IN THE COUNTY COURT AT CENTRAL LONDON
ON APPEAL FROM DISTRICT JUDGE BECKLEY

Claim no D58YX441

HHJ SAGGERSON
8, 9, 10, December 2020

BETWEEN:-

LONDON BOROUGH OF HARINGEY

Claimant/Appellant

-and-

IRENE EMILE
By her litigation friend and Deputy Sharon Amazigo

Defendant/Respondent

JUDGMENT
Electronically handed down corrected: 18 December 2020

Introduction

1. The Claimant/Appellant ("the local authority") is the authority with responsibility for safeguarding vulnerable people in Haringey and for authorising their detention pursuant to the Deprivation of Liberty Safeguards ("DoLS"). An outline of the statutory and regulatory scheme is to be found in the judgment of Garnham J. in *R on the application of Liverpool City Council and others v Secretary of State for Health* [2017] EWHC 986 Admin at paragraphs 1 to 19.

2. The Defendant/Respondent ("the Defendant") was resident in Haringey. She lived with her husband. They both suffered from dementia and as a result Mr Emile assaulted the Defendant on more than one occasion before the critical events relevant to this case in 2008. To safeguard this vulnerable adult the local authority placed her in a care home, Avon Lodge on 10 October 2008. Her placement there was made permanent on 15 April 2010. She remained there from 10 October 2008 to 8 March 2016 when, her condition having deteriorated, she was moved to the Stanford Nursing Home where she remained until her death on 27 August 2019. Mr Emile had died on 15 February 2013.

3. Mr and Mrs Emile had two children, Steven Emile and Sharon Amazigo and a further child of Mrs. Emile had been adopted by her husband.

4. Until the death of Mr. Emile in 2013 the family paid Mrs. Emile's care fees, but thereafter the former matrimonial home had to be taken into consideration when assessing her means. The family did not co-operate with the financial assessment and did not pay fees between 16 February 2013 and 5 June 2017 (the date on which the Defendant secured continuing healthcare funding after which no liability for fees arose). A deprivation of liberty enquiry was not undertaken until September 2015. The Defendant was moved to a nursing home on 8 March 2016. A standard authorisation of deprivation of liberty was eventually promulgated on 15 August 2016.

Capacity

5. The local authority accepts that it did not take steps to authorise the deprivation of liberty of the Defendant before then. The local authority now accepts the District Judge's finding that the Defendant lacked capacity to take decisions as to her residence from when she was first moved to Avon Lodge in October 2008; whilst the local authority considered at the time that she had capacity, and at all times acted on that basis, there is no appeal against the District Judge's ruling to the contrary.

Outstanding Care Fees

6. Because care fees remained outstanding from 2013 up to June 2017, the local authority commenced proceedings seeking payment. The Defendant defended through her litigation friend, her daughter Sharon Amazigo. She contended that she did not need to pay the fees because she had been wrongly deprived of her liberty. The District Judge rejected that submission. There is no appeal in respect of that. The District Judge held that up to 15 February 2016 (the "first period") the outstanding fees were recoverable by the local authority as a debt. Thereafter (the "second period"), due to the operation of section 69(2) of the Care Act 2014 the fees were not recoverable as a debt, but could be set off against any liability of the local authority to pay damages on the counterclaim for wrongful deprivation of liberty.

The Counterclaim

7. The Defendant counterclaimed for damages for wrongful detention. The essence of the counterclaim is that the Defendant lacking capacity to make decisions on her residence as she did from October 2008, the local authority failed to undertake any proper

assessment of her status or circumstances including reviewing these under the DoLS issued in 2009. The law on deprivation of liberty itself was clarified by the Supreme Court in *Cheshire West & Chester Council v P* [2014] AC 896. The local authority's case on the counterclaim was that even if Mrs. Emile lacked capacity and had been wrongfully detained, the failure to undertake the correct processes to authorise her detention was only a technical breach of the appropriate safeguards and protocols and proper authorisation would have inevitably followed had the local authority appreciated the Defendant's lack of relevant capacity in 2008. The local authority contended, therefore, that this was a case for only nominal damages.

Trial Issues

8. The issues for the District Judge were:
    a. Whether the Defendant had capacity to make decisions as to her residence from 10 October 2008 to 15 August 2016 (7 years 10 months), and if she did not, whether the unlawful deprivation of liberty meant that she did not have to pay care home fees;
    b. Whether the local authority had sought to enter into a deferred payment agreement with the Defendant and if not, what the impact of that was;
    c. The period and quantum of the claim for unlawful detention, including the general damages uplift and limitation.
    d. Interest and costs.

The District Judge's Order

9. After a hearing on 24 and 25 July 2019 and following a written judgment handed down on 8 November 2019 District Judge Beckley made an Order:
    a. Allowing the local authority's claim for unpaid care fees in the sum of £80,913.38 (as a debt for the first period and as a set off for the second period);
    b. Making no provision for interest on that sum;
    c. Awarding the Defendant the sum of £130,000 on the counterclaim for damages for unlawful detention for the entire period claimed plus a 10% uplift based on *Simmons v Castle* [2013] 1 WLR at 1252 (£143,000.00);
    d. Setting the two sums off against each other, ordering that the local authority pay the Defendant the sum of £62,086.62 by 28 November 2019;
    e. Ordering that there be no order for costs up to 7 May 2018 but that the Claimant

pay the Defendant's costs thereafter to be assessed.

The Appeal

10. The Defendant died between the date of the hearing and the date of the Order. The District Judge ordered that the action should continue by a representative of the deceased Defendant's estate. I shall continue to refer to "the Defendant" nonetheless. The Appeal proceeded under CPR 52.20 and 52.21 by way of review of the decision of the lower court.

11. The local authority appeals against the District Judge's Order with permission granted out of time by HHJ Baucher.

12. In hearing the appeal, I had the benefit of skeleton arguments from Ms. Hirst (Counsel for the Defendant/Respondent) and Ms. Rowlands (Counsel for the local authority). There were 3 volumes comprising the appeal bundle which included all the Defendant's relevant medical and social care records and notes, the court orders and transcripts of the District Judge's written judgments on liability and costs. There was a bundle of authorities. The bundles were also available in digital format. Oral submissions extended over 2 days, first in Court 62 and concluding on 9 December 2020 by Skype for Business video conference due to issues with the court facilities. I received further information from Ms. Rowlands on 10 December 2020 in the form of the judgment in *Liverpool City Council* (above).

13. There are 4 Grounds of Appeal.

    a. The first concerns the quantum of damages. The local authority submits that the District Judge's conclusions on damages and the sum awarded are so far outside any reasonable bracket of damages for wrongful detention given the evidence available and the particular facts of this case that the award is open to review by this Court on appeal. It is submitted that the District Judge should have made a nominal award of damages. Alternatively, the award was excessive and the District Judge ignored relevant evidence, reached unsustainable conclusions on the evidence, was unduly mechanistic and failed to apply any tapering of his award or take account of various different periods within the overall time of the

unlawful deprivation of liberty (7 years and 10 months). Alternatively, he failed to give evidence-based reasons to justify his approach and so this Court should assess damages afresh. It is further submitted that the District Judge should have addressed the local authority's case on limitation and that he was wrong to apply the 10% general damages uplift.

b. The second Ground is that the District Judge was simply wrong in his conclusion about deferred payment arrangements and his construction of section 69(2) of the Care Act 2014. Section 69(2) is engaged in this instance for the period between 16 February 2016 and 15 June 2017 ("the second period") but not for the period up to 16 February 2016 ("the first period").

c. Ground 3 maintains that the District Judge was wrong in refusing to add interest to the outstanding care fees due to the local authority. Although the award of interest is discretionary by virtue of section 69 of the County Courts Act 1984, the criticism of the District Judge is that in exercising his discretion on the grounds that the Defendant had been wrongly detained during the period over which the outstanding fees accrued he neglected to account for the fact that he was also awarding substantial damages for wrongful detention and the withholding of fees (as he found) was not justified as a matter of law.

d. Finally, the local authority criticises the District Judge's order as to costs.

Damages – summary of submissions

14. In more detail, the local authority submits that the District Judge's approach to damages was flawed in principle and the damages awarded were manifestly disproportionate.

14.1 Damages were awarded for the full period for which the Defendant lived at Avon Lodge, despite the fact that she repeatedly stated that she was happy living there and that she did not want to go back to the former matrimonial home where she had been unsettled and at risk.

14.2 Although the Defendant lacked capacity, she was nonetheless able to form and express views as to her residence. It is variously recorded in the extensive medical and care records that she did not want to return to her former matrimonial home. This, it is submitted, was overlooked in the calculation of damages.

14.3 Had the local authority realised that the Defendant lacked capacity, it would have inevitably authorised her detention, so that nominal damages only

should be awarded: *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 [2011] 2 WLR 671 and *Bostridge v Oxleas NHS Trust* [2015] EWCA Civ 79.

14.4 There were issues with the Defendant's mental and physical health that indicated that alternative accommodation placement or less restrictive arrangements were simply unrealistic; for example, after the Defendant suffered seizures in July 2015.

14.5 Whatever concerns the family had about the Defendant and her accommodation in a care home there was no official challenge made to the Court of Protection about the Defendant's placement at Avon Lodge by her family.

14.6 Undue weight was placed on the wishes of the Defendant's family about the accommodation and care arrangements and there was a failure to prioritise the Defendant's own views, albeit in the context of a lack of capacity.

14.7 He was simply wrong to conclude that alternative and less intrusive or restricting accommodation and care options were not considered in the Defendant's best interests.

14.8 The District Judge failed to focus on and have proper regard to the actual impact of the unlawful deprivation of liberty on this particular Defendant in circumstances where the unlawful deprivation was "benign", unchallenged, consistent with the Defendant's own wishes expressed from time to time, and at least initially designed to secure her own safety. The submission is that there was no adverse impact on the Defendant.

14.9 There was no tapering of the damages to account for the lengthy period involved and no account was taken of the reality that different considerations should apply to different periods of the detention.

14.10 The amount awarded is markedly out of proportion when compared with awards for serious personal injury.

14.11 The District Judge appeared to consider that there was a tariff based on the limited number of authorities available.

14.12 He was wrong to apply the 10% uplift and to reject the local authority's case on limitation.

15. Ms. Hirst on behalf of the Defendant submits that the District Judge heard oral evidence and considered written statements together with a large number of documentary records as a result of which he reached factual conclusions on the local authority's conduct, its processes and potential accommodation and care alternatives for the Defendant. He reached conclusions he was entitled to reach on the facts as he found them, and this court should not interfere. Central to the District Judge's approach on the facts was the failure of the local authority to comply with the provisions of the Mental Capacity Act 2005, particularly the best interests requirement in Schedule A1 and he was entitled to conclude that the local authority's inadequate approach to capacity was the real cause of its failure, as he found, to consider alternative and less restrictive accommodation and care options. Accordingly, this was not a nominal damages case. On quantum it is submitted that the District Judge addressed such authority as there was and appropriately distinguished the facts to meet the particular circumstances of this case. Given the considerable period of detention, and taking the lower starting point that he did, the District Judge's award of damages was within a bracket and no point of law or principle is disclosed justifying reconsideration. I accept Ms. Hirst's submissions.

Nominal Damages

16. I reject the criticisms made of the District Judge's approach and of his conclusions.

17. The District Judge noted that he had been referred to extracts from the large volume of documentary material presented as evidence and acknowledged the inevitability of each party concentrating on such extracts as best supported their respective contentions. Understandably, the same thing happened on this appeal review. He also noted that he was only going to refer to some selective parts of the material to which he had been referred. He was entitled to do this. It was no part of his function to rehearse every potentially relevant feature of the evidence. Provided his overall approach was balanced and fair (as it was) it would have been disproportionate for him to do more than he did in highlighting what he was entitled to regard as certain salient features of the evidence. He was entitled to consider the conclusions of the Local Government Ombudsman and the review report from the London Borough of Enfield dated 9 June 2016 as being unhelpful to his task. Such conclusions were, in any event, not binding.

18. The District Judge made important findings of fact. These findings also indicate that the District Judge had well in mind that the detention period was capable of being divided into different component parts. He said (paragraph 51 of the transcript of the judgment):

> "*I consider that a return home was a possibility if extra care was provided to IE's husband who was clearly finding caring for a person with dementia difficult. Once IE's husband died on 15th February 2013, the Claimant's safeguarding concerns no longer applied and there was a further possibility of a return home. I accept the evidence of Sharon Amazigo (para 67, [1722]) and Steven E (para 20 [1674]) that there was a possibility of their brother, Colin, returning to live at home with his parents to provide support. I accept the evidence of Sharon Amazigo (para 68 [1723] and Mr Obijiofor (para 44 [1689]) that they would have been happy for IE to live with them. The Claimant says that no such offers were made. However, it appears to me that alternative residence was not considered because of the failure to consider IE's lack of capacity to make decisions regarding residence".*

19. This short extract makes clear that the District Judge considered the evidence on both sides and on critical issues preferred the evidence of the family to the effect that options other than a return to the matrimonial home were potentially viable with various levels of support, which in turn is indicative of the fact that the local authority, when considering the Defendant's position in, for example, 2008 and 2013 not only overlooked such options but also failed to consider less intrusive or restrictive options to accommodation in a care home. It seems obvious that the District Judge's reference to "alternative residence" was a reference to residential and/or support options involving the family rather than a reference specifically to Avon Lodge or care homes generally such as *Priscilla Wakefield House* (which was not viable due to its poor performance levels). There were options short of (or other than) residential care, so the District Judge found, on the basis of the family's evidence that he accepted, that were not fully considered by the local authority. He decided that this all derived from the fact that the local authority thought the Defendant had capacity to make her own residential decisions rather than a conscientious consideration of less intrusive options including family options. He was entitled to bear in mind that the personal reflections of the Defendant tended to depend on who she was talking to as he was entitled to have in mind her historical preference not to be consigned to a care home.

20. In my judgment this was the foundation of the District Judge's conclusion that this was not a "nominal damages" case. He was plainly satisfied on the facts that care home

residence was not inevitable despite the Defendant's difficult and deteriorating condition and the complications presented by a struggling husband up to 2013. He was entitled so to conclude particularly as the burden of demonstrating that care home residence was inevitable (from whatever date) was on the local authority. The reality was that the Defendant's position was not reviewed at all between 2010 and 2016. The District Judge obviously considered this to be a further significant failure on the part of the local authority. So it was.

21. The District Judge was entitled to conclude that the local authority's failure to comply with the Mental Capacity Act 2005 particularly with regard to the best interests provisions of Schedule A1 were substantial and causative of harm. He was entitled to conclude as he plainly did that the local authority had not proved that it was inevitable that the Defendant's care would have been the same had the statutory framework been properly deployed in 2008 or at any other time before August 2016 and that it was speculative to proceed on the basis of what the Court of Protection might or might not have done had a challenge been initiated. He was entitled to proceed on the basis that the local authority's failures were more than merely technical ones.

Quantum

22. Having decided that this was not a nominal damages case the District Judge had the difficult task of assessing substantial damages in circumstances where authority is sparse and approved settlements of limited assistance.

23. The District Judge awarded £130,000.00 (uplifted to £143,000.00) for the 7 years and 10 months of unlawful deprivation of liberty. This amounts to just under £1,400.00 per month or £1,500.00 with the general damages uplift. The question on appeal is whether the award is so far off the wall or was based on inappropriate considerations such as to warrant reassessment.

24. The District Judge did not apply a tariff. He did not award monthly damages and in doing so fail to taper the award. All he did was to try and maintain his bearings by a broad comparison with cases such as *Neary* with appropriate adjustments. He awarded a single lump sum covering a very long period of time, implicitly recognising that over such a long period of time there would be ebbs and flows with regard to the harmful impact on Defendant within that period. Others might have chosen to subdivide the

whole period into artificially identifiable slots (e.g. 2008-2010; 2010-2013; 2013- 2016 and so on). If this had been done, no doubt he would have been accused of being unduly mechanistic. Quite apart from anything else no identifiable periods (artificial, mechanistic or otherwise) were submitted to the District Judge for his consideration. In adopting the approach he did, the District Judge was conscious that the facts he was dealing with were very different from the authorities to which he was referred and he reduced the award accordingly. It is impossible to criticise the District Judge for concluding that such a long period of time is likely to yield a significant sum of money in compensation once he had decided that it was not a nominal damages case. I do not consider that the "lump sum" approach is open to challenge in principle. I doubt that the District Judge considered that in adopting this approach there was any risk that others might crudely divide his total by 94 equal months in a forlorn attempt to find some sort precedent or benchmark.

25. In assessing the damages the District Judge was entitled to bear in mind that for nearly 8 years the local authority had been unwittingly officious and had overridden properly formulated considerations of the Defendant's best interests and the potential this yielded for trespassing on her freedom of movement more than was essential in the light of family or other supported residential options that could have been considered short of consigning her to a care home. He was entitled to bear in mind that historically the Defendant had expressed a firm preference not to live in a residential home and that for 6 years the local authority had not properly reviewed the Defendant's status; neither had the position been properly reviewed after the death of her husband in 2013. Any award would also have to take into account, as did the District Judge, the fact that in her declining years the Defendant was unlawfully subject to routine direction by residential staff, had her daily life and visits subjected to a formal regime and contact with family subjected to official approval (however benign), or at least there was a greater degree of control than the family's evidence would have warranted. These are all real consequences of a confinement albeit falling short of being locked down or physically restrained.

26. Ms. Rowlands on behalf of the local authority puts this part of the appeal in this way:

"The total award made by the Judge is the equivalent of the Judicial College Guidelines award for the loss of one eye and reduced vision in the other (category 5(A)(c)), the loss of both kidneys (category 6(H)) or the loss of an arm (category 7(E)(b)). The loss to the Defendant simply does not compare. To put it another way, she was recovering per month the equivalent of the award for the loss of a tooth: category 9(b)(f). It is submitted that it was wrong in principle to award that amount when she was not significantly disadvantaged by her detention" ...

...The [District] Judge's award of damages makes no attempt to consider the level of distress actually felt by the Defendant at her detention. Had he done so, he would have realised that she was not distressed, and that a minimal award was therefore appropriate. The amounts awarded are too high to compensate someone for living in a care home which met her needs and was where she wished to live, even if attempts could have been made to place her with her family".

27. In my judgment there is some force in this part of Ms. Rowland's submissions. There can come a point when an award is so strikingly disproportionate to the actual harm, distress, inconvenience and intrusion suffered by the injured party that it is proper to interfere with it.

28. If the submission was that the damages awarded were very generous; on the high side or even at the very top end of the permissible range for this sort of "benign" confinement I would be inclined to agree. However, that is not the test on appeal and in my judgment the award was not to a sufficiently high degree disproportionate to the harm suffered by the Defendant as to warrant its being set aside. The District Judge was not only entitled, but obliged, to take into account the fact that as a result of the local authority's failures the Defendant's freedom was unlawfully compromised for the greater part of the last decade of her life where less intrusive options of accommodation and care should have been considered. The good intentions and benign motives of the local authority are scant consolation to the person deprived of their liberty.

29. In my judgment, the District Judge appropriately considered all the negative aspects of the circumstances of the Defendant's confinement including the initial shock of her removal from the matrimonial home, but he also gave proper weight and applied an appropriate counterbalance to account for the actual impact of those negative aspects

on the Defendant herself in terms of distress, inconvenience and anxiety even though throughout the relevant period the Defendant was accommodated and cared for in conditions and by personnel that were not in themselves subject to any significant criticism. The District Judge was aware, in drawing the distinction he did with the authorities to which he was referred, that this was not a case where matters were aggravated by oppressive, vindictive or high-handed conduct by the local authority. The District Judge was plainly not unaware of the positive attributes of the Defendant's care over the years. The District Judge was entitled to take a guarded view of the Defendant's own changing preferences expressed, for example to doctors, over years given the weight he was entitled to attach to the family's evidence. Balancing both sides of the equation in this case was classically a matter for the District Judge.

30. Personal injury damages comparisons are necessarily inexact. To compare the significant intrusions on the Defendant's life (as the District Judge found) in the context of otherwise reasonable accommodation and care provision (even for 8 years) to the loss of an arm or loss of functioning kidneys may at first glance appear to disclose a mismatch. However, we are not comparing like with like. Similar mismatches could easily be argued to arise as between different categories of personal injury damages, or that personal injury damages are generally too low despite the best efforts of the Judicial College. Comparisons with personal injury damages are only likely to be of some assistance in those cases where there has been short term incarceration where the shock element of the immediate loss of freedom is of particular importance and comparable to small personal injury claims for anxiety and distress. In addition the District Judge was entitled to bear in mind, as he obviously did, that limits on a citizen's freedom of movement in circumstances that are not lawful, warrant appropriately substantial damages.

31. Generous as the award was, I can identify no error of law or principle in the District Judge's approach nor do I conclude that it is manifestly excessive or disproportionate. Whilst the framework of regulation and guidance has been refined during the period of the Defendant's deprivation of liberty and the law authoritatively declared by the Supreme Court as recently as 2014 in *Cheshire West* (above) the fact that the local authority perceives itself to be beleaguered by what it may see as the shifting sands of guidance and continuing changes in emphasis regarding their legal obligations under

DoLS standards with significant impact on its resources, these factors do not disclose any error of law or principle on the part of the District Judge and are not grounds for reducing any damages awarded.

The 10% uplift

32. The District Judge enhanced the award he made in line with the judgment of the Court of Appeal in *Simmons v Castle* [2013] 1 WLR 1239. He was right to do so. There is no indication that the inexact comparators that the District Judge referred to (particularly *Neary*) had taken the consequences of *Simmons* into account. For the reasons advanced by Ms. Hirst the presumption must be that such comparators had not already been enhanced.

Limitation

33. The District Judge refused to allow the limitation defence which had been pleaded by the local authority limiting the counterclaim to the period after 27 June 2011 being 6 years from the date proceedings were issued. This point was pressed half-heartedly, if at all, by Ms. Rowlands. There is nothing in it and it is unnecessary for me to say anything more about it.

Article 5

34. The Respondent has raised the issue of "Article 5" in a Respondent's Notice. It is common ground that Article 5 adds nothing in relation to the quantum of damages in the event that substantial damages are awarded. The point, therefore, does not fall for consideration in the present appeal.

Deferred payment arrangement

35. This is engaged with what I have described as the second period of outstanding fees.

36. By section 69(2) of the Care Act 2014:

> *(1) Any sum due to a local authority under this Part is recoverable by the authority as a debt due to it.*
> *(2) But subsection (1) does not apply in a case where a deferred payment agreement could, in accordance with regulations under section 34(1), be entered into, unless—*
> > *(a) the local authority has sought to enter into such an agreement with the adult from whom the sum is due, and*
> > *(b) the adult has refused.*

37. On 2 March 2017 the Claimant wrote to the Defendant about possible deferment:

> *"It may be possible to defer part of the payment in accordance with section 34 of the 2014 Act … please let me know if you would like to explore this option".*

38. The letter concluded by giving the Defendant until 24 March 2017 to make proposals for payment. The Defendant did not respond to the invitation contained in that letter.

39. The District Judge held that this letter was insufficient to amount to "seeking" within the meaning of section 69(2)(a). In doing so he was unhindered by authority and, in my judgment, he was right. I reject the submission made by Ms. Rowlands on behalf of the local authority to the effect that such a conclusion is a positive invitation to others to ignore correspondence and do nothing. The proper construction of section 69(2) is a matter of law but the application of the duly construed subsection is fact sensitive. The District Judge was entitled to conclude as he did that this extract from a much longer letter about a variety of matters was not sufficient to constitute the seeking of a deferred payment agreement. In that context he was also entitled to conclude that silence on the part of the recipient did not constitute a refusal. The District Judge acknowledged that had the circumstances and the correspondence been different, the answer may well have been different. This is an unstartling conclusion that is not open to valid criticism. At best the sentence lifted from the letter of 2 March 2017 is an invitation to the recipient to open discussions about the possibility of deferment for a yet to be negotiated part of the outstanding fees. The District Judge was entitled to conclude that the sentence was not asking for or attempting to secure or obtain a deferred payment arrangement.

Interest

40. On the other hand, the local authority "sought" interest on outstanding fees, which by the date of the judgment was £14,790.52 on the District Judge's figures. In other words, the local authority asked for or attempted to secure interest on the amount outstanding. Apparently, Counsel for the Defendant accepted that interest should be awarded. Nonetheless, and I am told without giving the local authority the chance to make submissions, the Judge refused to award interest. He said this:

> "*The Claimant claims interest on the outstanding care home fees pursuant to section 69 of the County Courts Act 1984. Section 69 holds, 'there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as may be prescribed'. The award of interest pursuant to*

section 69 is a matter for my discretion. Given that IE's deprivation of liberty in the care home had not been authorised by the Claimant, I do not consider that any interest should be awarded on those care home fees."

41. In submission it is said by the local authority:

> *"There was no reason to deprive the Claimant of interest on care fees when the Judge had found that those fees were payable despite the Defendant's lack of capacity and consequent unlawful detention. His decision was arbitrary and unjudicial. The Claimant feels aggrieved that there was no opportunity for them to make submissions on interest".*

42. I reject that submission. In reaching what is a discretionary decision the District Judge was entitled to evaluate and weigh in the balance all the circumstances of the claim and counterclaim. He was not depriving the local authority of interest as a means of imposing some additional, punitive compensation burden upon it, but merely reflecting his evaluation that in all the circumstances interest was not warranted in the context of this action because the liability for fees derived from periods of unlawful detention. This was a sustainable conclusion and I see no reason for departing from it.

43. To the extent that the local authority's contention is that there was at this point of the process a procedural irregularity in not allowing Ms. Rowlands to make submissions (particularly given Ms. Hirst's concession) the best that could be hoped for would be that this Court would revisit the exercise of the same costs discretion in the light of those submissions. The result would be the same.

Costs

44. The exercise of the evaluative discretion on costs is a matter for the trial judge *par excellence.* The Claimant contends that it should have been awarded its costs of the claim in full and that these should have been paid by the litigation friend.

45. It can be nobody's fault but my own, but I have been puzzled by this particular criticism of the District Judge's ruling. He took into account under CPR 44.2 the impact of the Defendant's "drop hands" offer and its effective date (7 May 2018) and made no order for costs as between the parties before that date.

46. Given that the net result of the litigation was a significant balance in damages due from the local authority to the Defendant, some might have thought that an order for costs in the Defendant's favour throughout was the more appropriate order. In the exercise of his evaluative discretion the trial judge obviously thought otherwise, and the Defendant does not challenge that determination. To the extent that the local authority won the claim and the Defendant won the Counterclaim there is a justifiable symmetry in making "No Order" up to 7 May 2018 and I can see no reason to interfere with that order.

47. I accept Ms. Hirst's submission that there is no basis for making a costs order against the litigation friend. There is no general principle to that effect in the absence of bad faith or unreasonable conduct. The District Judge was right not to make any such order.

Conclusion

48. For the reasons given above this appeal is dismissed and the Order of the District Judge affirmed. Subject to written submissions that I may receive directly to my judicial email address by 4.00pm on 18 December 2020, the Order dismissing the appeal will make provision for the local authority to pay the Defendant's costs of the Appeal to be subject to detailed assessment if not agreed and for any stay on enforcement to be lifted.

18 December 2020

Judgment Ends