Change of position

122. It appears that the change of position defence is not available under the Woolwich principle. In Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2014] EWHC 4302 Ch, Henderson J at [309-315]) addressed the question of why the change of position defence was not so available:

> *"**[315]** On balance, ...I now think that a better explanation for the bar on the defence of change of position to Woolwich claims is to be found in the stultification principle advanced by Professor Bant and other scholars. In essence, to allow scope for the defence would unacceptably subvert, and be inconsistent with, the high principles of public policy which led to recognition of the Woolwich cause of action as a separate one in the*

> *English law of unjust enrichment, with its own specific "unjust factor".*"

123. The analysis of Mr Justice Henderson is supported by the Restatement to the effect that:

> *"It is worth emphasising that while it appears that change of position is not a defence to a public authority under the Woolwich principles (see 23(2)(b)"*

124. However, the defence does appear to be available under the Auckland principle. It was applied at first instance by Mr Justice Cranston in Charles Terence Estates Ltd v Cornwall Council. Given the present claim does not fall squarely within the Woolwich doctrine, I consider that Lincolnshire NHS CCG is, in principle, entitled to its benefit.

125. The defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution (Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548 (Lord Goff at 581-3). However Lord Goff went on to state that:

> *"I wish to stress, however, that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things. I fear that the mistaken assumption that mere expenditure of money may be regarded as amounting to a change of position for present purposes has led in the past to opposition by some to recognition of a defence which in fact is likely to be available only on comparatively rare occasions."*

126. "The onus of pleading and proving the change of position defence is on the defendant who:

> *"must put it forward "fairly and squarely" in his statement of case so that "its factual merits can be explored at the trial"; he must also adduce evidence and give disclosure in support of the defence.* Where it is:
>
> "… based on the incurring of expenditure … after a payment was received from the [claimant], it is not essential that the money expended … [was] identical with the money … received from the [claimant]."
>
> *However the defendant must prove, at least on a "but for" basis, that his change of position was causally linked with his enrichment. The courts will make allowances for the fact that a good faith defendant may not keep an exact record of his spending, since he does not expect that he will have to account for his spending to anyone else. But a mere assertion that money has been spent, without*

> *supporting evidence, does not suffice..."* (Goff and Jones at [27-32])

127. The Court of Appeal addressed the factual problems typically faced by central government when seeking to establish a change of position defence in response to a claim to recover overpaid tax in Test Claimants in the FII Group Litigation v HMRC [2016] EWCA Civ 1180 [286]- [312] This analysis may be the reason for the more recent comment in Test Claimants in the FII Group Litigation v HMRC [2020] UKSC 47 [295] that "*many public authority defendants, including the Revenue, may be unlikely in practice to be able to rely on [the change of position defence].'"*.
128. It is common ground that Lincolnshire PCT was required by statute to fund the care of those to whom it had responsibility. This raises a prime facie presumption that the money 'saved' on JD would have been spent in any event on other patients. No evidence of relevant budgets or expenditure was put before the Court. Mr Fowler explained that it was not possible to go back over so many years to determine the precise financial position for the PCT in any of the relevant years where the claim is made. The most that Mr Fowler, who was doing his best to assist the Court, could do was to explain in general terms that the PCT might have faced difficult choices about discretionary services provided to other patients had it been necessary to fund JD during this period, given the ever present scarcity of resources in the NHS.
129. Even making allowances for the passage of time, the CCG's evidence in this regard amounts simply to assertion and speculation. Accordingly, I conclude that Lincolnshire NHS CCG has not discharged the evidential burden on it to establish the defence of change of position.

Conclusion

130. For the reasons set out in this judgment the claim is allowed.