Case No: B3/2015/3424

Neutral Citation Number: [2017] EWCA Civ 12
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MRS JUSTICE COX
[2015] EWHC 2279 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/01/2017

Before :

LORD JUSTICE TOMLINSON
and
LORD JUSTICE RYDER
(Senior President of Tribunals)

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Between :

Lamarieo Manna (A Child and Protected Party by his Father and Litigation Friend Samuel Manna)	**Claimant/ Respondent**
- and -	
Central Manchester University Hospitals NHS Foundation Trust	**Defendant/ Appellant**

- -

Derek Sweeting QC and Richard Baker (instructed by **hlw Keeble Hawson LLP**) for the **Claimant/Respondent**
Lord Faulks QC (instructed by **Hempsons**) for the **Defendant/Appellant**

Hearing date : 8 December 2016

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Judgment

Lord Justice Tomlinson :

1. This is an appeal in respect of one item only of an award of damages made by Cox J on 1 October 2015 in favour of the Claimant/Respondent Lamarieo Manna, then 18 years of age. There is also a challenge to the judge's order requiring the Defendant/Appellant Health Authority to pay on the indemnity rather than the standard basis the Claimant's costs incurred from 11 June 2015, including therefore the costs of the trial which started on 15 June 2015, lasted for 8 days and in the course of which a considerable body of expert evidence was heard.

2. The Claimant was profoundly damaged in consequence of failings in the management of his birth at St Mary's Hospital Manchester on 20 December 1996. He suffered severe brain damage resulting in widespread neurological dysfunction. He has bilateral tetraparetic cerebral palsy and very severe cognitive, social and communication impairments, with profound autism. There is no dispute that he is severely disabled. His condition is permanent and he will therefore remain dependent in respect of all daily living activities for the rest of his life.

3. Proceedings were commenced on 19 November 2009. The allegations of breach of duty in the management of the Claimant's birth were all denied, as was causation of injury. By order of Swift J dated 24 June 2013 judgment was entered for the Claimant, on her approval, for damages to be assessed at 50% of the full value of the claim.

4. The main issue at trial concerned the nature and extent of the Claimant's difficulties and of his manageability, both then and in the future.

5. The judge summarised the opposing stances adopted by the parties at trial as follows:

> "4. In summary Mr Seabrook QC, on behalf of the Defendant, acknowledges the challenges that Lamarieo presents and the huge demands his condition gives rise to. It is contended, however, that the case presented for the Claimant paints a far bleaker picture than is supported by the objective evidence. The key to his manageability, as the Defendant's experts suggest, is forward planning, anticipation of recognised triggers leading to violent outbursts and a support and therapy regime that affords him space and enables him to develop his independence. This can be achieved by allowing for one carer to be present at all times, plus additional hours for a flexible carer for some outings or at times of need, together with the moderate occupational activities and equipment recommended by the Defendant's experts.
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> 5. On behalf of the Claimant the case advanced by Mr Sweeting QC and Mr Baker is that the evidence shows Lamarieo to be prone to violent, aggressive and unpredictable outbursts. His severe intellectual limitations and behavioural problems are the product

> of his brain injury. There will be no change or improvement in his condition and the evidence shows that he is likely to continue to pose a serious risk to himself and to others, including his carers, without the tight care and occupational support structure considered necessary by the Claimant's experts. Lamarieo therefore needs two carers at all times for personal care and community activities and a structured routine and regime of activities to fill his days."

6. The judge produced a long and careful judgment, available at [2015] EWHC 2279 (QB). Reference may be made to that judgment for the full background and for the judge's careful conclusions. It suffices for present purposes to say that the nature of the Appellant's case involved a robust challenge to the evidence of the Claimant's mother and stepfather, which challenge wholly failed. The difference between the award made by the judge and the provision which the Appellant regarded as adequate is very largely accounted for by the judge having concluded, in agreement with the Claimant, that he would at all times for the rest of his life require two full-time carers. It was agreed that he was expected to live to the age of 67.5 years. However another acute difference in approach related to the cost of adapted accommodation, and in particular to the need to provide adapted accommodation at which the Claimant could spend time, including overnight stays, with his natural father. It is to the judge's resolution of this last issue that the first two grounds of appeal are directed.

Background

7. When the Claimant was born his mother Marva, now Marva Cocking, was married to his father Sam Manna. At the date of trial in 2015 Marva Cocking was 37 and Sam Manna 67. In 1996 when the Claimant was born they lived together in Moss Side, Manchester in Mr Manna's two bedroom, two storey council house.

8. The relationship between Lamarieo's mother and father ended in 1998 and they subsequently divorced, but they remained living in the same house, both sharing Lamarieo's care, until June 2000.

9. Marva Cocking had met Brett Cocking in December 1999 and they started living together in Bolton in June 2000. Then Mrs Cocking was pregnant with twins, the first two of a total of four further children which Mr and Mrs Cocking have had together. There were problems in Mrs Cocking's pregnancy with her twins in consequence of which Lamarieo continued to live with his father Sam Manna in Moss Side until March 2001. The twins were born in December 2000. Throughout this time Mrs Cocking and Mr Manna shared the care of Lamarieo.

10. In March 2001 Lamarieo went to live in Bolton with Mr and Mrs Cocking and their twins.

11. Between March 2001 and September 2013 Mrs Cocking and Mr Manna shared the care of Lamarieo. Lamarieo spent 3 out of every 4 weekends and a substantial part of the school holidays with Mr Manna in Moss Side. This arrangement came to an abrupt end in September 2013 when Mrs Cocking discovered that Mr Manna had

been leaving Lamarieo on his own in the house at Moss Side for short but nonetheless inappropriate periods of time. Thereafter and until trial Lamarieo had only limited contact with his father. Thus from September 2013 Mrs Cocking was Lamarieo's principal carer, although she sometimes received assistance from agency carers, and from May 2014 a carer called Jackie Lee had provided regular care.

12. Going forward, the various family members, and particularly Mrs Cocking, did not want to act as primary carers but preferred instead to concentrate on maintaining family life with Lamarieo. It was agreed on all sides at trial that the Cockings' current home in Bolton was unsuitable to accommodate the needs of Lamarieo and his carer/s, and that it could not be adapted. Mrs Cocking and Mr Manna both expressed the wish that the shared care arrangement should be resumed, with Mrs Cocking's agreement thereto dependent upon suitable accommodation being available to Mr Manna, with space both for Lamarieo and his carer/s. It was again agreed on all sides at trial that Mr Manna's current home in Moss Side is unsuitable to accommodate Lamarieo and his carer/s overnight and that it could not be adapted.

13. Thus the judge was presented with claims for the cost of acquiring suitable accommodation for both Mr and Mrs Cocking, the principal home, and for Mr Manna, which perhaps somewhat inappropriately came to be described as the second home. The Appellant's opposition to the claim for a second home was somewhat undermined by its positive case to the effect that Lamarieo's behaviour and manageability had deteriorated, at least in part, because of the enforced separation from his father in 2013.

14. The judge quantified the claim for a new principal home at £817,925.50 on a 100% basis. The Appellant would have liked to challenge her conclusions in that regard but has been refused permission so to do.

15. The judge also concluded that Lamarieo was entitled to recover the costs associated with acquisition of a second property in which Mr Manna would live and again quantified the claim, this time at £368,578 on a 100% basis. It is against that conclusion that the appeal is brought, the Appellant challenging both the award in principle and one vital element in the judge's quantification thereof, viz, the adoption as applicable in the *Roberts v Johnstone* calculation of the multiplier appropriate to Lamarieo's life expectancy rather than that appropriate to his father's life expectancy.

16. In relation to both the principal and the second home the judge adopted the approach to quantification established by the decision of this court in *Roberts v Johnstone* [1989] 1 QB 878. Under that principle, a claimant does not receive an award equivalent to the capital cost of purchasing a suitable property. An award calculated on that basis would give rise to the possibility of the claimant's estate receiving a windfall on his/her death in the shape of a capital asset enhanced rather than eroded by the passage of time. Damages in cases of this sort are notionally intended to provide a fund which will both meet the claimant's life-time needs and be exhausted contemporaneously with the termination of the claimant's life expectancy. *Roberts v Johnstone* prescribes that the claimant should, in respect of the cost of accommodation, be compensated for the notional loss of investment income on the capital cost incurred in buying a suitable property. The resulting sum awarded will be wholly insufficient to purchase a property, but the theory is that the shortfall and thus the balance of the actual funds required in order to purchase a suitable property can be

found in, or borrowed from, the awards made under other heads of damage such as pain, suffering and loss of amenity, loss of earnings, capitalised awards for therapy and other costs. See generally per Swift J in *Whiten v St George's Healthcare NHS Trust* [2011] EWHC 2066 QB at paragraph 411. In order to reflect the notional loss of investment income a tax free yield on risk-free investment was assessed at 2% in *Roberts v Johnstone*, although the rate now conventionally applied in the calculation is 2.5%. The theory here is that where the capital asset in respect of which the cost is incurred consists of residential property, the inflation and risk element are secured by the rising value of such property, particularly in desirable residential areas. When the calculation is concerned with the principal home it is conventional and consistent with the underlying theory to apply the lifetime multiplier appropriate to the claimant's life expectancy.

17. The exercise in which the court is thus engaged is in modern conditions increasingly artificial. The assumption underlying the approach is that the claimant will be able to fund the capital acquisition out of the sums awarded under rubrics other than accommodation. But in modern times residential property prices have increased rapidly while general awards for pain, suffering and loss of amenity have remained at their traditional levels. Whilst Peter is no doubt robbed to pay Paul, it must often be the case that the accommodation assessed by the court as suitable is simply not purchased. A further problem confronts the claimant with immediate and pressing needs but a relatively short life expectancy. The adoption of the appropriate multiplier in his case, when allied to the 2.5% notional return upon investment, will lead to a relatively modest award and a large shortfall between it and the cost of acquiring the property which is acknowledged to be required to meet the claimant's needs during his admittedly short life expectancy. A similar problem confronts the claimant who establishes less than 100% liability in the defendant, as here, where the award is only for 50% of the sums regarded as necessary to meet the Claimant's reasonable needs. Thus the award here for the "second home" is only in fact 50% of the cost of acquiring and adapting suitable accommodation. It seems very unlikely that such a property will in fact be purchased. Mr Derek Sweeting QC for the Claimant said that the Claimant's Deputy might decide to use the sum to generate an income which can be used to rent a suitable property. He might, but as Mr Sweeting also very fairly drew to our attention, there are difficulties in obtaining consent to the adaptation of rental property.

18. Whilst the *Roberts v Johnstone* approach is designed to avoid conferring a windfall upon a claimant's estate, it gives rise to other anomalies. Thus in many instances of adapted accommodation in cases of this sort there is potentially a windfall for the claimant in the event of the death of his parent carers, since he is likely to be left with a home which is larger than necessary for his own requirements. As Mr Sweeting also pointed out, one could mitigate those effects by adopting a different multiplier for that part of the cost which represents the provision of family accommodation over and above that required for the disabled claimant, but there has been little enthusiasm for such a solution.

19. Lord Faulks QC for the Defendant helpfully reminded us of the observations of Lord Woolf MR in *Heil v Rankin* [2001] 2 QB 872 that awards of damages in cases of this field must be at a level which neither results in an injustice to the Defendant nor is "out of accord with what society as a whole would perceive as being reasonable".

This is salutary, but society as a whole would not perhaps understand that an award elaborately structured in a manner which will ostensibly permit the attainment of a number of objectives desirable in the interests of the disabled claimant might not in fact succeed in enabling the claimant even to acquire the accommodation deemed appropriate for his care. It was not certain until quite shortly before the trial that the Claimant would pursue the claim for a second home for his father. Realistically, the second home may never here be acquired, so that the award in respect thereof serves only to augment the general fund of damages available for the Claimant's care. It was not suggested that that is in itself an undesirable or objectionable outcome, and indeed many would surely say that any device which legitimately facilitates the calculation of a fund which will enable proper care and support to be given to a person so grievously injured deserves support. No one suggests that we should on this appeal revisit the imperfect principles which have held sway since the decision of this court in *George v Pinnock* [1973] 1 WLR 118. Lord Faulks in his reply drew attention to the desirability of a settled formula in the light of which experienced practitioners can settle disputes. The point is well-taken, although in the event it militates against acceptance of the arguments advanced by Lord Faulks on this appeal.

20. Against that background Lord Faulks pointed out that whilst his predecessor at trial Mr Robert Seabrook QC had not disputed that a *Roberts v Johnstone* award could in principle here be made to reflect a requirement to provide a home in which Lamarieo could stay overnight with his father, he had not accepted that there is only one approach which must always be adopted. There were here points which militated against such an award, even if it was accepted, as the judge did, that the desire to resume meaningful contact was genuine. Lord Faulks points to the evidence which demonstrated that since September 2013 Mr Manna had seen Lamarieo only on two or three occasions, twice at Mrs Cocking's home in Bolton and once, towards the end of 2013, at a branch of McDonalds. On that latter, public, occasion Mr Manna had seemed embarrassed by Lamarieo's disability and would not assist in feeding him. There had been no contact at all since January 2014, notwithstanding that Moss Side is not far from Bolton, a distance of some 17 miles. There was no guarantee that any expressed intention on the part of Mr Manna to resume contact in his own home would endure.

21. Against that can be made the obvious points that it cannot have been easy for Mr Manna to have had contact with his son only at the home of his divorced wife, and that his behaviour in public may not be a reliable guide to his conduct in the privacy of his own home. Furthermore Mr Manna has continued to act as Litigation Friend in this case and his evidence that he genuinely wishes regular contact with his son to be restored was not challenged.

22. The judge took into account the long history of shared care and Mr Manna's extensive involvement in his son's life over many years. The judge accepted as genuine Mrs Cocking's desire that the shared care arrangement should be resumed, provided that appropriate accommodation was available to Mr Manna at which overnight care could be given to Lamarieo. Crucially the judge accepted that it was very much in Lamarieo's best interests for his relationship with his natural father to be restored. When combining these factors with her view that the costs involved were "relatively modest" the judge was persuaded that Lamarieo was entitled to the cost of a second property. She was at pains to emphasise that her decision was reached on the

particular evidence before the court and was not to be regarded as establishing any wider precedent in respect of such recovery.

23. The Appellant was plainly pained by the description of this cost as "relatively modest" but Lord Faulks was never able to do more than to suggest that this characterisation was, perhaps, idiosyncratic, although the latter is my choice of word to give content to Lord Faulks' more nuanced critique. Lord Faulks was able to point to expert evidence to the effect that to say that Lamarieo was unhappy because he was no longer seeing his father was a misunderstanding of the nature and effect of his profound disability, but his submission in that regard was undermined by the Appellant's positive case at trial that Lamarieo's behaviour had deteriorated, at least in part, because of the enforced separation from his father in 2013, an irony to which the judge drew attention at [282] of her judgment. Furthermore the same passage of evidence, from an educational psychologist, noted that whilst it was unlikely Lamarieo would the day following seeing his father remember that he had seen him the previous day, that did not mean that he would not be pleased to see him at the time.

24. The judge derived some support for the award from the decision of Swift J in *Whiten*. In that case Swift J made a genuinely modest award, £9,500, for the cost of limited adaptation to the existing home of the claimant's grandparents in Barbados so as to facilitate the claimant taking holidays there with his grandparents for the short remaining period during which air travel over that distance would be practicable. It would become impracticable once he became bigger and heavier and was no longer a child. The sum awarded also covered the purchase of specialised equipment suitable for infrequent use over a short period of time. This award, made under the rubric "Holidays" provides only the most slight, if any, support for the judge's award in relation to a second home in this case. It should also be noted, as Cox J did at [279], that in *Whiten* Swift J rejected a further claim for the costs of buying and adapting a holiday home in France, albeit not on principle but on the basis that the claimant would achieve the same benefit, in the few weeks each year that he would use such a property, by renting appropriately adapted accommodation or staying in an adapted hotel.

25. The judge went on to say:

> "280. The point is also made that if divorced parents, living apart and sharing the care of a child, then had to cope with a serious and negligently inflicted injury to that child, necessitating adaptation of their properties or the purchase of properties to be adapted, it seems inconceivable that the child would not be able to claim for the necessary adaptations or purchase of a new home for each parent."

I agree with Lord Faulks that this is a superficially attractive point. The conundrum is that apparently in no reported case has this situation given rise to the making of such an award, and yet the situation must be very common not least because the strain of caring for a seriously disabled child can typically have an adverse effect upon the relationship of mother and father.

26. In the circumstances the award in respect of a second home in this case should be regarded as generous and I entirely agree with the judge that it should also be regarded as intensely fact-dependent. Of course, generosity towards a claimant disadvantaged as is Lamarieo may not be misplaced, but I agree with the judge that her decision in this regard should not be regarded as establishing a precedent. I also agree with Lord Faulks that the question for our decision is whether that of the judge in this regard falls within the ambit of reasonable decision-making. In that regard Mr Sweeting made a number of telling points. The Claimant was entitled to spend time with his natural father after his parents' divorce, and the father should ordinarily be entitled to have his son stay with him in his own home. I interpose that if the proper language is not that of entitlement, these are at the very least reasonable expectations to which the law should strive to give effect. There was here, continued Mr Sweeting, a long history of shared care, including in the father's own home, both before but significantly after the divorce. The father had in the past made minor adaptations to his property which it was agreed was not adequate going forward into the new era of professional residential care. The fact that the shared care arrangement had broken down did not mean, the judge found, that it would not be resumed in the future. The judge considered that it was in Lamarieo's best interests for his relationship with his natural father to be restored, by which she meant I am sure that it was in his best interests that the arrangement of contact and care being partially afforded at the father's home should be restored. The costs of suitable accommodation had been identified. The Defendant had accepted that it could not be said that an award is impermissible pursuant to the *Roberts v Johnstone* principle. In all the circumstances I am persuaded that we would not be justified in setting aside the award under this head. It was within the generous ambit of decision-making entrusted to the judge.

27. That is not conclusive of the separate question whether we should uphold the judge's adoption of the Claimant's lifetime multiplier rather than the father's. However at trial the Defendant raised no objection to this aspect of the Claimant's proposed calculation of the award, in the event that it was made. After the judgement had been circulated in draft before hand-down Mr Seabrook invited the judge to consider whether it was her intention to apply the Claimant's lifetime multiplier, 28.43, on a second home for Mr Manna, as opposed to Mr Manna's own lifetime multiplier, which would be of the order of 14.90. The judge declined to alter her draft judgment.

28. In seeking permission to appeal on this point Mr Seabrook sought to justify not having raised the point at trial by pointing out that the Defendant had perhaps focused on simply defeating the claim which it regarded as lacking merit and unlikely to succeed. The judge regarded that as a tactical assessment.

29. Whether the course adopted was deliberate or the product of oversight, it is optimistic on the part of professional litigators represented by specialist solicitors and extremely senior counsel vastly experienced in the field to seek to revisit a critical aspect of the calculation which they have not challenged at trial. Mr Sweeting is able to submit with some force that had this point been taken below the Claimant would or might have explored further the question whether suitable provision might be made by some funding structure other than that established in *Roberts v Johnstone*. One possibility might have been an alternative structure based upon the Claimant claiming the costs

of purchasing and adapting the property based upon Mr Manna having a life interest with ownership of the property reverting to the Defendant on the death of his father.

30. Mr Sweeting also submits that to have adopted a multiplier based upon Mr Manna's life expectancy would have effectively negated the judge's conclusion that a second property was necessary. I am less impressed by this submission, which I agree with Lord Faulks comes perilously close to suggesting that the multiplier should be increased to take account of the fact that the Defendant only bears 50% responsibility for the Claimant's injury. In that regard it is interesting to note that Mr Harvey McGregor QC, arguing *Roberts v Johnstone* for the Plaintiff, presciently foresaw the potential difficulties inherent in the combination of a low rate of presumed return on investment with low multipliers – see at page 893 of the report.

31. However for the reasons which I have already set out the *Roberts v Johnstone* approach is imperfect but pragmatic. Mr Sweeting also observed that had the divorced parents decided to live under the same, necessarily larger, roof but with the father in a separate wing or distinct part of the house, no one would quibble with the adoption of the Claimant's lifetime multiplier. I consider that this obviously correct observation bears out my own conclusion as to the essentially pragmatic nature of the *Roberts v Johnstone* approach. It seems to me that the trial was conducted upon the basis that, if the claim for a second home was to succeed, it would succeed on conventional *Roberts v Johnstone* lines which would involve adoption of the Claimant's lifetime multiplier. The Defendant's challenge to this point is an afterthought. It is now too late for the Defendant to be permitted to suggest that whilst the *Roberts v Johnstone* model is not inappropriate to this head of claim, it should be adopted only with the use of a multiplier other than that appropriate for the Claimant. That would throw open for debate the entire wider enquiry on the basis of what, if any, financial model the claim for a second home should in this case be permitted to succeed. The outcome of such an enquiry might of course be recovery on a different and more generous scale. Conceivably however it might not. During the course of the argument we canvassed with counsel whether, if we were to allow the appeal on this point, we should remit the matter to the High Court for further argument and possibly evidence. Neither counsel urged this course upon us, and upon reflection I consider that they were wise not to do so. In a case where we are not invited to reconsider the principle established in *Roberts v Johnstone*, such an approach would have a damaging effect upon the confidence with which litigants could in the future compromise their disputes.

32. For all these reasons I would uphold the judge's award in relation to what is perhaps better termed the additional home for Lamarieo's natural father.

Costs

33. On handing down her substantive judgment on 1 October 2015 the judge heard submissions about ancillary matters, including costs. She delivered an extempore judgment giving her reasons for her conclusion, to which I have already referred at paragraph 1 above, that the Defendant should pay the Claimant's costs incurred as from 11 June 2015, including therefore the trial costs, on the indemnity rather than on the standard basis. The significance of that date is that it was on that day that a pre-trial offer of settlement by the Claimant was rejected by the Defendant.

34. The judge's costs judgment is available at [2015] EWHC 3461 (QB) and again reference may be made to it. The judge gave two reasons for her decision. The first was that the Defendant had failed "to enter into meaningful negotiations in a collaborative way and to seek a sensible compromise in a quantum only trial" in a manner which "was unreasonable, especially in light of the self-evident weaknesses in their care and occupational therapy evidence". The judge castigated the Defendant's decision to carry on to trial as "ill-judged", necessitating "an 8 day trial, at huge cost both to public funds and to the family of this severely disabled young claimant". The second reason was that the judge regarded the nature of the case advanced by the Defendant and as put to Mr and Mrs Cocking in the witness box as unsustainable and entirely inappropriate in the context of the case.

35. So far as concerns the first reason, the parties attended a joint settlement meeting on 15 May 2015 in accordance with the standard direction given in clinical negligence cases. Offers were exchanged which were made without prejudice.

36. On 22 May 2015, thus 21 days before the trial, the Defendant made an offer complying with CPR Part 36. In comparing offers and recovery in this case, where liability was compromised at 50%, it is important to compare like with like. This offer would have involved payment of a further lump sum of £1.25 million and periodical payments of £80,000 per annum. The Claimant rejected that offer.

37. On 8 June 2015, repeated on 10 June 2015, the Claimant made an offer which it is accepted was not compliant with CPR Part 36. This offer involved payment of a further lump sum of £1.65 million and periodical payments of £90,000 per annum. That offer was rejected by the Defendant on 11 June 2015.

38. The trial began on 15 June 2015.

39. The Claimant's recovery as a result of the judge's award of damages equates to a further lump sum payment of £1.75 million and periodical payments of £103,000 per annum. The Claimant has therefore made a recovery substantially in excess of his own pre-trial offer.

40. For my part I do not think that the Defendant's conduct in negotiations should attract any sanction in costs, and I do not consider that the judge gave adequate reasons for her conclusion that it did. A judge should in my view be very slow to entertain a discussion as to whether parties to litigation have negotiated in a reasonable manner. Such an enquiry opens up the prospect of undesirable and wasteful satellite litigation, as the reasonableness of a negotiating stance may and almost certainly usually will depend upon a careful evaluation of the respective states of knowledge of the parties. The Part 36 regime is designed precisely to obviate this kind of enquiry. The judge does not refer in her judgment to the circumstance that there was here a flurry of last minute disclosure of documents from the Claimant and also that significant witness evidence was provided very late in the day. Lord Faulks summarised these developments as follows:

> "(i) Documents received from the Claimant's solicitors on 8 May 2015 including (a) Bush & Co Risk Management Plan dated January 2015, (b) further disclosure of Local Authority records and (c) care

diary for Lamarieo Manna by Jackie Lee from 5 January 2014 to 18 January 2014;

(ii) Documents received from the Claimant's solicitors on 14 May 2015 including (a) daily evaluation from community support worker, (b) unplanned review reassessment from adult social worker, (c) diary written by Jackie Lee, Claimant's personal assistant, dated January 2014 to April 2015 and (d) Fulwood High School Annual Review Summary Report dated 2014/2015.

(iii) Documents received from the Claimant's solicitors on 11 May 2015 consisting of various invoices.

(iv) Documents received from the Claimant's solicitors on 18 May 2015 including school risk assessment records to include personal emergency evacuation plan and individual behaviour plan.

(v) Documents received from the Claimant's solicitors on 4 June 2015 consisting of (a) a statement from Mr Cocking dated 25 May 2015 and (b) a report from David Reynolds, the Claimant's accommodation expert, dated June 2015.

(vi) Documents received from the Claimant's solicitors on 5 June 2015 consisting of physiotherapy records."

Although the blame for this cannot be laid at the Claimant's door, it should also be noted that the joint statement from the assistive technology experts was received only on 26 May 2015 and the joint statement from the accommodation experts on 28 May 2015. I have already referred to the point that as late as 8 May 2015 it was uncertain whether the Claimant would pursue the claim for a second home in the light of the possible costs consequences in the event of failure of that head of claim and the adoption of an issues-based approach to costs. In all the circumstances the judge's criticism of the Defendant's approach to settlement was in my view unjustified.

41. I take a different view however so far as concerns conduct of the trial. Both Mr Sweeting and the judge were at pains to emphasise that there was here no criticism of Mr Seabrook, who had complied with his instructions and put in a fair and courteous manner a case which proved unsustainable. It was however the nature of the case which took it out of the norm. The case put against Mr and Mrs Cocking was that they had dishonestly set out to mislead the professional advisers by exaggerating the difficulties involved in Lamarieo's care, and that their evidence at trial was in these respects similarly dishonest. It was suggested to them that they had been motivated by greed rather than by the interests of Lamarieo. A particularly egregious example of this attack concerned their purchase of a Land Rover Discovery, a purchase of an eminently suitable vehicle for Lamarieo's needs about which they had consulted the Deputy Mr Alex Guy, a purchase nonetheless castigated by the Defendant as unnecessary extravagance motivated by greed. Furthermore the judge was very

critical of the evidence given by the Defendant's experts in the field of care and occupational therapy, which criticism went beyond the "self-evident weaknesses in their evidence" to which the judge referred in her costs judgment. The evidence of Ms Utting, the care expert, was described in the judge's substantive judgment as both "illogical" and "unrealistic" – [207]. Implicit in her report and her evidence was the incorporation of Lamarieo's parents into the care regime although overtly she accepted the premise that they wished to withdraw from the role of primary carers. Similarly Ms Utting's approach to the natural father Mr Manna involved that Lamarieo would spend more time with him in a property with accommodation for one dedicated carer, funding for the acquisition of which was of course vigorously opposed by the Defendant. The judge's more serious criticism was reserved for the Defendant's occupational therapy witness Marie Palmer. Her evidence was "wholly unrealistic" – [224] and, at [227], "extraordinary and . . . . wholly out of kilter with awards made in this area".

42. I have no doubt that had the judge acceded to the Defendant's suggestion that the Claimant's case was deliberately exaggerated the Defendant would have sought an award of indemnity costs. What is sauce for the goose should be sauce for the gander. I bear in mind that litigation in this field is often hard-fought. Given that litigation is necessarily adversarial, and that litigation unfortunately cannot be avoided in this field, I guard against a feeling that sometimes it is conducted in a manner inappropriate to the subject matter. I appreciate that there were here serious issues which the Defendant felt needed to be explored in the manner in which they were, although as the judge records at [9] the contemporaneous records, of which there were here a large number, including in particular medical, social services and educational records, were likely to be the most reliable source of information. Looked at in the round, the judge who heard the trial, and who I might add had heard many like it, plainly concluded that what had occurred fell outside the norm, although she did not express her conclusion in precisely that manner. That conclusion will I hope rarely be reached in litigation of this kind, but I do not consider that we would be justified in interfering with the judge's conclusion that here it properly should be. I would therefore dismiss the Appellant's appeal on this aspect also.

Lord Justice Ryder :

43. I agree.