Neutral Citation Number: [2021 EWHC 2293 (QB)

Case No: QB-2017-003009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/08/2021

Before :

MASTER DAVID COOK

- -

Between :

OLUSEYE ADEROUNMU	**Claimant**
(A Protected party acting by his litigation friend JOHN EDUN)	
- and -	
DR DEBORAH COLVIN	**Defendant**

- -

- -

Helen M Mulholland (instructed by **Bolt Burdon Kemp**) for the **Claimant**
Sarah Christie-Brown (instructed by **Browne Jacobson LLP**) for the **Defendant**

Hearing dates: 1st, 2nd ,3rd, 16th March and 28th May 2021

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Judgment Approved by the court for handing down (subject to editorial corrections)

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MASTER COOK: :

1. On 23 November 2009 the Claimant suffered a stroke, as a result of which he has been left with serious neurological injury. He has a right hemiparesis affecting the right arm more than the right leg. He has residual persisting dysphasia with regard to written and spoken language. Four days earlier on 19 November 2009 the Claimant had a consultation with his GP, the Defendant. It is common ground that when the Defendant saw the Claimant he was not speaking clearly. Her consultation note reads:

> " *cant talk clearly. Says at college but extremely inarticulate … very hard to work out what is going on … CVA with speech problems? … arrange further tests as appropriate. Head Scan?*"

2. In this claim the Claimant alleges negligence on the part of the Defendant in failing to exclude a stroke and in failing to refer him for urgent investigations. The claim was issued on 10 October 2017, just under 8 years from the date of the injury. In the Particulars of Claim the Claimant asserts that he is a protected party.

3. In her Defence the Defendant denies that the Claimant is a protected party and avers that at all material times the Defendant had the capacity to conduct litigation by reference to the criteria set out in the Mental Capacity Act 2005 (MCA). The Defendant then raises the defence of limitation, averring that any cause of action accrued on or around 23 November 2009.

4. By his Reply the Claimant asserts that the limitation period has not started to run because, since the date of the accrual of the cause of action, he has lacked capacity to conduct the litigation within the meaning of the MCA and is therefore considered to be under a disability for the purposes of section 38(2) Limitation Act 1980 (LA). His secondary position, in the event that he is found to have capacity, is that he did not have the requisite knowledge for the purposes of section 14A of the LA from a date more than three years before 10 October 2017. Lastly, in the event that his date of knowledge is found to be more than three years before 10 October 2017 he seeks the disapplication of the provisions of the LA by exercise of the court's powers under section 33 LA.

5. On 4 March 2020 I ordered that the issue of limitation should be tried as a preliminary issue; both parties consented to a trial of the preliminary issue by clinical negligence Master. Each party was given permission to rely upon expert evidence from a psychiatrist and a neuropsychologist.

6. The hearing commenced on 1 March 2021 as a hybrid hearing with the aid of CVP. On behalf of the Claimant I heard video evidence from Suzanne Trask, a solicitor and John Edun, the claimant's litigation friend. A witness statement had been served from the Defendant but Ms Christie Brown indicated that she would not to be called to give evidence.

7. I heard live expert evidence on behalf of the Claimant, from Dr Dilley, consultant neuropsychiatrist and Dr Soeterik, consultant neuropsychologist. Then on behalf of the Defendant, live evidence from Dr Wright, consultant neuropsychiatrist and video evidence from Dr Ballard, consultant neuropsychologist. Unfortunately it became apparent in the course of her cross-examination that Dr Ballard was having difficulty with the bundles. Dr Ballard's evidence had not been concluded by the end of the three

day listing and a fourth day was therefore listed for completion of the evidence and submissions on 16 March 2021. On the morning of 16 March 2021 I was informed by Ms Christy-Brown that Dr Ballard had experienced a medical emergency for which she was seeking treatment and was unlikely to complete her evidence that day. I was also informed that it was unlikely, though not certain, that Dr Ballard would not be able to complete her evidence since she had been advised to cease her professional practice with immediate effect. I adjourned the case for the Defendant to consider its position with regard to expert evidence. During the period of adjournment, Miss Christie Brown contacted the Court by e-mail and informed me that the Defendant wished to rely upon Dr Ballard's evidence, notwithstanding that it had not been completed. Ms Mulholland indicated that she had no objection to this course of action. It was agreed that I should give her evidence such weight as I thought appropriate given the fact her cross-examination had been interrupted at a relatively advanced stage.

8. It was therefore necessary to adjourn for final submissions which I heard on 28 May 2021. Thereafter I have re-read the extensive medical notes and that task combined with the general pressure of work has caused this judgment to be delayed, for which I offer my apologies to the parties.

9. It is common ground that the question of the Claimant's capacity to conduct this litigation had to be determined by reference to the provisions of the Mental Capacity Act 2005 "MCA". Mental capacity is the ability to make a decision and what is important is a person's ability to carry out the processes involved in making the decision and not the actual decision made.

The relevant law

10. The first stage of the test for capacity is set out in section 2 of the MCA which provides;

> *"(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.*
>
> *(2) It does not matter whether the impairment or disturbance is permanent or temporary …*"

11. If a disturbance in the functioning of the mind or brain is found to exist it is necessary to move to the second stage of the test set out in section 3 (1) of the MCA which provides;

> "*For the purposes of section 2, a person is unable to make a decision for himself if he is unable—*
>
> *(a) to understand the information relevant to the decision,*
>
> *(b) to retain that information,*
>
> *(c) to use or weigh that information as part of the process of making the decision, or*

> *(d) to communicate his decision ...*"

12. The principles which must be applied for the purpose of assessing capacity are set out in section 1 of the MCA and include;

> *"(2) A person must be assumed to have capacity unless it is established that he lacks capacity.*
>
> *(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.*
>
> *(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision*."

13. The question of capacity is issue specific as was made clear in the case of ***Masterman-Lister Brutton & Co*** [2002] EWCA Civ 1889 at paragraph 27:

> "*What, however, does seem to me to be of some importance is the issue-specific nature of the test; that is to say the requirement to consider the question of capacity in relation to the particular transaction (its nature and complexity) in respect of which the decisions as to capacity fall to be made. It is not difficult to envisage claimants in personal injury actions with capacity to deal with all matters and take all "lay client" decisions related to their actions up to and including a decision whether or not to settle, but lacking capacity to decide (even with advice) how to administer a large award.*"

14. Any given individual may have subject-matter capacity but not litigation capacity, see Mumby J in *Sheffield City Council v E(1) & S(2)*[2004] EWHC 2008 at paragraph 49,

> "*The question, as we have seen, is always issue specific. There may be different answers to the questions, 'Does this person have litigation capacity?' and 'Does this person have subject-matter capacity?'…it all depends on the circumstances. There is no principle, either of law or of medical science, which necessarily makes it impossible for someone who has litigation capacity at the same time to lack subject-matter capacity. That said, however, it is much more difficult to imagine a case where someone has litigation capacity whilst lacking subject-matter capacity than it is to imagine a case where someone has subject-matter capacity whilst lacking litigation capacity.*"

15. When considering the issue of capacity the court is not bound by the expert evidence alone, it may take into account all the available evidence. This was the approach taken by Andrew Edis QC in the case of ***Saulle v Nouvet*** [2007] EWHC 2902 where he took into account the following matters;

    i) "medical records in existence which record the condition and behaviour of the Claimant going back over 7 years"

ii) The fact that the Claimant had taken a long holiday in Australia on his own

iii) The fact that he had instructed solicitors to seek an order for contact between him and his son (and as far as the judge was aware, capacity had not been raised by those solicitors)

iv) Evidence from his family including DVDs showing his behaviour on holiday.

v) Expert medical evidence.

16. Section 11 Limitation Act 1980 provides:

> *"(3) An action to which this section applies shall not be brought after the expiry of the period applicable in accordance with sub-section (4)….*
> *(4) … [T]he period applicable is three years from –*
>
> *(a) the date on which the cause of action accrued; or*
> *(b) the date of knowledge (if later) of the person injured."*

Section 14 provides,:

> *"(1) … [I]n section 11… references to a person's date of knowledge are references to the date in which he first had knowledge of the following facts –*
>
> *(a) that the injury in question was significant; and*
> *(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence… or breach of duty; and*
> *(c) the identity of the defendant; …*
>
> *(2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment*."

17. In the case of *Wilkins v University Hospital North Midlands NHS Trust* Mr Richard Hermer QC sitting as a High Court Judge made the following observation:

> "*39. In a judgment delivered in July 1997 (Spargo v North Essex District Health Authority [1997] PIQR 235) Lord Justice Brooke complained that the law on the application of s.14 was 'grossly overloaded' with authority. 15 years later, in AB v Ministry of Defence [2013] AC 78. Lord Walker remarked that in the intervening period "the overload has increased". The clear authoritative emphasis is therefore to not overburden and overcomplicate the interpretation of s.14 with too ready recourse to myriad examples as to how it has been applied in the particular circumstances of other cases. Rather, section 14 should be capable of ready and sensible application by primary*

> *reference to the plain statutory language and sparing use of those cases designed to serve as general guidance*."

18. Generally, knowledge for the purpose of section 11 requires a state of mind of sufficient certainty to justify the Claimant embarking on the preliminary steps for making a claim for compensation, see, ***Nash v Eli Lilly & Co*** [1993] 1 WLR 782 at 409 F.

19. Knowledge may be actual or constructive as was made clear by Dame Janet Smith in ***Johnson v Ministry of Defence*** [2012] EWCA Civ 1505:

> "*the court does not ask whether the what the claimant did or did not do was subjectively reasonable. Rather, as the respondents submitted, when considering whether a claimant had constructive knowledge of the attributability of his condition, the court asks whether a normal adult in the position and with the knowledge of the claimant would have sought expert advice about the cause or attributability of his condition. Put another way, considered objectively, should the claimant reasonably have been expected to seek expert advice?*"

20. As to whether there is room for any subjective element in the test, there was considerable discussion in the case of ***Adams v Bracknell Forest Borough Council*** [2005] 1 AC 76. At paragraph 88 of the judgment Lady Hale said:

> *"I wonder, therefore, how much difference there is in practice between the two approaches. We are not here concerned with knowledge that the claimant might reasonably have been expected to acquire from facts observable or ascertainable by him. We are concerned with knowledge he might reasonably be expected to acquire with the help of medical or other advice which it is reasonable for him to seek. <u>The question is when is it reasonable to expect a potential claimant to seek such advice?</u> Objectively it will be reasonable to seek such advice when he has good reason to do so. <u>This will depend upon the situation in which the claimant finds himself, which includes the consequences of the accident, illness or other injury which he has suffered.</u> Rarely, if ever, will it depend upon his personal characteristics". (my emphasis)*

21. Section 33 of the Limitation Act 1980 provides:

> "*33.— Discretionary exclusion of time limit for actions in respect of personal injuries or death.*
>
> *(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—*
>
> *or 11A or 12 of this Act prejudice the plaintiff or any person whom he represents; and*

> *(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents; the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.*
>
> *....*
>
> *(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—*
>
> *(a) the length of, and the reasons for, the delay on the part of the plaintiff;*
>
> *(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A or (as the case may be) by section 12;*
>
> *(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;*
>
> *(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;*
>
> *(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;*
>
> *(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.*"

22. When considering whether to exercise its discretion, the Court must have regard to all the circumstances of the case, but the Court is also directed specifically to the matters set out at paragraphs (a) to (f) above. The burden is on the Claimant to show that it would be inequitable to disapply the statute, but it is "not necessarily a heavy one" see ***Chief Constable of Greater Manchester Police v Carroll*** [2017] EWCA Civ 1992, at para 42.

> "*3) The essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant: Donovan at 477E;* ***Adams v Bracknell Forest Borough Council*** [2004] UKHL 29, [2005] 1 AC 76*, at [55], approving observations in* ***Robinson v St.***

Helens Metropolitan Borough Council [2003] PIQR P9 *at [32] and [33];* ***McGhie v British Telecommunications plc*** [2005] EWCA Civ 48, (2005) 149 SJLB 114, *at [45]. Refusing to exercise the discretion in favour of a claimant who brings the claim outside the primary limitation period will necessarily prejudice the claimant, who thereby loses the chance of establishing the claim.*

4) The burden on the claimant under section 33 is not necessarily a heavy one. How heavy or easy it is for the claimant to discharge the burden will depend on the facts of the particular case: Sayersat [55].

5) Furthermore, while the ultimate burden is on a claimant to show that it would be inequitable to disapply the statute, the evidential burden of showing that the evidence adduced, or likely to be adduced, by the defendant is, or is likely to be, less cogent because of the delay is on the defendant: ***Burgin v Sheffield City Council*** [2015] EWCA Civ 482 *at [23]. If relevant or potentially relevant documentation has been destroyed or lost by the defendant irresponsibly, that is a factor which may weigh against the defendant:* ***Hammond v West Lancashire Health Authority*** [1998] Lloyd's Rep Med 146.

6) The prospects of a fair trial are important: Hoare at [60]. The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims, especially when any witnesses the defendant might have been able to rely on are not available or have no recollection and there are no documents to assist the court in deciding what was done or not done and why: ***Donovan*** *at 479A; Robinson at [32];* ***Adams*** *at [55]. It is, therefore, particularly relevant whether, and to what extent, the defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents:* ***Robinson*** *at [33];* ***Adams*** *at [55];* ***Hoare*** *at [50]…*

12) Proportionality is material to the exercise of the discretion: ***Robinson*** *at [32] and [33];* ***Adams*** *at [54] and [55]. In that context, it may be relevant that the claim has only a thin prospect of success (****McGhie*** *at [48]), that the claim is modest in financial terms so as to give rise to disproportionate legal costs (****Robinson*** *at [33];* ***Adams*** *at [55]);* ***McGhie*** *at [48]), that the claimant would have a clear case against his or her solicitors (****Donovan*** *at 479F), and, in a personal injury case, the extent and degree of damage to the claimant's health, enjoyment of life and employability (****Robinson*** *at [33];* ***Adams*** *at [55]*)."

23. Overall the more recent authorities stress the importance of focusing more on the question of whether it is still possible for a fair trial to take place than on a punitive approach to delay, see ***Cain v Francis*** [2008] EWCA Civ 1451.

> "73. *It seems to me that, in the exercise of the discretion, the basic question to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet this claim on the merits, notwithstanding the delay in commencement. The length of the delay will be important, not so much for itself as to the effect it has had. To what extent has the defendant been disadvantaged in his investigation of the claim and/or the assembly of evidence, in respect of the issues of both liability and quantum? But it will also be important to consider the reasons for the delay. Thus, there may be some unfairness to the defendant due to the delay in issue but the delay may have arisen for so excusable a reason, that, looking at the matter in the round, on balance, it is fair and just that the action should proceed. On the other hand, the balance may go in the opposite direction, partly because the delay has caused procedural disadvantage and unfairness to the defendant and partly because the reasons for the delay (or its length) are not good ones.*"

Factual Evidence

Suzanne Trask

24. I heard from Suzanne Trask the Claimant's solicitor who gave evidence in accordance with her witness statement. She has had over 15 years' experience of conducting serious injury cases since qualification. Ms Trask said that she had supervisory conduct of this case from January 2017 to date, working with assistance from solicitors and paralegals within her team. During that time she said she had relied upon the litigation friend, Mr Edun to provide her with instructions on the Claimant's behalf and that he had attended all meetings with the Claimant. She said that she understood that he considers and then explains advice to the Claimant and then provides instructions on the Claimant's behalf.

25. In particular Ms Trask stated that the Claimant had first contacted her firm on 12 January 2017 by telephone. The initial call was handled by another fee earner Laura Barlow. The file note records that the Claimant informed Laura Barlow of the following:

> " □ *Severe headache never had a headache like it - went to GP - told to go home and rest*
>
> □ *Went back next day -saw different GP - said would test blood but no urgency*
>
> □ *Went to A&E same day - told GP needed to refer him - no tests and sent home*
>
> □ *At home got up to go to toilet and collapsed - lives alone - couldn't get to phone*

> *Found 2/3 days later by his friend*
>
> *Taken by ambulance to hospital*
>
> *Had suffered a stroke - can't recall the events after the collapse*
>
> *Affected mobility of arm and leg*
>
> *Apparently clot caused the stroke*
>
> *4 months in hospital - rehab*
>
> *After that some therapies - SLT etc.*
>
> *Reason calling is he can't do anything - is not in a good way*
>
> *Previously was studying business admin. Now can't work/study*
>
> *Has to attend hospital every month*
>
> *Has a carer who comes every day*
>
> *He has never seen his medical records*
>
> *Has not spoken to a solicitor about this before*
>
> *Everything is difficult for him - can't speak/write*
>
> *Can't leave the house alone - needs support with everything*
>
> *Is on aspirin for blood thinning*
>
> *Last year was hit by a car crossing the road - had gone out alone - can't remember what happened.*
>
> *He has recently been speaking to friends about his situation and somebody suggested he contact a solicito*r."

26. Following the call she discussed the case with Ms Barlow and the potential issues of limitation and capacity were flagged up. It was suggested that the Claimant attend a meeting with his friend. A home visit then took place on 20 January 2017 at the Claimant's home when Mr John Edun, now the Claimant's litigation friend, was present. The meeting started with general introductions and then the topics of limitation and capacity were discussed. The file note records the following:

> "*investigate. Explaining 2 important issues to consider – limitation/capacity and case merits and prospects.*
>
> *Explaining why capacity is important in his case since 3 year time limit if he has capacity has been and gone. Explaining exception for patients. Explaining we don't think he has the*

> *necessary capacity at the moment but this may need formal assessment. Explaining he needs a litigation friend hence John asked to meeting. Explaining the role of a litigation friend to John Edun – John is happy to do this. Explaining will ask def to agree to claimant lacking capacity. They may dispute this in which case may need to be decided by court. Will cross that bridge when we come to it.* "

27. There was then a discussion about what steps would need to be taken to get medical records and obtain expert evidence following which a client care letter was signed. The attendance note then records:

> "*Running through facts of incident again – filling in a few gaps as follows:*
>
> *Date of hospital admission with stroke – 24 November 2009*
>
> *Dr on first visit also told him to take paracetamol*
>
> *On second GP visit was also experiencing difficulty speaking*
>
> *When home after A&E visit he slept before getting up to go to toilet, collapsing*
>
> *His diagnosis – right sided hemiparesis, left sided cerebral hypoplasia*
>
> *Taking down name and address of new GP:*
>
> *Jenner Health Centre, 201 Stanstead Road, London, SE23 1HU.*
>
> *Asking if he had any questions. He is frustrated with the situation he has been left in. He has no life now and he wants things how they were before. Explaining that we really want to help him and we will do everything we can to do that*."

28. Ms Trask then set about obtaining the Claimant's medical records and having received the majority of them she instructed a GP Dr Feltbower to carry out an assessment of the Claimant's capacity to conduct litigation. His assessment took place on 31 May 2017. Following his assessment Dr Feltbower indicated that he was not able to properly assess the Claimant as he was of the view a qualified speech and language therapist was required. He reported as follows:

> "*As discussed previously, I am unable to properly assess whether or not your client can communicate and understand complex information as required for capacity to undertake legal proceedings. This would require as assessment and opinion firm a qualified speech and language therapist.*
>
> *I can confirm that at the time of my home visit on 31" May 2017, and on the presence of his friend, Mr Edun, your client was alert and able to understand the majority of my questions and*

> *discussions. He was able to communicate decisions and answers, albeit slowly and with difficulty. He was able to retain simple information for at least a few minutes.*
>
> *He understood why I was there, and that his claim was against hospital and his GP for having done wrong.*
>
> *Although not being able to properly confirm that he does have capacity, I am unable to confirm that he does not have capacity and the statutory principle is that a person does have capacity unless it is established he lacks capacity*."

29. Given this conclusion Ms Trask approached an alternative expert, Dr Simon Kirwilliam, a neuropsychologist. Dr Kirwilliam produced a report on 22 July 2017. His was of the opinion that the Claimant had capacity to conduct proceedings. At paragraph 7 of his report he gave a summary of his opinion as follows:

> "*Mr Oluseye Aderounmu presents with significant impairment in expressive language and mild impairment in receptive language, in addition to mild-moderate memory impairment.*
>
> *Despite the presence of these communication and cognitive impairments, he successfully passed the current mental capacity assessment.*
>
> *As such, it is my opinion that Mr Oluseye Aderounmu will require additional support to be involved with decision making regarding the conduct of his legal proceedings (please see "Recommendations" section below).*
>
> *It is my opinion that Mr John Edun should remain a significant person of support for Mr Oluseye Aderounmu throughout the process of the legal proceedings, in order to enable his optimum level of ability.*"

30. At paragraph 8 of his report Dr Kirwilliam then made a series of recommendations as to how the Claimant could be assisted with his decision-making and gave guidance for conveying complex concepts to him.

31. Ms Trask described Dr Kirwilliam's conclusion as surprising and inconsistent with her experience of the Claimant. She decided that it would be necessary to carry out a more in depth analysis from a neuro psychiatrist.

32. On 23 August 2017 Ms Trask notified all potential defendants of the nature of the claim and requested their agreement to an extension to the limitation period. At this stage 8 potential defendants had been identified. On 18 September 2017 the Medical Protection Society on behalf of the Defendant wrote to state their position, that in the event the Claimant had capacity the claim was statute barred.

33. Proceedings were issued protectively on 10 October 2017 against all potential defendants. On 13 November 2017 Ms Trask instructed Dr Michael Dilley, consultant

neuropsychiatrist, to assess the Claimant's capacity to litigate and prepare a report on his findings. Dr Dilley's assessment took place on 17 January 2018. Ms Trask informed me in cross-examination that Dr Dilley was not provided with the Claimant's medical records in her possession as she needed the assessment done quickly.

34. On 10 January 2018 Ms Trask sought and obtained an extension of time for service of the particulars of claim and supporting documents until 9 June 2018 and for defences to be filed by 9 October 2018.

35. On 8 August 2018 Ms Trask obtained an order amending the claim form to remove six of the defendants so that the claim proceeded against the two GP defendants Dr Adeniyi and Dr Colvin. Both GPs served defences raising the issue of limitation. As noted at paragraph 4 above the defence of Dr Colvin stated that the Claimant had the capacity to conduct litigation at all material times. On 3 February 2020 a notice of discontinuance was served on the first GP defendant.

36. Having heard Ms Trask give evidence I have no doubt that she is a caring and conscious solicitor who was doing her best to assist the court. When I asked her why she persisted in the view that the Claimant lacked capacity following the reports from Dr Feltbower and Dr Kirwilliam she told me that she just had a gut feeling that something was wrong. It is however clear to me that her gut feeling has guided her approach to this case and that she hasn't necessarily given full consideration to evidence that points the other way. Whether this gut feeling was responsible for her decision not to send the Claimant's medical records to Dr Dilley for the purpose of his initial assessment I cannot say but it is unfortunate that she did not. I will return to the contents of the claimant's medical records later in this judgment.

Mr John Edun

37. Mr Edun gave evidence in accordance with his witness statement. He told me that he has known the Claimant since 2008 when he met him at the Christ Apostolic Church in Deptford. The Church has now moved to Eltham in South East London. He told me that he became good friends with the Claimant after a conversation in 2013 when he learned about the Claimant's stroke. He said that as their friendship grew, he started doing more of the stuff that the Claimant's church friends did. He would do all the reading of his post and contacting the Council or anyone else. It was easier for him to deal with everything than him going to a number of different people at the Church to help. In his witness statement Mr Edun gave examples of the help and assistance he gave to the Claimant as follows:

> "*20. A recent example is when Oluseye needed help to sort through some papers and find his immigration documents to provide to his solicitors. I went to his house to help him do this. He struggles if there are lots of papers in front of him and his brain gets mixed up so I help him with stuff like this. He forgets what he has read and has to re-read documents, but by the time he moves on to another document he will have forgotten what he has read. That's why I help him sort through his paperwork or help when he needs to find a document. I also help him sort through his post to make sure that he does not miss anything important.*

> *21. I help Oluseye complete any forms which he struggles to understand. He can hold a pen in his left hand and write, but he is unable to understand questions which go beyond name, date of birth and address for example. If there is anything that needs to be done on a computer, I will help him with this. For example, if he is searching for anything online I will do this for him.*
>
> *22. Oluseye's bills have all been set up through direct debits so he does not have to worry about paying these himself, but if there are any other bills to pay or items he needs to order I will do this for him. Numbers get jumbled up in his head and so I help him when he does his shopping or pays for any bills. If he needs to go to the bank or to the post office, I will go with him. If he needs to deal with benefits issues or contacting the council about anything, I do this for him. They all know me now as I have contacted them so often and gone with him to his appointments.*
>
> *23. If there are any phone calls which may be difficult for him to understand, I will make the call for him and explain it to him. If for example, Oluseye has spoken to someone on the phone he would usually call me and either tell me what they spoke about so that I remember it for him or if he has already forgotten then he asks me to call the person back and confirm what they spoke about. There are other times where he has told his solicitors for example that he has understood them, but then calls me straight away to admit that he did not understand. I then call back his solicitors and ask them to repeat it all to me. This is a regular thing for him. I am basically like his diary, calendar and note taker.*
>
> *24. If Oluseye has any Job Centre or benefits appointments or interviews, he will tell me in advance so that I can remember it for him and so that I can also go along with him. He finds it difficult to concentrate for long periods of time and is very tired by the end of long appointments. I stay with him to help him understand the information or questions being asked and bring him home. When he has long appointments or long tasks to do, Oluseye needs time to recover from it. He will be tired the next day and not have much strength to do anything other than rest.*
>
> *25. Oluseye also does not use public transport and the routes confuse him. He would get lost without someone with him so I take him to any appointments that he may have and bring him home*."

38. Mr Edun was cross-examined at some length as to the detail of his evidence. It became clear that there were many aeras of the Claimant's life about which he knew little or was ignorant. For example he seemed to know little about the Claimant's partner Atinuke and his 6 year old daughter who it appears spends most days at the Claimant's house or the details of a three week trip to Nigeria the Claimant undertook in May of 2018. It was also apparent that many of the details recorded in the Claimant's medical

records contradicted the evidence given by Mr Edun as to the Claimant's capabilities. In particular, entries in the medical notes confirm the Claimant is capable of working and travelling alone on public transport. I found this aspect of Mr Edun's evidence most unsatisfactory.

39. I formed the view that Mr Edun is a good friend of the Claimant who has acquired a detailed knowledge of the background and legal principles applicable to this case and is prepared to exaggerate the Claimant's difficulties if he perceives it to be of assistance to the Claimant's case. I also take into account that he is well aware of the way in which the question of the Claimant's capacity affects the limitation issue having been present at the initial meeting with Ms Trusk and every subsequent meeting.

40. Where Mr Edun's evidence is contradicted by entries in the medical notes I unhesitatingly prefer the entries in the medical notes. I treat his evidence with the greatest of caution.

Dr Colvin

41. Dr Colvin was not called to give evidence but I was asked to read her written witness statement. At paragraph 5 of her statement she states that she has some independent recollection of the consultation in November 2009 as she only saw the Claimant once and his presentation was very puzzling. With the help of her notes and the practice records she is able to give a clear account of the consultation and the steps she took in response to the Claimant's presentation.

42. I did not form the impression that she was in anyway handicapped by the passage of time from giving a full and accurate account of her actions.

Expert evidence

Neurology

43. I was referred to the written condition and prognosis report of Dr Paul Jarman attached to the particulars of claim. I was asked to note the neurological findings contained in the report. Dr Jarman noted at paragraph 8.4 of his report that the Claimant has been left with a number of persisting neurological impairments as a result of his stroke. He noted a right hemiparesis affecting the right arm more than the right leg. In this regard it was noted that the Claimant told Dr Jarman that he was largely confined to his house and was unable to walk more than 100 metres. Dr Jarman observed that previous therapy assessments had stated he was using the bus as public transport.

44. At paragraph 8.7 of his report Dr Jarman also noted residual persisting dysphasia;

> "*He has a moderate expressive dysphasia with difficulty expressing himself and word-finding, but he can communicate, speaking slowly and using simple sentences, in a fairly effective manner, but clearly has more difficulty engaging in more complex conversations. From the point of view of his understanding of written and spoken language, this is also impaired, although he does appear to have reasonable understanding of simple sentences and commands but is likely to*

> *have a significantly impaired ability to understand more complex and abstract language. If this requires quantification, this could be performed by a neuropsychologist*."

45. At paragraph 8.9 of his report Dr Jarman noted that as over eight years had passed since the stroke there would no further improvement of the Claimant's neurological condition.

Psychiatry

Dr Dilley

46. Dr Dilley produced reports dated 13 March 2018 and 16 September 2020. He is a consultant neuropsychiatrist at the Lishman Brain Injury Unit at the Maudsley Hospital with over 14 years experience. He is approved by the Secretary of State under section 12(2) Mental Health Act 1983.

47. Dr Dilley's first report was a mental capacity report. For this purpose he had access to a letter of instruction and the mental capacity assessment report prepared by Dr Kirwilliam. The assessment took place at the claimant's home in the present of Mr Edun. As part of the assessment Dr Dilley completed a standard neuropsychiatric assessment.

48. It is worthy of note that in the course of the assessment Dr Dilley recorded the Claimant reporting the following functional problems;

    i) unable to use the stairs

    ii) mobilising outdoors with two elbow crutches and the supervision of one person.

    iii) Needing supervision in toileting

    iv) Occasional urinary incontinence

    v) Pain "all over his body"

    vi) Balance problems and dizziness

49. Dr Dilley formed the view that the Claimant would need considerable support to manage the litigation. He said that his assessment was similar to that of Dr Kirwilliam insofar as the use of communication guidelines would enable the Claimant to understand information, however he formed the view that the Claimant would have difficulty in holding information in mind. He noted;

> "*There were significant impairments in recall on cognitive testing and Mr Aderounmu also gives a subjective account of difficulty in concentrating and recalling information and holding this in mind in order to reach decisions in his day to day function. Whilst he is aware of these difficulties and sensibly seeks advice in decision—making, I was concerned, particularly from the perspective of his reading information, that his ability to weigh in the balance was impacted by his difficulties in recalling that*

> *information and retaining as well as manipulating several pieces of information, in order to reach a decision*."

50. Dr Dilley therefore concluded that the Claimant would on the balance of probabilities lack litigation capacity. However he also concluded that the Claimant was able to understand and weigh up the risks and benefits of different financial decisions which may arise from any money he might receive in compensation and be able to understand and weigh in the balance the risks and benefits of placing money in a trust. He therefore concluded that the Claimant had capacity manage his financial affairs.

51. Dr Dilley's second report was a full report considering the issues of the Claimant's capacity to conduct litigation and whether he had such capacity since he suffered his stroke in 2009. On this occasion Dr Dilley had access to the Claimant's medical records and to the report of Dr Sonja Soeterik, consultant neuropsychologist, dated February 2020 as well as the witness statement of Mr Edun. He conducted a further interview with the Claimant in the presence of Mr Edun, see paragraph 1.2 of his report and summarised the Claimant's medical records, see paragraph 1.3 of his report.

52. Dr Dilley concluded that Dr Soeterik's report was extremely useful in considering the Claimant's cognitive, dysexecutive and functional impairments. He also noted;

> "*At my re-examination, Mr Aderounmu was reporting that he was less able to manage his affairs and had deferred much of this to Mr Edun on a day-to-day basis. Mr Edun's witness statement and account at interview at the consultation, confirmed that he supported Mr Aderounmu in managing finances and affairs and that this was made straightforward by having established Direct Debits for bills*."

53. Dr Dilley stood by his previous conclusion as to the Claimant's litigation capacity. However he also concluded that the combination of the Claimant's dysexecutive impairment and dyscalculia impaired his ability to make abstract and complex decisions regarding finances. He therefore concluded that the Claimant did not have capacity to manage his financial affairs.

54. As to the question of the Claimant's capacity since his stroke in 2009 Dr Dilley concluded;

> *"…on the balance of probabilities, I cannot identify any reason to presume that he did have capacity to litigate at any point from the stroke onwards. I have no reason to believe that neuropsychologically he has deteriorated over the ten-year period since his stroke and that would not be consistent with the natural history of his stroke unless there had been any clear evidence of further neurovascular injury. I would defer to neurological expertise in considering whether there has been any further vascular disease which may be expected to have caused a deterioration in his cognition and subsequently a worsening of his decision making capacity as a result of the cognitive consequences of any cerebrovascular disease subsequent to the index stroke*."

Dr Padraig Wright

55. Dr Wright produced a report dated July 2020. He is a consultant psychiatrist with a background in neurology. He has been on the GMC's Specialist Register since 1997 and was a senior lecturer at the Institute of Psychiatry, University of London from 1994 to 2010. He has been in private practice in London since 2002 both treating patients and preparing medico legal reports.

56. Dr Wright had access to the capacity reports of Dr Kirwillam and Dr Dilley. In addition he had access to the Claimant's medical records, educational records and immigration documentation. He also had the report of Dr Ballard, neuropsychologist, dated July 2020.

57. Dr Wright conducted an interview with the claimant on 14 December 2018 again in the presence of Mr Edun. Dr Wright noted that the Claimant took telephone calls from his carer and his partner, see section 7.1.5 and paragraphs 180 and 181 of his report.

58. At section 7.1.4 of his report Dr Wright undertook a careful analysis of the Claimant's medical records noting occasions where they contradicted more recent accounts given by the Claimant and Mr Edun. He was also concerned that the level of disability reported to by the Claimant was greater than that recorded in his medical records and gave examples at paragraph 171 of his report.

59. Dr Wright concluded that the Claimant did not suffer from any psychiatric disorder which might affect his capacity to litigate. It was his opinion that the Claimant currently possessed the mental Capacity to litigate. At section 7.2.2 of his report he set out his answers to the questions posed in the Capacity (Court of Protection) Certificate as follows:

> "*Question - Does the person to whom the application relates have an impairment of or disturbance in the functioning of the mind or brain?*
>
> *Answer - Yes, the Claimant sustained a stroke on 23rd/24th November 2009 and this caused receptive and expressive dysphasia and impairment of memory which has persisted to date*
>
> *Question - If the decision (litigation) is not urgent, can it be delayed because the person is likely to regain or develop the capacity to make a decision for themselves?*
>
> *Answer - It is now over 9 years since the Claimant had his stroke and further improvement in his receptive and expressive dysphasia and impairment of memory is highly unlikely*
>
> *Question - Can the person understand the information relevant to the decision (litigation)?*
>
> *Answer - Yes, the Claimant can understand relatively complex information that is relevant to the decision (litigation).*

> *Furthermore he appreciates that his receptive and expressive dysphasia and his impairment of memory may affect his ability to litigate and will compensate for this by taking the time he requires and by involving his friend, Mr. John Edun, in the process. The Claimant's understanding of the information relevant to the decision (litigation) will be enhanced by additional supports during the process including for example presenting information in written as well as verbal formats, presenting information more slowly than usual and possibly involvement of a Yoruba interpreter.*
>
> *Question — Can the person retain the information long enough to make a decision (litigation)?*
>
> *Answer -Yes the Claimant has impairment of memory but this is relatively mild and he can retain information long enough to use it to make decisions during litigation.*
>
> *Question — Can the person use or weigh the information as part of the process of making the decision (litigation)?*
>
> *Answer - Yes, the Claimant can use or weigh information as part of the process of making the decision (litigation).*
>
> *Question - can they communicate their decision by any means available to them?*
>
> *Answer - Yes, the Claimant has receptive and expressive dysphasia but these are relatively mild and easily overcome by, for example, rephrasing questions, speaking more slowly and/or more clearly, re- questioning him, asking him to clarify his answer or paraphrasing his answer back to him and having him confirm the understanding or further explain his answer*."

60. Dr Wright concluded that the Claimant had capacity to litigate between November 2009 and his assessment on 14 December 2018. He recognised that the assessment of retrospective capacity was not easy and that it was important to take into account all the available evidence both medical and non medical. He particularly took into account three features. Firstly, the Claimant was recognised to have receptive dysphasia, expressive dysphasia and impaired memory following his stroke, which had persisted to the date of his report. Secondly, no concern was ever raised about his mental capacity by health professionals familiar with the issue of mental capacity in patients following stroke (including clinical psychologists who met him on almost 20 occasions) during either his 4 month hospitalisation or the subsequent almost 9 years. Thirdly, during this period he made decisions that required him to understand very complex information, to retain this information for sufficient time to weigh it and to make significant decisions about his health, his accommodation, his finances and whether or not to marry and have children.

The joint psychiatric report

61. Dr Dilley and Dr Wright produced a joint statement dated 22 December 2020. Unfortunately this is an overly lawyered document comprising 34 questions many of which had numerous sub clauses and in places descended into cross-examination. This is not helpful to the court. A joint statement should aid the understanding of key issues and each expert's position on those issues. I will return to this subject in the context of the neuropsychologists joint reports.

62. The following points of agreement can be distilled from the document;

i) that there are no objective tests for capacity although standardised interviews have been proposed,

ii) that they were not reliant on the results of the neuropsychologists' testing in order to reach an opinion on capacity. They noted the Mental Capacity Act Code of Practice 4.50 states 'For certain kinds of complex decisions (for example, making a will), there are specific legal tests (see paragraph 4.32 above) in addition to the two-stage test for capacity. In some cases, medical or psychometric tests may also be helpful tools (for example, for assessing cognitive skills) in assessing a person's capacity to make particular decisions, but the relevant legal test of capacity must still be fulfilled',

iii) that an assessment of capacity is time-sensitive,

iv) that an assessment of capacity is decision-specific.

v) that the kinds of questions that would be asked by a doctor in assessing a patient's capacity to consent to medical treatment include those that are outlined in the British Medical Association Consent and Refusal Toolkit 2019

vi) that these questions are not the same as the questions that should be asked in determining whether a patient has capacity to litigate. They agreed that the questions that are asked in capacity to litigate include:

a) - awareness of the existence of a potential claim,

b) - knowledge of the potential Defendant,

c) - ability to seek and act upon legal advice,

d) - ability to instruct solicitors,

e) - ability to make decisions given appropriate advice during proceedings, (issue proceedings approve disclosures, approve an offer to settle, modify the claim, withdraw the claim if appropriate, proceed to Court),

f) - understanding of the risks of rejecting an offer to settle,

g) - understanding of how payment of a claim may be structured.

vii) That the following issues might be relevant to the assessment of capacity to litigate, depending on the evidence available and its influence on the Claimant's decision making capacity:

a) evidence of those close to the patient.

b) other assessments of capacity (whether in relation to litigation or otherwise).

c) evidence from professionals who may have assisted, represented or treated the patient.

d) medical records.

e) cultural issues.

f) religious issues.

viii) that the Claimant has a permanent impairment of the brain as a result of his stroke?

63. The core issues on which they disagreed related to the extent to which the Claimant's impairment affected;

i) His memory.

ii) His ability to understand information relevant to a decision within the context of legal proceedings(where an explanation is given to him in a way that is appropriate.

iii) His ability to retain information.

iv) His ability to use or weigh that information as part of the process of making the decision.

v) His ability to communicate his decision (by any means).

vi) His numerical ability.

64. Dr Dilley considers (i), (iv) and (v) to be the case in his opinion. In particular Dr Dilley considered that the Claimant's ability to use or weigh information was impaired at the time of his 2018 assessment and this was later corroborated in the neuropsychological assessment of Dr Soeterik. He also considered that the Claimant's numerical ability would be expected to impact upon his ability to use numerical information as part of the process of making a decision.

65. Dr Wright's opinion was the Claimant's impairment affects his memory to a very slight extent that is easily overcome by relatively simple measures (in December 2011 the Claimant was already implementing some of these and was 'able to read and understand information, for example, formal letters with repeated re-reading'). It does not affect his ability to understand information relevant to a decision within the context of legal proceedings (where an explanation is given to him in a way that is appropriate), his ability to retain information, his ability to use or weigh that information as part of the process of making the decision or his ability to communicate his decision. This point appears to be confirmed by the Claimant's active engagement with his immigration litigation from very soon after his stroke and thereafter.

Neuropsychology evidence

Dr Soeterik

66. Dr Soeterik produced a report dated February 2020, comments on the witness statements dated September 2020 and two supplementary reports dated September 2020. She trained as a clinical psychologist in New Zealand and has practised in the United Kingdom within the field of neuropsychology for the past 19 years. She practiced at the Royal Hospital for Neuro Disability, Putney between 2001 and 2009 and has held a number of prestigious academic positions.

67. Dr Soeterik examined the claimant on 6 January 2020 at the Claimant's solicitor's offices. Mr Edun was present and the examination lasted 5 hours with a 30 minute break for lunch.

68. At paragraph 4.8 of her report she noted;

> "*Mr Aderounmu confirmed he has noted various changes to his cognitive abilities. He explained his memory is "bad". He told me that "everything is blank, I can't remember anything, nothing, not even my date of birth"... "my memory was wiped, things I could do before, I don't know how to do it" but thought it had improved as a result of the blood transfusions he has had. He stated his speed of thinking feels "slowed down" and he is always "losing" track of what is being said. He explained he does not feel he can make decisions now and "don't know what is good for me" he described that he no longer has "any confidence" in his decision making.*"

69. Dr Soeterik's conclusion on litigation capacity is set out at paragraph 13.5 of her report;

> "Whilst he has impairments in communicating his thoughts, it is possible with a skilled listener to support his communication and assist him to express his ideas and decision. I think he is therefore able to communicate by any means. Mr Aderounmu, has impaired comprehension and difficulties with understanding all the information relevant to the decision as a result of his memory difficulties. When this is all laid out, time pressures are off him, his fatigue is minimized and communication uses a total communication approach, I think on balance his is able to understand the information relevant to the decision. However, overall I conclude that he lacks the mental capacity to litigate in this matter because of the problems he has with both holding information in mind and his ability to use and weigh information. These difficulties are the direct result of the injury to his brain. I do not consider some 10 years post injury that they will resolve and therefore his difficulties should be considered permanent."

70. Dr Soeterik was also asked to consider the issue of retrospective capacity and at paragraph 3.22 of her supplementary letter she stated;

> "*It is difficult to give an opinion retrospectively on mental capacity, as decision making in the spirit of the Mental Capacity Act (2005) is time specific and the potential for fluctuating capacity is recognized. However, as I have stated it is unlikely that his abilities could have declined. By the time he was assessed by Dr Dilley in 2018 he was considered to lack mental capacity to litigate and this was still my view in 2020. Therefore, on the balance of probabilities it seems unlikely that he would have had mental capacity to litigate and then lost it. In my opinion, it is equally unlikely that his capacity for this specific decision has fluctuated as he does not have a clinical reason for this fluctuation. It seems to me that it is more feasible to understand the differences in perceptions of mental capacity by the differences in assessment criteria and thresholds, therefore I suspect that Mr Aderounmu would have been assessed as lacking the mental capacity to litigate had he been assessed by myself at an earlier time point.*"

Dr Ballard

71. Dr Ballard produced a report dated July 2020. She is a Chartered Clinical Psychologist and a qualified Educational Psychologist currently in private practice. She accepted that she had last been in clinical practice over 15 years ago in 1980 at Westminster Hospital. Prior to that she had an impressive CV holding many prestigious academic and teaching posts. As was confirmed in the course of this hearing, sadly she is now at the end of her career.

72. In preparing her report she took into account; the assessment reports of Dr Kirwilliam and Dr Dilley, the neurology report of Dr Jarman, the Claimant's education and medical records.

73. Dr Ballard interviewed the Claimant at the offices of his solicitors on 29 November 2018. Due the unfortunate late arrival of the Claimant the interview lasted approximately 1 hour and 25 minutes. Mr Edun was in attendance. She managed to conduct approximately six standard psychological tests which made her wonder whether the Claimant was exaggerating his problems and demonstrating lack of effort.

74. As with Dr Wright Dr Ballard was struck by the manner in which the Claimant engaged with the various medical professionals who looked after him post stroke;

> "*The most important aspect, perhaps, was the way he engaged with the various medical professionals who looked after him post—stroke and dealing with his sickle cell disease which had probably been lifelong, and we know that he had had some sickle cell illness prior to coming to England. He would be seeing these people in their hospital consulting rooms for advice and when they had finished talking to him about his haemoglobin levels, or other speciality, he would lead the conversation to asking them to help him with a letter supporting him to have leave to remain in the UK and a lengthened visa. He did this with different doctors, sometimes the same doctors repeatedly. He was able to*

> *lead the conversation to this particular aspect, and to believe in his problems enough to support him and do this extra work, which is not part of their duties working in the NHS*.
>
> *This seems to me not only an indication of him understanding what he needed to do to fulfil his ambition of staying in England and getting a Visa or getting UK nationality, a passport. He knew what he needed to do, and he was persuasive and capable of doing it. As relationships with these doctors went on he gradually exaggerated the importance of his student studies, which may have made people feel more sorry for him in that they thought he was losing something really valuable and important. It gave an impression of him suffering a greater intellectual loss or loss of ability to speak English than we have any evidence of. I think also that he was able to make people feel that he was so disabled and they felt sorry for him, showed that he did indeed have capacity, not only to see what he needed to do but then to persuade these doctors to get them to write the letters. This was all happening over the nine years since the stroke and up till the present*."

75. She also picked up in the apparent change in the Claimant which had been noted by Dr Dilley and speculated that it may have something to do with a lack of effort on the Claimant's part in the interview with her. She identified the following factors as supporting the Claimant having litigation capacity;

> "(i) At interview in presentation and the limited testing he was prepared to engage in I would assess him as within the low average range for intelligence. He has the ability to understand the facts he needs for this, so showing that aspect of capacity. This means that as regards ability to understand issues of a case he has capacity.
>
> (ii) His approaches to doctors to write letters of support for him were persistent and consistent in content and also he managed to achieve this in many cases. He has a well—developed capacity to argue in his own interest and persuade others to help him. He can attend to the details of a case and persist, which is an aspect of capacity to achieve ends.
>
> (iii) He shows evidence of being able to learn new material since the stroke since if he did not know about sickle cell disorder in detail, post stroke, he has learned about this and retained that new information. He is able to learn and his memory is good enough to retain new information and by this he shows he has capacity.
>
> (iv) He is adept at and can concentrate on arranging matters in this case so that they are to the benefit of achieving his aims. He can do this without the help of others and has had considerable success.

(v) I do not have any reason to think he does not have capacity"

Joint report neuropsychological report

76. The joint statement dated 14 January 2021 suffered from the same vice as the that of the psychiatrists, it is an overlong overly lawyered document which asked many questions which were nothing more than a cross-examination of the experts on their respective approaches or attempts to advance the arguments on behalf the parties' respective positions. Of the 41 questions posed only about 2 where of assistance to me in understanding the issues on which the experts agreed, the issues on which they disagreed and the reasons for their disagreement.

77. Parties should resist the approach that has been taken in this case, a joint statement by experts pursuant to CPR 35.12 is for the benefit of the court and should not be a proving ground for the parties' respective cases. Written questions should be put to experts under CPR 35.6 within 28 days of the service of an experts report.

78. Dr Soeterik and Dr Ballard agreed that the Claimant had an impairment of the brain as a result of his stroke.

79. Dr Soeterik and Dr Ballard disagreed as to whether the claimant's impairment affected the Claimant's ability to understand information relevant to his case and to retain information. Dr Ballard's position was;

> "*He has shown great capacity to continue to reside in the UK and to use the NHS. He has remembered what he wants, understands what favours his case, and can retain and act on information regarding his immigration status. His numerical ability seems reasonable and consistent with his Nigerian exam credit and his likely premorbid intellectual level. He gives a strikingly coherent clear account in one of his psychology sessions with Tina Greenhill as to 'what he wants' but at my assessment he sometimes simply would not attempt, or stopped doing the tasks. He shows the capacity not to cooperate if he thinks it would reveal that he has normal numerical and other abilities, which would weaken his legal case. I have my doubts about his physical difficulties, because although he arrived at my interview using a crutch, when he left he simply carried it, walking normally through the office, not seeming to rely on it at all*"

Dr Soeterik's position was that she stood by her formal assessment in her February 2020 report however she went on to say;

> "*I concluded that Mr Aderounmu had difficulties with both holding information in mind for the purposes of decision making AND his ability to use and weigh information specific to this decision. Despite his communication impairments,I considered he was able with a skilled communication partner using a total*

> *communication approach, to maximise his abilities to understand the information relevant to the decision and to communicate by any means. The causative nexus of these difficulties in my opinion was his neurological injury he sustained in 2009 and given the length of time post injury, I did not think these would resolve or more time would assist him in enhancing his mental capacity for this specific decision. In addition to the assessment I formally conducted, I refer to the standardised neuropsychometric assessment in this report which shows difficulties with memory and executive skills that would be relevant in decision making. I also refer to the further behavioural based information detailed in the Witness Statement of Suzanne Trask and Mr Edun. Ms Trask an experienced solicitor, raised concerns about his mental capacity to litigate on the basis of their interactions. Mr Edun confirms Mr Aderounmu will say he has understood something someone has said to him, but later in private admits he did not understand the details and requests Mr Edun to help him understand this information. He notes how problematic Mr Aderounmu finds paperwork and completing forms. In my opinion in the round, this illustrates the polite deference Mr Aderounmu makes to people in positions of authority and his desire to maintain his dignity as an adult and avoid feeling humiliated by sharing he is unable to follow discussions and understand critical details about issues in his own life. Nonetheless, it illustrates that he has difficulties with decision making in the terms of the mental capacity act as a result of holding information in mind and using and weighing it.*"

Discussion and conclusions

Capacity

80. Both Dr Dilley and Dr Wright were of the view that this was a difficult case. They both agreed that it was necessary to focus on all the available evidence and that psychometric testing was only one part of the picture, at best a useful tool. The real issue between them and the principle issue for me is the extent to which the Claimant can hold and retain information pertinent to his decision making.

81. I think it is useful to begin by summarising the evidence relating to the Claimant's immigration status. The available documents reveal the following;

    i) On 26.1.11, the Claimant applied for leave to remain in the UK on the basis of his human rights. This application was refused with a right of appeal.

    ii) On 24.4.11 The Claimant appealed against the decision refusing his application of 26.1.11

    iii) On 1.6.11 his appeal was heard at the first tier and allowed

iv) On 25.10.12 the decision to refuse the Claimant's application of 26.1.11 was reconsidered. The application was refused with a right of appeal.

v) On 12.11.12 the Claimant lodged an appeal against the decision to refuse the reconsideration of 25.10.12.

vi) On 1.10.13 the Claimant's appeal was dismissed at the first tier.

vii) On 12.11.13 his application to the upper tier was refused

viii) On 20.11.13 his appeal rights were exhausted

ix) On 2.3.15 the Claimant was issued with a 1S151A.

x) On 20.4.15 he was issued with a RED0001.

xi) On 3rd August 2015, the Claimant's application for leave to remain was refused.

82. On 17 February 2017 there is reference in the notes to a full hearing before Judge Fitzgibbon at Taylor House. On that occasion the Claimant was represented by Counsel and gave evidence. The case was adjourned for further evidence to be obtained from the Claimant.

83. On 31 October 2017 the Claimant received a letter from the Home Office granting him a period of leave to remain outside the rules on an exceptional basis for 30 months. I was unable to ascertain the Claimant's current immigration status.

84. It is also apparent from the records that following his representation by the Afro-Asian Advisory Service the Claimant instructed two different firms of solicitors to help him; in October 2011 Harrild & Dyer in Croydon and in April 2015 Samuel Louis Solicitors in Deptford. Mr Edun had no knowledge of this.

85. The available medical records demonstrate that the Claimant was able to obtain documents from his treating clinicians for the purpose of assisting his immigration case and various other issues in his life. These records are among the 64 individual records referred to by Dr Wright at paragraph 166 of his report. Having reviewed the relevant records I agree with Dr Wright that no concern was ever raised about the Claimant's mental capacity by health professionals familiar with the issue of mental capacity in patients following stroke (including clinical psychologists who met him on almost 20 occasions) during either his four month hospitalisation or subsequent almost 9 years. I also agree with Dr Wright that in this period of time the Claimant made decisions requiring mental capacity about the following complex issues;

i) the diagnosis of stroke in a young man and the investigations, treatment and rehabilitation he subsequently required,

ii) subsequent investigations carrying significant risk for an anterior communicating artery aneurysm,

iii) the diagnosis of complex sickle cell disease (HbS+C) and the prolonged and continuing treatment he subsequently required,

iv) a complex immigration issue during which he sought help from statutory and voluntary organisations and from his health professionals,

v) difficulties with housing and accommodation for which he sought help from statutory and voluntary organisations and from his health professionals,

vi) difficulties with debts at his university and at Homerton Hospital for which he sought help from statutory and voluntary organisations and from his health professionals,

vii) the complex issue of marrying and having children with a woman who has sickle cell trait,

viii) the possibility of contracting HIV and the decision to have a HIV test.

86. A further striking example appears in the Claimant's GP records. On 30 May 2018 there is a record of the Claimant attending with his daughter the record states:

> "*asking for co-codamol use: them as sickle cell. not using regularly. also going to Nigeria for over 3 weeks asking for repeats early just in case he runs short should have another month left but will issue early as will be away when needs*"

To my mind this is a clear example of the Claimant planning for the future (his trip to Nigeria), identifying a problem (the fact he will run short of medication) and taking steps to remedy that problem (obtaining more medication).

87. In cross-examination Dr Dilley had a tendency to downplay the importance of these medical records and on occasions speculated that the Claimant must have had some support when making decisions and had assumed that there was no conscious or unconscious exaggeration of the Claimant's behalf in the absence of any evidence which would cause him to change his mind since his first assessment.

88. Dr Wright identified some obvious examples of discrepancies between the level of disability reported to him by the Claimant and the medical records. He gave three particular examples;

i) Kings College Hospital note 10 May 2011 - *Mr. Aderounmu was looking after himself he attended the clinic independently, gave a good account of himself and was able to dress himself, feed himself etc.* This contrasted dramatically with the current level of independence reported to Dr Wright.

ii) GP note 24 August 2011- *He has an interview for college coming up He uses the bus as his means of transport.* This contrasts dramatically with the level of independence and support reported to Dr Wright.

iii) OT discharge report 8 December 2011 - *has started working on a Saturday in a charity shop in Catford on a voluntary basis and reports to be enjoying the work … attended an interview at Sydenham Gardening Group and is looking forward to attending weekly sessions. He was able to attend the meeting on his own using public transport … able to wash and dress himself independently and prepare a basic meal … has achieved his goals of increasing his leisure activities,*

> *attending voluntary work and being able to prepare a basic meal*. This also contrasts dramatically with the level of independence and support reported to Dr Wright.

89. Dr Dilley did not question the fact that in September 2020 the Claimant reported him that he sometimes needed help transferring to the toilet, had started to have episodes of urinary and faecal incontinence and needed assistance with washing and shaving. I have to say I find this somewhat surprising in view of his agreed position that there was no reason to believe the Claimant had neuropsychologically deteriorated over the ten-year period since his stroke

90. I was impressed by Dr Wright's account of his interview with the Claimant and in particular with the fluent and amusing telephone conversations the Claimant had with his partner and the recall of a previous telephone discussion with his carer.

91. I have no doubt that both Dr Dilley and Dr Wright are well qualified experts who were doing their best to assist the court but I am unable to accept that Dr Dilly has given appropriate consideration to the implications of the material contained in the Claimant's immigration and medical records, the discrepancies in the Claimant's statements to him and others about his capability and his inability to allow for what appeared to be obvious deterioration in the Claimants' abilities.

92. Dr Wright on the other hand was prepared to make appropriate concessions, in particular that if I accepted the evidence of Ms Trask and Mr Edun, his view would change.

93. I have to say that I did not derive great assistance from the neuropsychologists. They were both impressively qualified. Dr Soeterik obviously had more experience of current clinical practice but she was prone to stray outside her area of expertise particularly in relation to the interpretation of the radiology. She also a had a tendency to argue the case for the Claimant and in my judgement did not give sufficient weight to the wider body of evidence including his educational records and the contradictions in the accounts given by the Claimant as to his capabilities. I was also concerned that her 5 hour interview and testing session regime was too long.

94. Dr Ballard was not so familiar with current practice and at least one of the tests she had carried out, the Warrington test, had been superseded by a more recent version. However in my judgment that did not materially affect the validity of her results or opinion.

95. Of course I take fully into account that Ms Mulholland had been unable to finish her cross examination of Dr Ballard, however it was sufficiently well advanced for me to form a balanced understanding of Dr Ballard's conclusions.

96. Overall I prefer the evidence of Dr Wright and Dr Ballard. I place little reliance on the results of the formal testing carried out by either expert as I am not satisfied that the Claimant properly engaged with the tests. Nonetheless I must form my own view of the Claimant's capacity to litigate. The core issue in this case is whether notwithstanding the Claimant's impairment in expressive and receptive language he can retain information in mind in order for him to make appropriate decisions in this litigation.

Put another way, does the evidence put forward on behalf of the Claimant displace the statutory presumption of capacity?

97. It was submitted by Ms Mulholland that the issues arising in this claim are far more complex than those faced by the Claimant when making decisions with regard to his medical treatment and immigration litigation. I would accept that there is a difference but I do not necessarily accept they are more complex decisions. I have no difficulty in concluding on the basis of all the evidence before me and consistent with the view of Dr Kirwilliam and Dr Wright that, with appropriate assistance, the Claimant could deal with issues and make decisions in this litigation concerning the liability of the GP namely the fact that he should have been referred onwards and as to causation, that his current condition was the result of his GP's failure to refer. I am also satisfied that the claimant is able to give instructions about his losses and his current condition so as to enable particulars of his damages to be provided. I am also satisfied that he is able to understand and weigh the pros and cons of any offer of settlement that might be made. None of this requires him to understand every element of his case and the full content of every expert report, this would be beyond most average litigants in clinical negligence claims.

98. The Claimant made considerable improvement since his stroke between 2009 and 2011 which is well documented. There is no evidence of any deterioration in his condition since that time.

99. I therefore find that the Claimant has current capacity to litigate and has had capacity to litigate at all material times.

Date of Knowledge

100. The Defendant relies upon entries in the Claimant's medical records to show that he was well aware of the alleged failure by the Defendant in December 2010 to refer him for treatment.

101. The first record is the note dated 16 December 2010 relating to the Claimant's appointment with Ute Davies an occupational therapist:

> *"S: He was very angry with his GP from Hackney. He reports through investigations by the Kings Haematology department he has learned he requires treatment (blood transfusions). He reports prior to his stroke he had been unable to speak for a short amount of time with no physical symptoms. Reports he went to see his GP who sent him home saying…there was nothing wrong with him. States "He has destroyed my life".*
>
> *O: Discussion around anger/using anger to give feedback to GP/PCT … reluctant to do so – understands his Christian principles as not making a complaint. Discussed how feedback may prevent the same thing happening to someone else – he asked how he could do this, OT agreed to provide contact details for Hackney pct PALS/complaints team with discharge report*."

102. The second record is the note relating to the Claimant's appointment with Marisa Kilburn a Speech and Language Therapist:

> "*At the end of the session he also spoke for more than 10 minutes about how he is so angry with his old GP for not sending him to hospital when he was unable to speak (before his stroke), as this probably indicated he was having a TIA. He was very emotional about this and stated "he has torn my life down". Client has previously discussed this issue with Ute OT and is considering making a complaint about it. Though he also expressed being reluctant to complain*."

103. Ms Christie-Brown also referred to a passage in a letter dated 23 March 2011 in a letter from Chris Clough, consultant neurologist to the Claimant's GP:

> "*Many thanks for asking me to see this very pleasant Nigerian man. now 30 years old. He was on a student visa when he had a sudden onset of speech loss. it wasn't clear from his story how long it took hin to get to the complete hemiplegia. but presumably that happened all very quickly and he was admitted to Homerton Hospital. The story at this time was complicated by the fact that his GP and the A&E department told him there was nothing wrong with him."*

104. I am satisfied on the basis of this entry that the Claimant was able to talk to Ute Davis for approximately 10 minutes about his treatment by the GP.

105. I also found it useful to look at what else the Claimant reported to Ute Davis on 16 December 2010 at another part of the note she records;

> "*Discussed stepping out self management programme.*
>
> *S: Reports he has read the stories and found it useful to see how many different symptoms stroke can cause and how people coped. Reports he is going to see the stroke association - had a map with their address marked. Reports he has been to the library once to find the address on the internet.*
>
> *Reports he is due to move to a new accommodation next week. Also wants to return to college - consistent with last SALT entry*
>
> *However, did not wish to set specific goals in this session - feels he has to cope with a lot of change (move as well as medical treatment)*."

106. I find there is no indication that the Claimant was prevented in any way from taking his complaint forward should he have wished to do so. I also note the period of time between the notes and deduce that he was capable of retaining the information and pursuing it with his treating clinicians. I reject the submission that the Claimant cannot be fixed with constructive knowledge at any time prior to late 2016 early 2017.

107. The Claimant certainly had the knowledge in December 2010 that his injury was significant. It is clear that by this time he knew that his injury was attributable to an omission on the part of his GP and that this was probably a breach of duty.

108. I therefore find that the Claimant had acquired actual or constructive knowledge for the purpose of section 14 LA no later than 20 December 2010.

Section 33 LA

109. I must therefore turn to consider the application of section 33 LA. The court must weigh the balance of prejudice to the Claimant and the Defendant taking to account the six listed factors in section 33 (3) LA. Conventionally it is assumed the prejudice to the Defendant by losing a limitation defence is balanced by the prejudice to the Claimant caused by the loss of the action.

110. The first consideration, the length of and the reasons for delay by the Claimant. I have concluded that the Claimant has litigation capacity but in agreement with Dr Kirwilliam and Dr Wright that he requires appropriate help and support to make relevant decisions. The experts were of the view with which I agree that this is a finely balanced decision. I also have accepted the contents of the notes by the occupational therapist Ute Davis on 16 December 2010 and the SALT Marisa Kilburn on 20 December 2020 as accurate.

111. It is not however clear to me the precise level of help and support the Claimant actually had at this time. I certainly accept he may have had strong Christian principles which would have predisposed him against making a claim against his GP, this is clearly recorded in his medical notes. It is also clear to me that he was recorded as being in a very emotional state about the issue. There is also in my view a difference between making a complaint to the GP or hospital about what had happened and taking legal advice with a view to bringing a civil claim.

112. I accept it was not until 2013 that the Claimant became friends with Mr Edun and begun to discuss issues surrounding his stroke and immigration status with him. It seems likely that there were others who also attempted to help particularly from his church community and that Mr Edun's influence was slow to develop. I also accept it was likely that the Claimant was primarily preoccupied with conducting his immigration litigation until October 2017 when he was granted leave to remain in the United Kingdom; this seems to be well supported by the available documentation.

113. In my judgment the delay in contacting solicitors until January 2017 is explained by a combination of these factors. It is clear to me that the Claimant was prompted to contact solicitors by others.

114. The second consideration, whether the cogency of the evidence is affected by the delay? In common with many clinical negligence claims the medical records will be of central importance and in this case they are all readily available. As I have already observed Dr Colvin has an independent recollection of the consultation and does not appear to be in anyway handicapped by the passage of time from giving a full and accurate account of her actions. This is to be contrasted with the usual position which is that the medical practitioner has no independent recollection of the consultation and has to rely on a combination of the medical notes and their usual practice. The standard of care

provided will be the subject of evidence from appropriate GP experts which it would seem both parties have already obtained.

115. Of course I accept the general proposition that the longer the delay the less cogent the evidence will be, however I conclude in the circumstances of this case the impact of the delay is much less that it might otherwise have been.

116. The third consideration, the conduct of the Defendant. There is no relevant conduct to take into account.

117. The fourth consideration, the duration of any disability of the claimant arising after the duration of the cause of action. The word "Disability" for the purposes of section 33 (3) d LA has the same meaning as under section 28 Act. Given my finding that the Claimant did not lack capacity this issue does not arise.

118. The fifth consideration, the extent to which the claimant acted promptly. I must take into account the Claimant's conduct from his date of knowledge, which I have found to be no later than 20 December 2010. It is common ground that the Claimant first consulted solicitors on 12 January 2017. The Defendant understandably criticises this period of delay but I must take into account my findings on capacity and in particular that he requires the extra support first identified by Dr kirwilliamon 22 July 2017. I also take into account that the suggestion that the Claimant should contact lawyers did not come from Mr Edun.

119. The sixth consideration, the steps taken by the Claimant to obtain legal advice. It is clear that no steps were taken for approximately seven years; this must to some extent count against the Claimant.

120. I am asked by the Defendant to take into account the fact that the Claimant has exaggerated his symptoms and has misrepresented his abilities. There is undoubtedly a degree of exaggeration present here but against that the Claimant undoubtedly suffers significant cognitive impairments. The influence of Mr Edun cannot be wholly discounted. Such exaggeration as may have taken place does not go to the merits of the claim and is easy to discern.

121. Standing back considering all the circumstances of the case and balancing the prejudices to the Claimant and to the Defendant, in my judgement the balance comes down in favour of the Claimant whom has undoubtedly suffered a serious neurological injury. I am particularly satisfied that it will be possible to have a fair trial of the issues arising in this claim. In the circumstances I find that it would be equitable to allow this action to proceed.