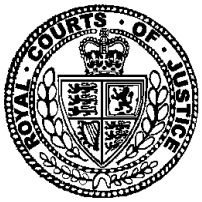
**Judgment Approved by the court for handing down**
**(GWS and others v St Thomaas Becket)**



Neutral Citation Number: [2023] EWHC 3321 (KB)

Case No: KB-2022-004591

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/12/23

**Before** :

**Master Brown**

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**Between :**

**GWS (A MINOR BY THEIR LITIGATION FRIEND FWH) (1)**

**WIG (2)**

**APL (3)**

**Claimants**

**- and –**

**ST THOMAS BECKET CATHOLIC PRIMARY SCHOOL**

**Defendant**

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-and-

**Nathan Tavares KC** (instructed by **Stewarts Law LLP**) for the **Claimants**
**Lucy Wyles KC** (instructed by **Weightmans LLP**) for the **Defendant**

Hearing dates: 9 and 22 November 2023
(draft circulated 18 December 2023)

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# Approved Judgment

**Judgment Approved by the court for handing down**
**(GWS and others v St Thomaas Becket)**

## Judge Brown:

1. This is my decision on an application to approve the setting up of a bare trust for the First Claimant.

## Background

2. The First Claimant seeks damages in respect of injuries he suffered on 11 December 2019, then aged 7, at his school's annual carol concert when the costume he was wearing accidently set on fire. He suffered life threatening full thickness burns to his torso, arms, neck and face, covering 45% of his body surface area. The Second and Third Claimants were present at the concert, and bring claims as secondary victims. Liability is not in dispute in any of the claims.

3. I have provided directions to an assessment for the claims of the Second and Third Claimants and for ease of reference, I refer to the First Claimant as 'the Claimant' in this judgment. His aunt acts as Litigation Friend and she has attended both hearings by videolink.

4. The Claimant has undergone extensive treatment and has been left with serious and substantial scarring. He underwent scar release surgery in June this year. I understand that multiple surgical interventions are anticipated throughout his lifetime, the extent of which is not yet fully known but can, in broad terms, be estimated.

5. Interim payments have been made totalling £430,000 in respect of the Claimant's claim: £30,000 was paid in December 2020, £50,000 in July 2021 and £150,000 in September 2021; following the issue of proceedings on 1 December 2022, in March 2023 a further £200,000 was paid.

6. I understand that the Claimant has been provided with extensive support, both educationally and psychologically. The medical evidence suggests that his reports at school are good and I am told that he enjoys taking part in sport. Indeed he has recently moved from a fee paying preparatory school to a senior school, having passed the senior school 11+ entrance examination. The available evidence, however, also suggests that although he has not yet developed any significant psychiatric or psychological injury as a result of his injuries, when he reaches early adolescence, in about 2 years, some problems of a psychological nature may then emerge.

7. It is because of the risk of such problems emerging and the potentially serious impact on the level of damages if the Claimant were to develop such a reaction that the parties were agreed at the first hearing of the CMC on 9 November that I should not then list the claim for assessment. Ms. Wyles KC was subsequently instructed to attend the resumed hearing and there was no substantial dissent from her to this suggestion and notwithstanding some initial reservations of my own I was satisfied that it was appropriate to delay consideration of the listing of any assessment. This is however on the basis that some progress can be made as to the service and possible agreement in respect of the core medical evidence in the meantime, and a decision can be made at the next CMC, in about 2 years' time, as to whether and/or what provision should then be made for further medical or non-medical evidence.

8. I have taken on board the concern of the Claimant's advisers as to the view, expressed in the report of Dr Berelowitz, Child & Adolescent Psychiatrist, that the Claimant may be at particular risk of developing a psychological reaction when he reaches adolescence and again in mid to late (16-17) adolescence. General experience might however suggest that whilst early adolescence and possibly early adulthood are particular points at which the Claimant might be more vulnerable to a psychological reaction, it might also be thought that the Claimant would remain at some risk of some such reaction throughout his life. I am not sure that it is possible to be quite as prescriptive as it is said Mr. Berelovtiz's report should be read. In any event, the court will be better informed on this matter at the next CMC. Needless perhaps to say, the deferral of the certainty that comes with an assessment of the final award carries with it some toll. In general, it is in the interest of claimants, and other parties, to resolve claims in as short a time period as is reasonable; at the risk of stating the obvious, a court is of course able to take into account uncertainties as to prognosis and vulnerability. Be that as it may, there is, I think, a real prospect that the claim will be considered suitable for an assessment in the interests of the parties well before the Claimant's 18th birthday. Indeed the directions that I have made are subject to further order and do not prevent the parties pressing for an earlier listing than the current directions might otherwise envisage if a way forward can be found to address the concern that Dr Berelowitz has raised.

9. Of the sums paid on an interim basis by the Defendants some £270,000 has been spent. Payments have been made for case management, treatment, various therapies including physiotherapy and aids and equipment. I understand that the Claimant's parents are divorced and live some distance from each other and funds have been made available to pay for what was assessed, as I understand, to be the Claimant's particular transport needs. This includes the purchase of a vehicle and, I understand, driving lessons for the Claimant's father (the Claimant currently travels to his father's home at weekends and in the holidays). The payments have also been made for private school fees, the Claimant having moved into a fee paying school and members of the Claimant's family have also been reimbursed for various expenses incurred in respect of assistance or attendance at hospital and the like. There is about £160,000 remaining to be distributed or invested pending future expenditure. After accounting for outstanding payments which are currently due or under consideration (amounting to about £20,000), if all these payments are made this would leave about £140,000 currently in the solicitors' client account for the Claimant.

10. The Claimant's solicitors sought my approval to the payments out to meet the particular expenses which have been incurred. I understood Mr. Tavares KC for the Claimant to have been frank with me in telling me that such approval would, if it were granted, be relied upon in the assessment of damages albeit that it would not bind the judge. I raised some concerns in the hearing about approving specific payments not least because I lack the evidence to consider these payments properly and I would, I think, need advice from counsel as to their recoverability. Whilst I doubt there could be any real prospect of dispute about the need for treatment and therapies and would expect in general terms the funding to be recoverable, for reasons which were explored in argument (and it is not necessary for me to repeat) it was not entirely clear to me that there was no room for argument about some of the other expenses. Indeed I had some concerns as to the extent to which it was appropriate for me to descend into detail as to the recoverability of the payments made. In the event, it was common ground

between Mr. Tavares and Ms Wyles, at least for current purposes, that it was sufficient that I should approve the making of interim payments by the Defendants so that they had good receipt- which I have done. Mr. Rogers is, I understand, an experienced personal injury solicitor with experience dealing with the high value claims on behalf of protected parties and has been and will be in a position to consider the appropriateness of payments out. I need, of course, assurance that payments are being made for the benefit of the Claimant but the precise nature of the expenses and the manner in which expenses are met if they have been incurred for the Claimant to undergo treatment, for instance, are not I think a matter for me. It seems to me appropriate for trust to be placed in him, as officer of the court, and in the litigation friend, who is certified as being a suitable person to act as a litigation friend, to ensure that the payments made are appropriate. Where interim payments are made before issue of proceedings - which is, of course, commonly the case – the responsibility of ensuring funds are properly used for a minor must necessarily rest on the solicitor and that must remain the position afterwards subject to supervision thereafter. The court is not able to predict the evidence that might be available to a trial judge and it seems to me - and as I understand the advocates to accept -not able to conduct some form of mini-trial on issues that might arise.

11. Against this background and the prospect of further interim applications or requests for further payments from the Defendants, the Claimant's solicitors say, in effect, that it is not appropriate for them to hold such a large sum of money in their client accounts on a long term basis not least because that would infringe relevant professional rules concerning the use of client accounts. For this reason it is said that a trust should be set up to administer and manage payments to be paid to the Claimant.

12. Neither counsel, perhaps understandably, was however able to give me any very clear indication as to the level of any further sums that might be sought by way of further interim payments from the Defendants. The interim payments are currently being used to pay school fees and there is likely, I would assume, to be a significant ongoing need for treatment and therapies. The reports of Mr Healy, Consultant Plastic and Reconstructive Surgeon, instructed by the Claimant, also indicate a need for a conditioned / climate-controlled accommodation and transport and a need for some adaptations at home is intimated. I understand that the Claimant finds it difficult to regulate his temperature and it is suggested that perhaps a garden room with air conditioning may be appropriate. There is also reference to the possible need for a saline pool.

**Relevant provisions/guidance**

**- the CPR and guidance**

13. CPR r 21.10 provides as follows:

***Compromise etc. by or on behalf of a child or protected party***

*(1) Where a claim is made –*

*(a) by or on behalf of a child or protected party; or*

*(b) against a child or protected party,*

*no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.*

…

14. CPR r 21.11 provides as follows:

***Control of money recovered by or on behalf of a child or protected party***

*(1) Where in any proceedings –*

*(a) money is recovered by or on behalf of or for the benefit of a child or protected party; or*

*(b) money paid into court is accepted by or on behalf of a child or protected party,*

*the money will be dealt with in accordance with directions given by the court under this rule and not otherwise.*

*(2) Directions given under this rule may provide that the money shall be wholly or partly paid into court and invested or otherwise dealt with.*

15. It is, of course, usual practice in accordance with these provisions for the court to approve the making of interim payments by a defendant. As Mr. Tavares pointed out even at this interim stage the court is not limited to ordering that sums are paid in court and invested in court funds and the court has the power to approve the setting up of a trust to administer payment of expenses.

16. Footnotes in the White Book at 21.11.3 contemplate the management of child funds in a bare or discretionary trust, albeit they relate principally to final awards of damages rather than interim funds.

17. The King's Bench Guide has a section on Trust Deeds which largely follows what is in the White Book, but states:

"*As the court is giving up control of the child's funds, it will, save in exceptional circumstances, require that the bare trust have a professional trustee (or trust corporation) throughout the child's majority* [sic – should be minority]. *Standard trust provisions are not always appropriate and the Master will expect to see the terms of trust in order to approve them. The Trust must provide that issues such as change of trustee and dissolution of the trust remain subject to the approval of the court until the claimant is 18*".

- **Solicitors Accounts Rules**

18. As to the holding of money in a client account, Rule 3.3 of the Solicitors Accounts Rules provides:

> *You must not use a client account to provide banking facilities to clients or third parties. Payments into withdrawals from a client account must be in respect of the delivery by you of regulated services.*

19. Further, rule 2.5 of these rules requires law firms to return client money promptly to the client or third party for whom the money is held, as soon as there is no longer any proper reason to hold those funds.

20. The reasons for these rules are set out in the guidance to the rules to which I have referred. It is not necessary for me to rehearse it. It is however plain (indeed repeated in guidance) that the rule is not intended to prevent the usual practice of solicitors as part of their traditional work.

**The options for managing the interim funds**

21. The receipt of payments by solicitors as damages on a final basis and interim basis is part of the pursuit of a claim for personal injury. Of necessity[1] sums will be paid to solicitors who will receive the sums on behalf of the Claimant. Nevertheless, I can see that there might be legitimate concern if a client account were being used to keep substantial sums of money over the medium or long term. Going forward then, it seems to be necessary to consider alternative arrangements of which I think there are essentially two options: the creation of a bare trust ('the trust option') and the payment into Court funds, in particular the Special Account, pending further directions ('the CFO option').

22. I should perhaps say that Mr Tavares appeared to suggest that there is a distinction to be made between an arrangement under the CFO option which involves the litigation friend withdrawing and distributing funds and another, with solicitors doing this. I am not sure that there is such a clear distinction to be made. I would not expect the litigation friend personally to be administering the interim sums available in this case, albeit she will be involved in this process and clearly give instructions as appropriate to the solicitors.

**The trust option**

23. The proposal is that two trustees are appointed: the Claimant's Litigation friend, and Wilsons Trust Corporation Limited ('WTCL'), who would be appointed as the professional trustee contemplated in the guidance to which I have referred.

24. Ms Frances Mayne has provided two witness statements in support of the application for approval of a trust. She is a solicitor and partner of Wilsons LLP solicitors ('Wilsons'). She is also a director of WTCL which she describes as her firm's trust corporation. It is her firm contention that it would be in the best interest for the trust to be set up with her, as I understand her witness statement, to be involved in the management of the trust.

25. The proposed trust deed provides that trustees can charge for their work in connection with the trust. But, as the explanatory notes to the deed make clear, in practice WTCL will not charge directly, but will instruct Wilsons Solicitors LLP to

[1] Not least to preserve and give effect to the solicitor's lien.

carry out work on its behalf and their time (and presumably expenses) will be charged as an expense of the trust.

26. Estimates of costs have been provided. Wilsons have offices in Lincoln's Inn Fields and Salisbury. Ms. Mayne's hourly rate is £375 per hour which she suggests reflects Salisbury rates. An assistant solicitor is to charge at £325 per hour and a fee earner described just as a solicitor at £225 per hour and a paralegal at £145. On the basis of these rates, Ms. Mayne estimates the costs of setting up the trust at £2,400 (inclusive of VAT as are all the figures she has given). She estimates the management of the trust in its first year at £9,000-£11,100 and the following years at some £6,000 - £7,200 per year. Should the Claimant's claim settle and the trust continue, she estimates that her firm's fees for the first two years post settlement would be some £27,360-£29,760 and thereafter run at about £8,400- £10,800 until the Claimant reaches the age of 18. For a period of about 6 months after the Claimant turns 18 costs are estimated at about £3,150.

27. There is, of course, no suggestion that the Claimant will lack capacity at 18. Indeed, as I indicate above, he appears to be progressing well at school. From aged 18 the Claimant will be free to decide how he spends such damages as he may receive. It was suggested by Mr. Tavares, at least as I understood his submission, that one of the advantages of setting up a trust now is that there will be one in place when he turns 18 and it may be in his interests to have a trust for himself at that age.

**Decision and reasons**

28. I should perhaps say before I set out my decision and reasons, that I had understood it to be said in support of the trust option that this was a common arrangement (it will be appreciated that where a claimant is a protected beneficiary a Deputy could be appointed) and that the Claimant's solicitors were aware of one other case where (as I understood it) a trust had been set up possibly - albeit I was not clear about this - on an interim basis. Whether or not it is a common arrangement does not, I suppose, really matter: I have to consider each case on its merits. But, for what it is worth, my enquiries (and experience) suggest that the setting up of a trust is not a common arrangement, at least not on an interim basis.

29. Having considered all the matters raised by Mr. Tavares and his solicitors and bearing them all in mind, not least of which is the expense, I am not satisfied that it is appropriate to approve the trust option. I address below the various grounds relied upon in support of the trust option as they were developed and add to them my own concerns, particularly as to the recoverability of the costs of the trust option.

**Alleged delays with the CFO option**

30. As I understand, the CFO option was not at first considered by the Claimant's solicitors to be appropriate due to what is said to be a "*constant need for interim funds to be actively managed and used for the First Claimant's treatment, therapies, accommodation and education*". There was, as the point was developed, a real risk of the Claimant's rehabilitation suffering undue to delay in obtaining the release of funds from the Court Funds Office.

31. The CMC at which I was first asked to approve the setting up of a trust had been listed by videolink for one hour and we had exceeded the allotted time before we got to this issue (there being other matters to address) and so it was necessary to adjourn the hearing. However I had some concern about this contention, I was not aware of there being any significant delays in processing payments from Court Funds- indeed my own experience was that these matters were dealt with efficiently by the Court Funds Office.

32. There is no detail provided in the witness statement to support the assertion that the Court Funds Office was not able to deal with the demands associated with managing this fund and I am not satisfied that this is the case. I say this not only on the basis of my own experience but also having spoken to other Masters who have considerable experience dealing with requests for payment out of court funds. I do understand that requests for payment out may sometimes take a matter of a few weeks. But it is difficult to imagine that such periods would cause any serious problem to the Claimant. Further steps can be taken to reduce any such delays by, for instance, contacting the assigned Master directly by email and requesting the payment to be arranged on an expedited basis. Indeed, it is also possible to arrange for regular payments to be made.

**State Benefits**

33. One of the advantages to having sums paid by way of damages put in trust is that this might protect entitlement to benefits (which would otherwise be lost). I understand that for adult claims such a consideration might be an issue and that HMRC approve such an arrangement. The Claimant however is not expected to receive benefits as a minor. Whilst I accept that this might conceivably be a consideration when the Claimant reaches 18 this does not seem to me any justification for setting up a trust now.

**Investment Opportunities**

34. It was initially said that the trust option would offer more or less unlimited investment options so that a trust could maximise the return whereas if the money was put into the court funds it would be limited to the EITF and Special Account. The difficulty, to my mind, rather obviously is that the time frame for payment out to meet expenses is, or might be, relatively short. When the point was considered in the hearing it became clear the investment option contemplated on behalf of the Claimant was a deposit account and, possibly, NS&I bonds. If the money were to go into the Court Funds Office it would be invested in the Special Account not least because it would be assumed that the Claimant's Litigation Friend would want to have access to it in the short term.

35. It is correct, as Ms Mayne pointed out, that if invested in Courts Funds sums are likely to be restricted to earning interest at the Special Account rate and the Claimant loses the flexibility and benefit associated with a trust which might permit interim funds which are not earmarked for more immediate use to be invested in other funds. But given the time frames involved and the possible demands on the existing funds I have some concerns as to the extent this will cause any substantial prejudice. It was not a point developed by Mr Tavares, quite possibly because his concerns were that there

would be a need for further interim payments from the Defendant and the current funds are ear-marked for use over the coming years.

36. The Special Account currently pays 6 % interest. Historically it appears to have compared less favourably than it does now with other cash investments. But, as things stand it is difficult to see how the Applicant would do better. Of course I accept that there is every prospect that the interest rate on the Special Account may reduce. However, it is not at all clear how better investment returns might be achieved having regard to the likely demands on the fund.

37. Moreover, it was not said that Ms Mayne had experience or expertise to deal with or to advise on an investment strategy. I understood that further professional advice would be required on this (with a beauty parade of potential investment advisers). But it was not clear to me whether the potential costs of investment advisers had been factored into her estimates– albeit it might be assumed that in some way they would charge for their services.

**Cost effectiveness**

38. Following the concerns that I had expressed about the contention that the Court Funds Office could not deal with this matter effectively, it was this further ground which, as I understood it, lay at the forefront of the case advanced at the resumed hearing. It was developed in Mr. Roger's witness statement dated 21 November 2023 which was filed just before the second hearing.

39. In short, it is said that although the actual management of funds byt the CFO option is essentially free there are substantial solicitors' costs associated with it. Mr. Rogers refers in his witness statement to a need to review files for the purpose of providing the appropriate information and evidence to the Court Funds Office when justifying a request for release of funds, and arranging for the request to be checked and approved by the Litigation Friend and then actually making the said request to the Court Funds Office for such payments. He says that this is likely to require chasing and the requests are likely to be extensive and frequent.

40. Mr. Rogers also refers to information found on Gov.uk under the heading *Litigation Friends: manage a Court Fund Office account*. The page provides details of the information and evidence required by the Court Funds Office to permit the release of funds. He cites the website which states that upon writing to the Court, "*the Court will tell you whether you need to:*

- *provide evidence that the child will benefit*
- *provide proof of exact costs*
- *attend a hearing – the child may also need to attend*
- *pay a fee*"

41. Mr. Rogers says that the cost of dealing with the payments to date is £10,186 (again this and the subsequent figures in this paragraph are inclusive of VAT). The

schedule he has provided is broken down essentially only per year and to reflect changes of hourly rate. Going forward and to settlement at age 18, he relied on a schedule which estimated indicative costs at £55,650 on the basis of 10 transactions per annum at £7,950 per year. He anticipates that 70 hours of work per year would be spent by him at an hourly rate of £525 per hour and 35 hours for a junior fee earner at an hourly rate of £185 per hour. He refers also to the fee of £54 for requesting the court to withdraw sums held in court (and at 10 requests per year he puts the costs of such disbursements at £3780).

42. On this basis, as I understood Mr Roger's contention to be, the costs of the CFO option -essentially of managing, administering and assessing interim payments - were of the same scale, if not less than that that would be incurred if a trust were set up (see above - the estimate over two years of the costs of a trust was put at some £20,000). Much, if not all of this work would be avoided as I understood this case, if the trust dealt with the interim payments, and the trustee made payments direct to the Claimant's family. Indeed the release of these tasks would enable him, as it was put, to get on with 'running' the case.

43. I am not satisfied that Mr. Roger's approach is correct. Nor do I accept his assertions as to the costs on the CFO option. There are, I think, a number of matters that I need to deal with in some detail on these points.

44. Fundamentally, I do not accept the premise which appears to underlie the analysis put forward by Mr. Rogers in respect of the costs of the CFO option, namely that he would essentially be able to pass over responsibility for dealing with interim payment to the trustees. As Ms Wyles pointed out in her submissions, the description given by Ms Mayne in her witness statement of the work to be undertaken by her or her firm included time to be spent with the Claimants' solicitors liaising with them about interim payments and other work relating to the progress of the claim. It is plain that Ms Mayne anticipated that significant work would be undertaken by Mr. Roger's firm in this task and yet these matters had not been taken into account in his analysis. In short there would be a further additional layer of costs in dealing with the trust on top of the costs of Wilsons.

45. It would certainly be my expectation and understanding ( derived in part from my own experience including that as costs judge) that in high value personal injury claims the need for interim payments and their use would be something on which a care manager might be involved. Indeed, a solicitor does need to advise on the recoverability of payments made out to cover expenses. This is not a responsibility that I would expect to be passed on to a trustee; quite apart from anything else I am not sure Ms. Mayne has the necessary experience or expertise to advise on the recoverability of expenditure.

46. It will be appreciated that in many cases the Court Funds Office holds a fund for minors following a final award and in those cases litigation friends, or indeed other family members, may want to obtain the release of funds for the claim before the child attains the age of 18. Sometimes these applications can require scrutiny – a typical example being claims for the costs of holidays in circumstances where one might expect parents to pay for. I would not however expect the oversight of payments to the Claimant's litigation friend or to the solicitor in this case should be anything other than a fairly straightforward matter. I certainly would not expect it to require hearings

on a routine basis as is suggested, even allowing for the possibility that the court may have some queries on the request (which might be dealt with by way of a short discussion). The majority of such applications are dealt with on the papers. Case managers (sometimes jointly instructed with a defendant) should be keeping a tally of expenses incurred and in particular should be able to say when further funding is required for treatment etc. To the extent that a case manager continues to be required in this case, their reports, and any relevant medical evidence or explanations (from parents if need be) for the need for funds can easily be provided to the Court (direct to the Master) by email.

47. Even allowing for the fact that Mr. Roger's evidence as to the frequency of the transactions is in some measure supported by Ms Mayne, an experienced trustee, I would not expect the solicitors to have to have to liaise with the court for the release of funds, with anywhere near the frequency that is suggested. The prohibition on acting as a bank does not mean that the solicitors cannot hold some money in their client account pending payment out; indeed as I have indicated regular payments can be set up for some expenditure such as school fees (if appropriate).

48. Further, quite apart from the perhaps obvious concerns about the hourly rates Mr. Rogers has charged and is proposing to charge, I would expect a substantially greater degree of delegation of the work associated with interim payments. Indeed at least some of the work dealing with payments of this type are likely to be administrative in nature and not separately chargeable (that is to say it is work that is comprehended within the hourly rate charged for other progressive fee earner work).

49. Accordingly, I anticipate that the costs of and associated with communications with the court and administering payments would be substantially less than suggested – in any event very substantially less than the costs of setting up and maintaining a trust as estimated in Ms. Mayne's statement. In coming to this view I take into account concerns that whilst the Claimant's parents are understood to have an amicable relationship that might not always be so (a matter which might add something to the time that might be required dealing with this) and other such uncertainties.

50. Although, given my conclusions above, it is not necessary for the purposes of my decision I should perhaps add this. Not only do the costs of managing a trust involving the sort of sums which appear to be in contemplation look high to me (accepting of course I have nothing to compare them with), I am concerned that I have not been provided with any obvious mechanism by which charges of Wilsons solicitors might reasonably be controlled. The figures provided were estimates only and not fixed costs. Although not canvassed at the hearing, presumably Wilsons would present their bills to WTCL for payment and a claim would be made against the trust for work done. It would presumably be for WTCL to challenge the solicitor's bills and possibly, as a third party, the litigation friend. Given the apparently close nature of the relationship between Wilsons and the WTCL there are, it seems to me, obvious difficulties with this arrangement. The extent to which a third party may in law challenge a solicitor bill is currently the subject of some controversy[2] but even putting

[2] See section 71 of the Solicitors Act 1974 and *Kenig v Thomson Snell & Passmore LLP* [2023] EWHC 181 (SCCO) currently the subject of consideration by the Court of Appeal

aside this matter for current purposes it cannot I think be presumed that the Litigation Friend would have the wherewithal to challenge the costs of a professional trustee.

**Stress and inconvenience under the CFO option**

51. It was suggested that there would be considerable stress associated with making requests to the Court – given, it was said, the possible need for Claimants to attend a hearing. I perfectly understand why it would be concerning to the Claimant if he were required to attend the court on multiple occasions. But as I have already indicated my understanding is that the guidance cited is intended to encompass the situation where a litigation friend is acting without solicitors. I would consider it highly unlikely that attendance at court would be required for approving the release of funds on an interim basis. Communication with the court in large part by an email from a junior fee earner appending the case manager's report, relevant medical evidence and in some cases written input from the family would ordinarily be sufficient.

**Trust at 18**

52. The prospect that on turning age 18 the Claimant would want to hold his damages in trust was not something that I can wholly discount and, if this were so, he would at least have the benefit of the trust being up and running. Why he would want to do that, given the associated costs, when he might just seek some help from a financial advisor, was not clear to me. In any event if a trust were to serve some useful purpose at 18 it seems the only obvious saving would be the costs of setting up the trust (which would, presumably, be offset by the costs of any modifications which would be necessary to the trust when the Claimant turns 18).

**Potential purchase/adaption of property**

53. It is further contended that if for the benefit of the Claimant a property were purchased in the name of one of the parent, or indeed if substantial adaptions are made to a property owned by a parent, it might be appropriate to consider dealing with ownership of the property by way of a trust. I can see why in those circumstances the Claimant might require the setting up of a trust to protect his interest. But that, it seems to me, is a quite separate matter from the setting up of a trust for the managing of the interim funds.

**Other considerations including recoverability of costs in respect of the trust option/CFO option**

54. At the first hearing reliance was placed on the assertion in the first witness statement of Ms. Mayne that the Claimants' solicitors had advised her that at least the costs of setting up a personal injury trust and subsequent trust management until the Claimant reached the age of 18 would be recovered from the Defendant (albeit not thereafter). No real attempt was made beyond this to make good the suggestion that I think I was being asked to accept which was that these costs would be recoverable from the Defendant. Ms Mayne's witness statement indicated that she accepted this advice

as she asserted that in consequence of the recoverability of these costs there would be no financial detriment to the Claimant in the setting up of trust.

55. I raised my concern as to whether that advice was correct and as to whether expenses associated with the trust option may not be recoverable. If they were not recoverable and if I were to approve the trust option the Claimant may end up having to pay for it out of his damages - damages which he had received to pay for ongoing and future treatment or care.

56. As Ms Wyles made clear at the resumed hearing, the Defendant did not accept that it should pay for the creation of this trust or, if it were set up, for maintaining it. Mr. Tavares, properly recognizing the importance of this point, produced a number of authorities on the issue. None of them however, to my mind, provide any compelling basis for thinking that either the costs of setting up or of maintaining the trust would be recoverable.

57. In *Clerk v Greater Glasgow Health Board* [2016] CSOH 126 Lord Stewart, having it would appear, rejected a claim for damages for very serious personal injuries, produced a judgment on the damages which he would have awarded had the pursuer (claimant) been successful. The judgment included an allowance for the costs of a personal injury trust. The award would have been made on a final basis. The justification for the allowance was that although the pursuer had retained her intellect she had suffered neurological injuries which meant that she was completely dependent on others and could not communicate with non-family members save with the use of technology which was described as painstaking for her. The learned judge considered that the pursuer would be unable to administer her damages personally and would be vulnerable to exploitation. I note that the possibility of using Court funds does not appear to have been open to her.

58. In *OH v Craven* [2016] EWHC 3146 (QB) Norris J said [at 24]:

> *"There are other advantages and disadvantages [of a bare trust]. In the case of a minor the establishment of a trust also affords the opportunity for the trust to continue after majority if the applicant chooses not to revoke it. On the other hand, in all these structures not only is there investment risk, but there is also the risk of default by a trustee or by an investment manager.*
>
> *25 There is a growing popularity for personal injury trusts where the Court of Protection is not involved (and the possibility of their use even when it is: see Watt v ABC [2016] EWCOP 2532; [2017] 4 WLR 24). But their facilitation by the payment out of moneys in the Court Funds Office at the request of a capable adult or their approval at the request of a litigation friend in the individual case should not become routine".*

59. In *LW v Hammersmith Hospital NHS* Trust [2002] WL 498850 HH Judge Dean QC, sitting as a High Court judge, rejected a claim by a severely injured child claimant whose awareness and intelligence was intact for the costs of administering his damages and investment advice He did so on the basis that the High Court could provide the necessary service at a significantly lower cost.

60. Each case has to be considered on its own merits. This was made clear in *Watt v ABC* [2017] 4 WLR 24 in which Charles J gave guidance on the approach required dealing with the competing merits of an appointment of a deputy rather than trust. That decision was however made in the context of a final award where the Court was concerned that careful consideration was required as to the extent of any capacity an injured claimant may have to manage funds. It is not necessary for me to rehearse the details of the judgment albeit I have fully in mind the guidance in it .

61. In short, it seems to me there would be at the very least room for substantial argument about the need for a trust to be set up given the ability of the Court Funds Office to manage these funds.

62. Although the matter was not explored in submissions in any depth, I doubt very much that my approval of the setting up of a trust could bind the judge assessing damages as a matter of law (not least because the Defendant has no formal role in this process). Indeed I would assume that a judge carrying out an assessment could in law wholly disregard any approval that I might now give. But even if the trust option had greater advantages to it than I consider it to have, I would be uneasy about an arrangement that committed the Claimant to the level of charges associated with the proposed trust without a reasonable level of certainty that they would be recovered from the Defendant. Indeed there is, it might be supposed, a further potential concern that if I were approve the setting up of the proposed trust this might be said in some way to render what is sometime referred to as the 'playing field' uneven (because it would be difficult for the assessing judge to find that it was not a reasonable step). It is not however necessary for me to consider either of these matters in any detail given my other determinations on this application.

63. The management of money held with the Court Funds Office comes for free. Care manager fees are as I understand it to be claimed as damages. Mr. Tavares understood the fee (£54) which would be charged in respect of a request to the court for release should be recoverable. Whether the costs associated with dealing with interim payments (including payments out) under the CFO option might be costs or damages or in part administrative in nature (and thus included within the hourly rate charged by the fee earners) (I heard little by way of submissions on this) they should be modest, if not very modest, set against the costs of the trust option.

64. In coming to this view I have taken into account all that is said by Mr Tavares as to method of management under the CFO option. It is clear that the decision whether to apply for an interim payment from the Defendant and the consideration of recoverability expenditure is, in general, a recoverable cost; advising on the recoverability of expenditure is indeed a primary role of the solicitor. Moreover, it is the substantial responsibility taken by the primary fee earner in high value personal injury which is often the reason which justifies departure from Guideline Hourly Rates in determining the reasonable level of fees. I would have some difficulty understanding how such enhancements might be justified if the decisions made in respect of interim payments were in some way passed on to the court or to the trustee. Moreover, I have to say I formed the impression from the way the case was put to me that in some measure the Claimant's solicitors were seeking to pass on the responsibility for decisions made on the payments out of interim payments and/or secure approval to them in a way which would enhance their recoverability. Whilst the Claimant has

clearly suffered serious injuries which demand the highest level of sympathy and understanding there are, to my mind, clearly difficulties with such an approach.

## Conclusion

65. As will be apparent from the matters set out above, quite a number of points have been made in support of the application. I have considered them all. I understand Mr Tavares' point that in some instances a child who is expected to lack capacity on reaching majority may have the benefit of a Deputy (who might assist with the distribution of payments out). The arrangement that he contends for might, he suggests, in some ways mirror that. I bear that in mind. But to my mind there are other considerations that apply in those circumstances, and in any event this does not change the essential analysis as to the options on this application and on the facts of this case.

66. Even accepting that in some instances a trust can provide advantages in permitting greater investment opportunities, to my mind, in this case any benefits associated with the trust option (which are difficult to discern) are substantially outweighed by the costs. For this and all the other reasons I have given, payment into the Special Account is, in my judgment, in the best interests of the Claimant. This application is, accordingly, rejected.