



Neutral Citation Number: [2015] EW COP 87

Case No: 11020846

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2015

Before :

MR JUSTICE CHARLES

BETWEEN

PJV

(by his litigation friend the Official Solicitor to the Senior Courts)

Appellant

-and-

(1) THE ASSISTANT DIRECTOR ADULT SOCIAL CARE NEWCASTLE CITY
COUNCIL

(The Officer fulfilling the roles and duties of the Director of Social Services Newcastle
City Council)

(2) THE CRIMINAL INJURIES COMPENSATION AUTHORITY

Respondents

David Rees (instructed by the Official Solicitor) for the Appellant
Timothy Lyons QC (only on 2 October 2015) and **Nicola Greany** (instructed by the
Criminal Injuries Compensation Authority) for the Second Respondent

The first Respondent did not appear and was not represented

Hearing dates: 21 July and 2 October 2015

Approved Judgment

I direct that this judgment is a public document and that copies of this version as handed
down may be treated as authentic.

MR JUSTICE CHARLES

Charles J :

Introduction

1. This is a public document.
2. The appeal before me is from part of an order made by Senior Judge Lush dated 26th March 2015. It relates to the part, if any, that the Court of Protection must play in the finalisation of an award of compensation under the relevant scheme that the Second Respondent (CICA) has decided and the applicant has agreed is to be held on trust.
3. The Official Solicitor, as the Appellant's litigation friend, has appealed because he is of the view that the issue is one of general importance. I agree and CICA did not demur. It is however puzzling why the issue had not been resolved a long time ago.
4. The Director of Social Services, Newcastle City Council (the Deputy) who has not taken any active part in this appeal made the application to the Court of Protection. By it he raised other points which were decided by Senior Judge Lush and have not been appealed. However, it appears to me that my analysis of the point that was appealed raises points that the Deputy and the court should consider but were not argued before me. I return to these at the end of this judgment. They relate to:
 - i) the imposition of a term in a trust directed to the risk that a perpetrator would benefit from the award,
 - ii) the terms of the appointment of a deputy,
 - iii) the declaratory relief granted and the discharge of the Deputy, and
 - iv) the *Peters* undertaking and a restriction on the powers of the trustees.
5. On the issue that was appealed the Official Solicitor argues that the Court of Protection need take no part after it has appointed a deputy to make the claim under the relevant scheme whereas CICA argues that it must make a further order in every case before CICA can pay the award to the trustees of the trust.
6. Senior Judge Lush found that CICA was right and that the Court of Protection must set up the trust on the basis that the applicant for the award is the settlor and so, if the applicant lacks capacity, an application must be made under s. 18(1)(h) of the Mental Capacity Act 2005 (the MCA) for an order under s. 16 thereof settling P's property.
7. CICA's position and the conclusion reached by Senior Judge Lush clearly involve additional expense and although such costs can be added to an award the Official Solicitor is concerned that they should be avoided in case they are not and, in particular, when the award is capped because there is no provision that enables costs to be paid by CICA over and above the cap. So, and I agree, the Official Solicitor points out that CICA's position and the decision of Senior Judge Lush may not be in P's best interests.
8. The arguments have developed since the hearing before Senior Judge Lush and indeed the first hearing before me in July 2015. The essential points in CICA's argument are now:

- i) It must act in accordance with the provisions of the relevant scheme and in doing so it does not apply an approach or test that is governed by the “best interests” test set by the MCA. This is clearly correct and is not disputed. Indeed the same can be said of the point made that in exercising its functions CICA will not be aware of issues that are relevant to the application of that test.
 - ii) Senior Judge Lush was right and an order under ss. 16 and 18(1)(h) of the MCA is necessary because the trust required by CICA under the relevant scheme is a settlement of “P’s property”.
 - iii) Further or alternatively Section 20(3)(a) and further or alternatively s. 20(3)(c) of the MCA preclude a deputy from creating a trust of P’s property and/or from agreeing that the CICA award should be subject to trusts and so paid to trustees on those trusts and so this must be done by court order under ss. 16 and 18(1)(j) of the MCA.
9. The Official Solicitor argues that a deputy can be appointed to pursue and finalise an award from CICA and, in so doing, a deputy can agree and so accept on behalf of P that the moneys awarded are to be paid to trustees on defined trusts and that the award moneys and thus the trust property never become the applicant’s (P’s) property and so the trust is not a settlement of P’s property.
10. He argues that this finalisation of the award by a deputy is not precluded by s. 20(3) as it does not involve a settlement of any of P’s property or the exercise of a power referred to therein (or in s. 18(1)(j)). Clearly, if the deputy wanted directions from the Court of Protection on whether he should or should not agree to the terms of an offer (including conditions that the money must be paid to trustees on trusts that include provisions that CICA asserts it can require in the exercise of its powers) the deputy can do so.
11. I agree with the Official Solicitor and so this appeal succeeds.

CICA and its schemes

12. It was common ground that in his skeleton argument counsel for the Appellant set out the relevant terms of the schemes. The schedule to this judgment is based on that account. Central to the issues raised on this appeal are the terms of the schemes set out in paragraphs (3) and (4) of the schedule.
13. The present claim was made under the 1990 scheme which was an ex gratia scheme.
14. It is not necessary for me to set out an account of the history of CICA and the schemes. Under later schemes there is a maximum award for a single case but this is not the position under the 1990 ex gratia scheme.
15. CICA is an executive agency of the Ministry of Justice and it is clear and common ground that its procedural and substantive decision making process (and that of tribunals when dealing with claims) is governed by the terms of the relevant scheme, whether ex gratia or statutory. In short, the relevant decision makers must properly

apply the schemes. Those decision makers are given discretions under the schemes and they include provisions that enable them to react to new evidence.

16. The decisions made by decision makers under the schemes can be challenged on grounds which include error of law in interpreting the scheme or failure to take relevant and only relevant factors into account when exercising discretions and making decisions under the scheme.
17. The date upon which the application for compensation is received determines which scheme applies. So, the claim in this case is governed by the 1990 scheme because it was made before April 1996. Different and later application dates apply for the 1996, 2001, 2008 and 2012 schemes.
18. There are differences between the schemes over the years and the 1990 scheme was an ex gratia scheme. However, there is a framework that is common to all of the schemes and relevant to the issue on this appeal. This is because under all the schemes the relevant “die is cast” when:
 - i) the proposed award is determined and offered by the decision maker under the schemes, and
 - ii) the award that is made is finalised by the acceptance of that offer by the applicant.

The fact that the 1990 scheme is an ex gratia scheme makes no difference to that.

19. CICA suggested that I should confine my decision to the 1990 scheme because there might be relevant differences. But it did not identify any differences or refer to relevant differences in its approach in practice under different schemes and I have not identified any terms or features of the later schemes that could found a different conclusion on the issue raised on this appeal by the Official Solicitor.

The facts of this case

20. The Appellant who is now 23 years old was born on 17th August 1992. On 21st January 1993, and so when he was a baby, he suffered non-accidental, and so inflicted, head injuries.
21. Reports indicate that he suffered a frontal subarachnoid haemorrhage and bilateral retinal haemorrhages consistent with a violent shaking injury, that he has significant intellectual, cognitive and behavioural problems which are almost certainly attributable to these inflicted head injuries and that his current neuropsychological deficits relate to and can be explained by the injuries inflicted in 1993.
22. The Appellant will never be able to compete in the open labour market, will never be capable of independent living and will always require daily support. He is not capable of managing his financial affairs and cannot carry out basic tasks such as shopping or cleaning. His difficulties are permanent and are unlikely to improve. He may be able to have children and to marry.
23. No one was ever charged with any offence relating to the causation of the injuries but the Appellant’s mother, her brother and her then partner were present at the time the

- injuries were suffered. They therefore make up what in Family cases is referred to as the pool of possible perpetrators. While medical opinion can attribute the Appellant's present state to the inflicted injuries there is no medical evidence which identifies the perpetrator.
24. This is not an uncommon situation in proceedings in the Family Courts. The papers before me indicate that it is unclear whether there were any findings by a Family court on who inflicted the injuries and I do not know what, if any, proceedings were taken under the Children Act 1989. The papers indicate that after the injuries were inflicted the Appellant was removed from the care of his family but that he was returned to the care of his mother in 1994 and that she has been his main carer ever since. I do not know what part, if any, the mother's brother or her partner (in 1993 at the time of the injury) have played in the Appellant's life.
 25. He still lives with his mother. This history of care is a clear indication that although the Appellant's mother was in the pool of possible perpetrators of his inflicted injuries the decision makers on behalf of the relevant local authority charged with making decisions on whether an application for a care order should be made and where the Appellant should live:
 - i) were content for him to be returned to the care of his mother, and so
 - ii) concluded that the possibility that she might have been the perpetrator or complicit in the injuries did not warrant her child being removed from her care.
 26. On 19th March 1996, the Appellant's mother made a claim to CICA. On 21st April 1998, that claim for compensation was rejected by the Board because it considered that she may benefit from any award made and that any such benefit would be contrary to paragraph 7 of the 1990 scheme (which is cited later in this judgment).
 27. That decision was reviewed at a hearing on 13th January 1999. A panel decided that an award should be made but that no part of it should benefit the Appellant's father, mother, brother or any other family member and that an award should be put into trust for the Appellant. It also directed that CICA and the local authority should liaise to produce a trust deed.
 28. On 30th April 2002, an order was made by the Court of Protection (as it was then constituted) that the Director of Social Services of Newcastle Upon Tyne was authorised to make a claim for criminal injury compensation subject to the approval of the Court as to quantum and was directed to apply to the Court for certain directions as to receiving and giving discharge for any award and for directions as to dealing therewith. It may be that these directions prompted the Deputy to make the application that was heard by Senior Judge Lush.
 29. On 10th June 2002, the Court of Protection appointed the Office of Director of Social Services for Newcastle Upon Tyne to be a Receiver in respect of the Appellant. The Receiver was authorised in the name and on behalf of the Appellant to receive, give discharge and accept the compensation awarded by CICA in respect of a personal injury claim and, for that purpose, to sign any necessary documents and to request CICA to lodge the said compensation into court (as thereafter provided). It seems

- that CICA and the Receiver (later the Deputy) acted on the first part of these directions but not the second.
30. In 2004, an interim award of £5,000 was paid to the trustees of a trust established pursuant to a Declaration of Trust made by the Director of Social Services for Newcastle Upon Tyne as the original trustee on 25th January 2005 (the 2005 Interim Trust). The claim was then stayed during the Appellant's minority.
 31. The 2005 Interim Trust does not set out the capacity in which the Original Trustee (the Appellant's Receiver) executed the deed. The recitals to it are effectively the same as those to which I shall refer later when commenting on CICA's current practice in respect of applicants who have capacity and the trust fund is the £5,000 interim payment. It is worthy of comment that in whatever capacity the Original Trustee was acting the creation of this trust:
 - i) accords with CICA's present practice for capacitous applicants, but
 - ii) does not accord with its arguments on this appeal.
 32. On 1st October 2007, the Receiver became the Deputy for the property and affairs of the Appellant pursuant to the MCA. The Appellant attained his majority on 17th August 2010.
 33. Some time before 24th July 2012, another interim award was made in respect of the claim made on behalf of the Appellant in the sum of £500,000 to be paid into a trust. It has not been so paid.
 34. On 24th July 2012, the First-tier Tribunal ordered that a total award of £3,000,856.07 be made less a sum of £166,014.42 for state benefits. By this order the First-tier Tribunal directed that the interim award of £500,000 should now be paid "into the Trust that had been set up to receive the compensation payment in this case". It seems that that can only be a reference to the 2005 Interim Trust because no other trust had been set up. No such payment was made. I understand that this may be because it was thought that the terms of the 2005 Interim Trust did not make appropriate provision in respect of the exclusion of possible perpetrators from benefit.
 35. The papers include a reference to an email sent on 4th June 2013 by which CICA told the Deputy that a new trust deed was required because the 2005 Interim Trust did not comply with directions given in 1999 concerning the exclusion of benefit to the Appellant's father, mother, brother or other family member.
 36. The order made on 24th July 2012 went on to provide that CICA would then have to make a final payment of £2,329,841.65 "into the Trust" which is the net figure payable after deducting the two interim payments of £505,000 and the sum of £166,014.42 in respect of state benefits.
 37. A draft trust deed is included in the papers. It refers to a balance of £2,829,841.65 (and so the balance plus the unpaid £500,000 – but no interest). Its recitals mirror those of the 2005 Interim Trust and are effectively the same as those to which I shall refer later when commenting on CICA's current practice for capacitous applicants. The trust fund is the sum of £2,829,841.65. It is a deed to be executed only by the

original trustees who are (1) a solicitor, and (2) the Director of Adult Social Care of Newcastle City Council. Again it is worthy of comment that in whatever capacity the Original Trustee was acting the creation of this trust:

- i) accords with CICA's present practice for capacitous applicants, but
- ii) does not accord with its arguments on this appeal.

38. A *Peters* undertaking was sought before payment was made.
39. On 22nd April 2014, the Deputy for the Appellant made the application that came before Senior Judge Lush, the Appellant was joined as a party to it and the Official Solicitor agreed to act as his litigation friend. CICA was also joined as a party but the Appellant's mother was not.
40. The application was heard by Senior Judge Lush on 12th November 2014. His order dated 26th March 2015 provided that the Deputy was authorised to accept the award from CICA on the Appellant's behalf and give the *Peters* undertaking. It also contained certain provisions as to the content of the trust to which the award was to be paid which reflect the point made in the judgment that other terms of the trust could be negotiated and that when finalised the relevant document would be initialled by Senior Judge Lush to identify it as the settlement of the Appellant's (P's) property that was the subject of the order under ss. 16 and 18(1)(h) of the MCA made by Senior Judge Lush.

Preliminary observations on this history

41. I apologise on behalf of the court for the time it has taken to deal with this case.
42. Standing back and for whatever reason it is the case that since some time before June 2012 the Appellant has not had the benefit of an interim award of £500,000 and that since June 2013 he has not had the benefit of the balance of his award in a sum of over £2 million.
43. This is a sorry state of affairs.

Further preliminary observations

44. There is no doubt that the solution advanced by the Official Solicitor is administratively much the easiest and least expensive and that it would equate the position of an applicant who lacks capacity to pursue and agree an award with one who has that capacity.
45. On any view, when CICA decide that an award is to be held on trust and so offer to make an award on that basis the legal analysis of what and whose property is being settled, and how and by whom this is being done, must be the same in respect of applicants with and without capacity. This is because when the relevant decisions and actions cannot be taken by an applicant because he lacks capacity they are taken on his behalf by an attorney, a deputy or the Court of Protection.

46. So the general practice of CICA when the decision maker under the relevant scheme requires there to be a trust and the applicant has capacity to agree to and so accept the award on that basis is relevant.
47. At the hearing in July 2015, an argument of the Appellant, namely that on the terms of such an award being agreed between CICA and the applicant (or someone authorised to act on his behalf) a constructive trust arose gained more prominence than it had before. It seemed to me that CICA should have an opportunity to consider that further and, in any event, I indicated that I was of the view that an adjournment would permit CICA and the Official Solicitor to address how in practice claims in which a decision and so an offer by CICA to make an award to be held on trust:
- i) were being finalised, or if different
 - ii) should be finalised
- having regard to the arguments on this appeal.
48. It seemed to me that this should lead to an agreed solution that either reflected existing practice in respect of applicants with capacity or changed that practice and introduced a new one for applicants with and without capacity. But that if it did not at least the basis for a further interim award would be agreed.
49. The terms of the 2005 Interim Trust and the draft proposed trust in the papers reinforced this view because to my mind they provided a way forward on an agreed basis that accorded with existing practice.
50. No agreement was reached. Additionally, to my considerable surprise CICA had not felt able to even agree an interim payment of this large and obviously much needed award.
51. Further, at the adjourned hearing CICA's counsel was not able to say how awards to be held on trusts for applicants with capacity were being or would be finalised and, until he was specifically asked to do so, he did not indicate how on CICA's analysis as a matter of administrative, property and trust law awards that under the schemes it properly required to be held on trusts were to be finalised in practice. This was an abject failure by CICA to address issues that it had been invited to address over the adjournment.
52. CICA's arguments as to why it did not accept the constructive trust argument raised a range of general points concerning the administration of the schemes, and, in particular, its discretion under them and the fact that the schemes also applied in Scotland, that in exchanges counsel properly accepted had no substance or relevance. As I have already mentioned, CICA also suggested that any decision should be limited to the 1990 scheme without saying why different results would arise on other schemes, or why as a matter of law or good administration this made sense, or pointing to examples of a different approach being taken in practice in respect of different schemes.
53. This approach does not support the conclusion that CICA would act, as counsel submitted it would, in a co-operative and constructive manner in the applications to

the Court of Protection to settle P's property that it submitted must be made if it decided that an award to an applicant who lacked capacity should be held on trust.

54. After the second hearing CICA provided evidence on its approach to the finalisation of an award that it decided was to be held on trusts for the benefit of an applicant who had capacity to make and finalise an award.
55. Unsurprisingly, given the relevant terms of the schemes, the 2005 Interim Trust and the draft trust in the bundle of documents before me, the evidence indicated that CICA's practice:
- i) applies across all the schemes,
 - ii) recognises that the CICA decision maker makes a decision under the scheme and bases the offer of an award on that decision, and
 - iii) recognises that the finalisation and so payment of an award that is so determined and offered requires its acceptance by the applicant.
56. The practice also accurately reflects that the bargaining position of CICA and the applicant during the process leading up to and after the decision and offer by the CICA decision maker is not the same as say parties to a contract or civil litigation because the proper application of the scheme dictates both
- i) the terms of the award that CICA or tribunal decides should be made and so the award and its terms offered by CICA, and
 - ii) the bases upon which the applicant can challenge and/or refuse to accept that offer.

This means, for example, that an applicant (a) can effectively dictate terms in a trust that do not have any impact on terms sought by CICA in applying the relevant scheme, but (b) has to accept the terms that CICA can lawfully insist on under the scheme.

57. This negotiating position in respect to the terms of a trust is recognised in CICA's practice in respect of a capacitous applicant because under it:
- i) CICA regularly provides to the applicant a draft trust document that contains the terms of the trust it seeks to impose,
 - ii) those terms are the subject to negotiation, and
 - iii) the negotiation can be based on a draft provided by the applicant.
58. This negotiating process shows the concerns advanced by CICA in argument about it being held responsible for the terms of any trust that it did not impose applying the scheme have no weight. Indeed these concerns are expressly addressed and avoided in the examples of the correspondence provided. This is because CICA's role and participation is to implement the relevant scheme.

59. The practice also requires the applicant to sign a document headed "Acceptance of Final Award" including the terms "I understand that the award of compensation will only be paid in accordance with the approved and executed trust".
60. This acceptance reflects an earlier standard form letter from CICA that states that a "trust is required in this case" and that (again with my emphasis):

Please note that an award will not be made, nor will the trustees have any entitlement to it, until the principal trust document, duly signed and executed, has been exhibited and approved by the CICA. Please also note that the CICA reserves the right to reconsider a determination before final payment of an award in accordance with the [2012] scheme.

61. Finally, it is instructive that the "principal trust document" that is so required is not a declaration of trust by the applicant. Rather, it is a declaration that is executed only by trustees (described as the Original Trustees) and the examples provided contain the following recitals:

- (1) The Criminal Injuries Compensation Authority (hereinafter called the Authority) administers the Criminal Injuries Compensation Scheme ----- [Note; The drafts I have seen in the evidence of CICA's practice and in the bundle contain two examples in which the Scheme is identified by year (1990 and 2001) and two when it is not.]
- (2) An [award] [interim award] has been made under the terms of the said Scheme in favour of (X) (hereinafter called "the Beneficiary") and it has been determined pursuant to the powers thereby conferred to settle the sum of £Y (hereinafter called "the Specified Sum") on the trusts hereby declared
- (3) For the purposes aforesaid the Authority has caused the Specified Sum to be paid to the Original Trustees to be held on the trusts hereby declared

The trust fund is defined as the Specified Sum and any additions to it (and the assets for the time being representing them).

62. No doubt different language to describe the source of the Trust Fund could be used that would also adequately reflect the making and finalisation of an award. But any such language would have to reflect that:
- i) the award and its terms, including the requirement for a trust, is founded on CICA's decision under the relevant scheme,
 - ii) under the scheme, the applicant (and the trustees of a trust required by CICA) are not entitled to payment of the sum comprising the award that CICA decides should be made until the award CICA has decided to make has been accepted by the applicant,

- iii) when a trust is required by CICA this is a condition of the award, and
- iv) when it decides to include that condition CICA will not pay the sum awarded to the applicant until it has been agreed and so accepted by him or on his behalf and CICA can make the payment to the trustees to hold on trusts that have been agreed between CICA and the applicant.

Discussion

- 63. In my view the points listed in the last paragraph, which are correctly reflected in CICA's practice concerning a capacitous applicant, show that when CICA, on a proper exercise of its powers under the relevant scheme, requires that the award is to be paid to trustees on trusts that contain certain provisions, the applicant never becomes entitled to the moneys representing the award (i.e. the Specified Sum and so the Trust Property) and so it is never his property to settle or to deal with in another way.
- 64. Rather, what they show is that the trusts are created by the acceptance of the award decided on and so offered by CICA by the applicant because that finalisation of the claim provides that the award must be paid to trustees on trust. So the die is cast by that process which is finalised by an acceptance of an award determined by CICA under the relevant scheme.
- 65. CICA's practice reflects an obvious and sensible way to achieve this end result by trustees executing a trust in respect of the award before it is paid and they and the applicant have any entitlement to it (apart possibly from one based on an argument that CICA must properly apply the relevant scheme).
- 66. It is clearly sensible as a matter of risk management and good administration for CICA not to pay the award it has decided must be held on trust to the applicant. But the question whether the award and the money representing it is ever the applicant's property can be tested by asking: If CICA did pay the sum awarded to the applicant could he lawfully do what he wanted with it? The answer is "No", because the award and the money is impressed with an obligation (which can be described as a constructive or purpose trust) which means that the applicant is never entitled to treat it as his property.
- 67. So the applicant never becomes entitled to or holds the award and the money representing it absolutely, or in a way that enables him to deal with it as he wishes, because his claim under the statutory scheme (and so by analogy his cause of action) is finalised by the acceptance of a condition decided on by the decision maker under and applying that scheme that the award and the money representing it is not to be paid to the applicant, and so become his property, but is to be held on trust and so paid to the trustees and becomes the trust property.
- 68. Accordingly, CICA's practice in respect of a capacitous applicant runs directly contrary to the conclusion of Senior Judge Lush at paragraph 38 of his judgment where, accepting arguments put by CICA, he says:

----- The applicant (the person to whom the award is made) is always the settlor. -----

69. In fairness to Senior Judge Lush he was not informed of the practice that I finally managed to get CICA to set out and I remain puzzled why, having regard to it, CICA instructed counsel to take a number of the points argued before him and me.
70. The question therefore arises why a different process for creating the relevant trust is needed if the applicant (P) lacks the relevant capacity.
71. The starting point is that the Court of Protection, a deputy or an attorney acts on behalf of P. So the Court of Protection by making a welfare order under s. 16 of the MCA, or a deputy or an attorney under their powers, would accept and finalise a CICA award on behalf of P on the basis that it was to be paid to trustees to be held by them on identified trusts that had been declared or would be finalised and declared.
72. The question is therefore confined to whether CICA is right and a deputy is precluded from doing so by s. 20(3)(a) and further or alternatively s. 20(3)(c) of the MCA. These sub-sections of the MCA provide that a deputy may not be given powers with respect to:
- (a) the settlement of any of P's property, whether for P's benefit or for the benefit of others,
 - (b) -----, or
 - (c) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise.
- Section 20(3)(c) is in the same terms as s. 18(1)(j).
73. In my view, CICA is wrong, and so I agree with Senior Judge Lush that a deputy can accept an award on behalf of P. As I understood it, CICA does not dispute this but argues that when a trust is to be created:
- i) the acceptance has another element, namely a consent to the money being paid (and I add paid only) to trustees on declared trusts and that part of the acceptance or that step involves the exercise of a power precluded by s. 20(3)(c), and further or alternatively that,
 - ii) on acceptance the applicant obtains title to the award and the subsequent payment to the trustees would be a settlement of P's property that is precluded by s. 20(3)(a).
74. In support of these arguments CICA says that the MCA is not a conveyancing statute but one that is intended to ensure protection for vulnerable people. Why this would support an argument that a deputy could accept an outright payment to P but not one to be held on trust was not explained.
75. In my view s. 20(3)(c) (and so s. 18(1)(j)) is not directed to abilities and so powers that anyone has and so, for example, a power to make and accept a claim for compensation made under a statutory scheme or on some other basis. Although not necessary to do so, because it involves decisions relating to P's property and affairs, it can be said that the ability to make, pursue and finalise the claim relates to the control

and management of P's property (including causes of action and claims) under the description in s. 18(1)(a) of what the powers under s.16 as respects P's property and affairs extend to.

76. The power to accept the award decided on by CICA is not given to the applicant by the relevant scheme, it is something he can do as an individual exercising his right to make his own decisions and so to choose whether to accept what the CICA decision maker decides he should be awarded and so offers. When the applicant does not have the capacity to make that decision, and so that choice, someone else (i.e. the Court of Protection, a deputy or an attorney) can do it for him just as they can make a range of decisions relating to P's property and affairs on behalf of P.
77. Rather, s. 20(3)(c) is directed to powers conferred by something (e.g. a mortgage or a trust).
78. The application of s. 20(3)(a) turns on the same point argued before me and Senior Judge Lush namely that P's property is being settled. As I have explained in my view it is not. I do not agree with CICA that on acceptance and so finalisation of an award that CICA has decided that (and so offered on the basis that) it should be placed in a trust, the applicant obtains title to the award and so to the money representing it. Rather, in my view the process by which such an award is decided on, offered, accepted and so finalised and then paid means that the award and the money representing it has never been the applicant's property; it has always been the trust property.
79. So I agree with the Official Solicitor that on the correct analysis of the implementation of the CICA schemes a clear distinction exists between cases:
- i) where CICA has determined that an award should be paid to P absolutely and a proposal is subsequently made (by the deputy or some other person) to settle it on trusts; and
 - ii) where under the scheme CICA has determined that the award is to be held on trust and this condition or term of the award is accepted by or on behalf of the applicant.

I also agree that the distinction between these two situations is in essence the same one that was recognised Eveleigh J in *Allen v Distillers* [1974] QB 284 in the context of settling damages awards for children. In that case he held that although the court could not postpone beyond 18 the vesting of damages that belonged absolutely to a child plaintiff it could, when approving a compromise under RSC Ord 80 r.12 (now CPR Part 21.10), sanction a compromise which involved damages being placed in trust where that settlement is a term of the compromise.

80. In my view:
- i) CICA correctly recognises that distinction in its approach to and practice on awards to capicitous applicants that it decides, on a proper exercise of the relevant scheme, should be held on trust and so requires to be paid to trustees on trusts that include and do not conflict with terms that CICA is so entitled to require, but

- ii) CICA failed to recognise that distinction in its arguments in this case.

Conclusion on the appeal

81. There is no need for an application to the Court of Protection to finalise an award that CICA, in the proper exercise of its powers under the relevant scheme, decides should be held on trust and so requires to be paid to trustees on trusts that include and do not conflict with terms that CICA is so entitled to require.
82. A deputy appointed by the Court of Protection can be authorised to negotiate and finalise the terms of such an award and so of the trust and to enter into the “Acceptance of Final Award” or the equivalent document for an interim award on behalf of P and thereby finalise the claim.
83. There are number of ways by which such trusts can be declared and evidenced and so by which the result can be achieved that the award moneys are paid to and from the outset are held by trustees on terms properly required by CICA and wanted by the applicant. A convenient and sensible way is that adopted in practice by CICA when the applicant has capacity (i.e. a declaration of trust by original trustees setting out the trusts over the award which will start to operate on payment). No doubt trust lawyers could set up other ways to give effect to the terms and so the trust created by the finalisation of the process of an application for compensation to CICA under the relevant scheme.

Further points

84. As mentioned at the beginning of this judgment, the appeal related only to the general issue addressed above. However, exchanges during the hearing indicate that the following matters merit, or may merit, further consideration and that in light of the directions given to the Deputy in this case, or more generally, it may be that the Deputy would conclude that he should negotiate further and/or seek further directions from the court.
85. These points also have, or potentially have, widespread impact and so I hope that CICA will be true to its position advanced by counsel that it will co-operate with the Court of Protection in ensuring that they are addressed and will not, for example, take points that have already been decided by Senior Judge Lush or the First-tier Tribunal and have not been challenged or should be the subject of judicial review. If the last point has technical merit I would consider treating such an application as being before me.
86. In any event, and notwithstanding what he says in paragraphs 31 to 34 of his judgment, Senior Judge Lush says in paragraph 75 thereof that the declaration he will make is to be subject to further amendments that can be negotiated in the terms of the trust and his order reflects this.
87. Whilst I acknowledge that in one sense it can be said that the award is in the discretion of CICA, in my view what Senior Judge Lush says in paragraphs 31 to 34 of his judgment must be qualified to make it clear that the decisions made by CICA are not “entirely” in its discretion. This is because it has to make its decisions on a correct interpretation of the relevant scheme and its exercise of discretion under it is

subject to challenge applying public law principles. Indeed routes of challenge are provided in the schemes and then from a decision of a First-tier Tribunal.

88. This means that an applicant and so the Court of Protection, a deputy or attorney does not simply have to accept CICA's decision and can challenge quantum and the terms that CICA seeks to require.
89. Having said that I acknowledge the point made by counsel for the Official Solicitor that a challenge may result in the award not being made or its payment being delayed. But CICA, as a body governed by public law principles, is bound to act fairly and that is likely to preclude a commercial negotiating stance along the lines accept what is offered now or you will not or may not get an award.

The imposition of a term in a trust directed to the risk that a perpetrator would benefit from the award.

90. Paragraph 7 of the 1990 Scheme provides that:

Compensation will not be payable unless the Board are satisfied that there is no possibility that a person responsible for causing the injury will benefit from an award.

91. This founds a term in the proposed trust which prompted the question during the hearing: Are the trustees precluded from funding the purchase of a pot of marmalade for the appellant because of the possibility that his mother might eat some? The answer was "yes". Many similar problems obviously arise (e.g. if the trust fund is used to pay the heating bill).
92. I acknowledge that it can readily be seen why the schemes contain provision directed to ensuring that a perpetrator does not benefit from the award and that it is arguable that the use of the words "no possibility" in the 1990 scheme permits the imposition of the proposed term. Later schemes do not contain the same wording, but their wording "no likelihood that an assailant would benefit" (the 1996, 2000 and 2008 Schemes) and "no award will be made if an assailant may benefit from the award" (the 2012 Scheme) give rise to similar issues.
93. But equally it seems at least arguable that the proposed term in this case:
- i) does not reflect a proper interpretation of paragraph 7 of the 1990 scheme or the exercise of the discretions conferred thereunder because it has not taken account of all and only relevant factors having regard to the underlying purposes of the scheme,
 - ii) it is unduly harsh and could present real difficulties in its implementation because since he was a baby the appellant has lived with and been cared for by his mother,
 - iii) on a proper application of the scheme and its underlying purposes that harshness and those difficulties can and should be avoided, and
 - iv) similar points can be made in respect of the later schemes.

94. It appears that there has not been a finding that the Appellant's mother inflicted or took any part in the infliction of the injuries and so, applying Family law, the possibility that she was a perpetrator cannot be relied on to found the existence of a risk that her child was likely to suffer significant harm in her care (see the cases cited in the notes to s. 31 of the Children Act in the Family Court Practice under the sub-heading "burden and standard of proof in particular *Re B and Re J*). This means that there is a mis-match between:
- i) the result based on the application of the Children Act and the decisions by the relevant local authority on how the best interests of a child who is the victim of a criminal injury, namely that the child should be cared for by a parent who was in the pool of possible perpetrators at his or her home (probably in a different household), and
 - ii) terms governing the award which contain restrictions that prevent or hinder the application of the compensation to best promote the welfare of the victim.

Indeed such restrictions would also run counter to the basis of the award in this case for costs of care (in a sum in excess of £2 million) if they prevented or unduly inhibited expenditure on that care because there was a possibility that the appellant's mother would benefit in any way from that expenditure.

95. As I indicated during the hearing it seems to me that these points merit the Deputy seeking to agree different terms of the trusts with CICA and raise points of general importance for child victims as they are relevant to the promotion of their best interests including their physical and emotional well being and their Article 8 rights.
96. It seems to me that there is at least a prospect that an appropriate solution can be reached by, for example, not including the Appellant's mother within those who cannot benefit, or by a qualification to the terms relating to her exclusion from benefit which provides that she can benefit as the Appellant's carer.
97. I acknowledge that further negotiation has the potential for further delaying an interim payment of £500,000 ordered as long ago as June 2012 to the 2005 Interim Trust. But I again express the hope that, even if any such negotiations or proceedings directed to the points underlying them take some time, an interim payment need not be delayed.

The terms of the appointment of a deputy.

98. The terms in this case are affected by history. It would seem sensible for CICA, the Official Solicitor and the Deputy to discuss and try to agree, for approval of the court, standard terms of appointment when a CICA claim is envisaged or is a possibility.

The declaratory relief granted and the discharge of the Deputy.

99. This merits review in light of my disagreement with Senior Judge Lush. As the present order obviously reflects his analysis and conclusion on the creation of the trust and the roles of the court and a deputy it would probably be easier and more sensible to discharge the whole order and start again.

The Peters undertaking and a restriction on the powers of the trustees.

100. I am unclear what, if any, impact the deduction of £166,014.42 for state benefits has on the terms of such an undertaking in this case or future similar ones. I invite the parties to consider this.
101. I also invite them to consider whether having regard to the difference between my analysis and that of Senior Judge Lush it is still appropriate for such a restriction on the powers of the trustees in line with the *Peters* undertaking to be included in the trusts as he directed. The point of the undertaking is to bind P and the Deputy gives it on P's behalf, whereas a restriction on the trustees does not do that and they are not the persons who would make the relevant claim, although they might take the availability of state benefits into account in exercising their powers under the trusts.
102. If points on the standard terms for appointment and the *Peters* undertaking are agreed I could deal with them at the same time as I deal with costs and the terms of the order when handing down this judgment (with or without attendance). If they are not so agreed, at that time, I could give directions relating both to those matters and any issues arising as a result of the points I have raised about the exclusion of the appellant's mother from the possibility of any benefit.

SCHEDULE TO JUDGMENT

- (1) Compensation is payable for personal injuries sustained in Great Britain as a result of *inter alia* a crime of violence:

1990 Scheme	para 4
1996 Scheme	para 8
2001 Scheme	para 8
2008 Scheme	para 8
2012 Scheme	para 4

- (2) Compensation will not be payable unless the CICA or (in the case of the 1990 Scheme the Tribunal) is satisfied that there is no possibility that a person responsible for causing the injury will benefit from the award;

1990 Scheme	para 7
1996 Scheme	para 15
2001 Scheme	para 16
2008 Scheme	para 16
2012 Scheme	para 21

- (3) Where the CICA or the Tribunal determines to make an award of compensation it may pay the award subject to conditions or to be held on trusts. The precise scope of the power to impose such trusts and conditions varies between the Schemes:

1990 Scheme	para 9	If in the opinion of the Board it is in the interests of the applicant (whether or not a minor or a person under an incapacity) so to do, the Board may pay the amount of any award to any trustee or trustees to hold on such trusts for the benefit of all or any of the following persons, namely the applicant and any spouse, widow or widower, relatives and dependants of the applicant and with such provisions for their respective maintenance, education and benefit and with such powers and provisions for the investment and management of the fund and for the remuneration of the trustee or trustees as the Board shall think fit. Subject to this the Board will have a general discretion in any case in which they have awarded compensation to make special arrangements for its administration
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1996 Scheme	para 50	An application for compensation under this Scheme will be determined by a claims officer, and written notification of the decision will be sent to the applicant or his representative. The claims officer may make such directions and arrangements, including the imposition of conditions, in connection with the acceptance, settlement, payment, repayment and / or administration of an award as he considers appropriate in all the circumstances.
2001 Scheme	para 50	An application for compensation under this Scheme will be determined by a claims officer, and written notification of the decision will be sent to the applicant or his representative. The claims officer may make such directions and arrangements, including the imposition of conditions, in connection with the acceptance, settlement or trust, payment, repayment and / or administration of an award as he considers appropriate in all the circumstances. Any such directions and arrangements , including any settlement or trust may be made having regard to the interests of the applicant (whether or not a minor or a person under an incapacity) as well as to considerations of public policy (including the desirability of providing for the return of any parts of an award which may prove to be surplus to the purposes for which they were awarded) on terms which do not exhaust the beneficial interest in the award and which provide, either expressly or by operation of law, for the balance of the trust fund to revert to the Authority

2008 Scheme	para 50	<p>(1) An application for compensation under this Scheme will be determined by a claims officer, and written notification of the decision will be sent to the applicant or his representative....</p> <p>(2) The claims officer may make such directions and arrangements, including the imposition of conditions, in connection with the acceptance, settlement or trust, payment, repayment and / or administration of an award as he considers appropriate in all the circumstances. Any such directions and arrangements , including any settlement or trust may be made having regard to the interests of the applicant (whether or not a minor or a person under an incapacity) as well as to considerations of public policy (including the desirability of providing for the return of any parts of an award which may prove to be surplus to the purposes for which they were awarded) on terms which do not exhaust the beneficial interest in the award and which provide, either expressly or by operation of law, for the balance of the trust fund to revert to the Authority</p>
2012 Scheme	para 99 and 106	<p>99 A claims officer will notify the applicant in writing of the determination of the application</p> <p>106 A claims officer may give directions, impose conditions and make such other arrangements as the claims officer considers appropriate in connection with the acceptance, payment or administration of an award including for the purposes of:</p> <ul style="list-style-type: none">(a) making one or more interim payment;(b) establishing a trust to administer the award, on such terms or in accordance with such arrangements as the claims officer may specify;(c) retaining the award until the applicant's 18th birthday;(d) providing that an award is to consist in whole or in part of an annuity;(e) requiring the appointment of a deputy or guardian;(f) repaying the award in full or in part in the event that it is no longer required by the applicant, including by means of a trust on terms which provide for unused funds to revert to the Authority

(4) An applicant must provide written acceptance of an award

1990 Scheme	para 22
1996 Scheme	para 50

2001 Scheme	para 50
2008 Scheme	para 50
2012 Scheme	para 100

The last sentence of paragraph 22 of the 1990 Scheme provides:

“An applicant will have no title to an award offered until the Board have received notification in writing that he accepts it”

The paragraphs 50 put this differently and provide that:

“---- title to an award offered will be vested in the applicant when the Authority has received notification in writing that he accepts the award”

Paragraph 100 of the 2012 Scheme is in different terms and provides that:

“Where an applicant has been notified of the determination of their application --- and the applicant wishes to accept that determination an award will not be made unless the applicant sends written notice of their acceptance of the determination -----”

- (5) The 1990 Scheme provided for an applicant dissatisfied with an initial decision to apply for an oral hearing (para 22). Determinations under that Scheme are now made by the First Tier Tribunal. The 1996 Scheme and its successors contain provisions to enable a dissatisfied applicant to have a decision reviewed.

1996 Scheme	para 58
2001 Scheme	para 58
2008 Scheme	para 58
2012 Scheme	para 117

- (6) Decisions made under the 1996 Scheme and its successors may be appealed to the First Tier Tribunal.

1996 Scheme	para 61
2001 Scheme	para 61
2008 Scheme	para 61
2012 Scheme	para 125

- (7) No appeal lies from the decision of the First Tier Tribunal, although in appropriate cases it may be challenged by judicial review.

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2008 Scheme	para 50
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