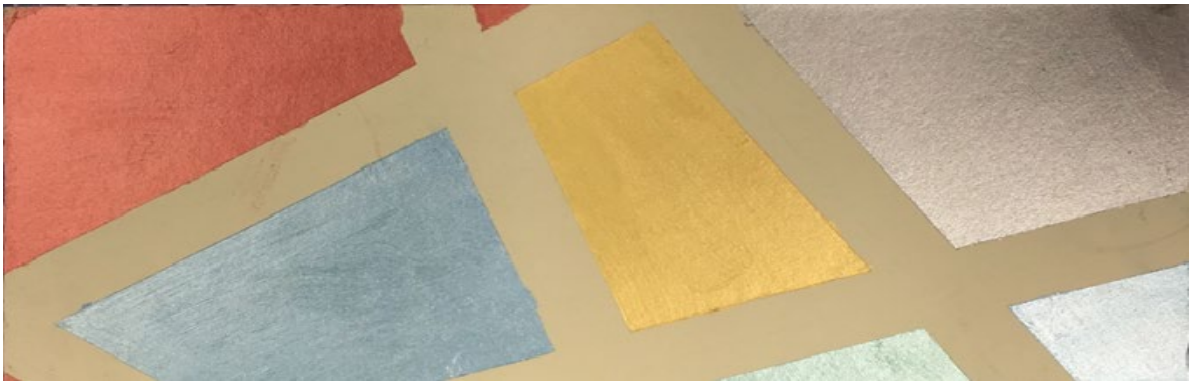


Welcome to the February 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: myth-busting about DoLS and strong words about assessment of capacity of D/deaf people;

(2) In the Property and Affairs Report: revoking Deputyship for a person no longer present in England & Wales;

(3) In the Practice and Procedure Report: litigation capacity and a very clear statement of the ordering of the capacity test, delays in obstetric cases and guidance on neurodiversity before the courts;

(4) In the Mental Health Matters Report: the Mental Health Bill progresses and two important Upper Tribunal cases;

(5) In the (new) Children's Capacity Report: deprivation of liberty before the courts and Parliament, when capacitous consent is not enough, and best interests and the clinical circling of the wagons;

(6) In the Wider Context Report: The Terminally Ill Adults (End of Life) Bill and capacity, CCTV and care homes, and using the arts to be more creative in capacity assessment.

(7) In the Scotland Report: Scottish Government's law reform proposals – the consultation responses, and the OPG digitalises.

There is one plug this month, for a free digital trial of the newly relaunched Court of Protection Law Reports (now published by Butterworths. For a walkthrough of one of the reports, see here.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

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Terminally Ill Adults (End of Life) Bill

The Public Bill Committee convened to consider this Bill held – unusually for Private Member's Bill – oral evidence sessions between 28 and 30 January. Unsurprisingly, given that clause 3 of the Bill simply cross-refers to the MCA 2005, the concept of capacity, its fitness for purpose, and extent of understanding by practitioners of the test, all featured extensively in the oral evidence (including that given by Alex), as well as in the written evidence that has been submitted and started to be published.

One statement by Professor Sir Chris Whitty is likely to have provoked some eyebrows to rise, namely that his "*the Mental Capacity Act clearly makes the point that the more severe the decision, the greater the degree of capacity that has to be assumed before people can actually take that decision.*" With respect, this is not accurate. Before the MCA 2005 came into force, courts had made statements to the effect that the common law contained a 'sliding scale' of capacity.[1] However, the MCA 2005 itself is silent on this, and, indeed, in its work leading to the Act, the Law Commission identified that "[w]*e have some difficulty with the idea that there should be a 'greater capacity' as opposed to an ability to understand more, or more significant, information. We do not consider that more than a 'broad terms' understanding is required.*"[2] Cases decided under the MCA 2005 have emphasised in the medical treatment context that what is required "*is a broad, general understanding of the kind that is expected from the population at large* […] *We should not ask more of people whose capacity is questioned than of those whose capacity is undoubted.*"[3]

The Supreme Court has confirmed that where there are "serious grave consequences" to a decision, it is particularly important that the person understands (and can retain, use and weigh) that information.[4] But, being pedantic, that it is not saying that there is need for a "greater degree of capacity," but rather a need for people considering capacity to be considering the question with particular care.

[1] See *Re T* [1992] EWCA All ER 649 at paragraph 28 and *Re MB* [1997] EWCA Civ 3093 at paragraph 30.
[2] Law Commission *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research*, Consultation Paper No.129 (HMSO 1993) at paragraph 2.16.
[3] *Heart of England NHS Foundation Trust v JB* [2014] EWCOP 342 at paragraph 26.
[4] See *A Local Authority v JB* [2021] UKSC 52 at paragraph 78.

The complexity of autonomy is also highlighted – in a different – context in the decision in *TM' v Bonne Terre Ltd* [2025] EWHC 111 (KB), considered by Alex on this post on his website.

Line by line consideration of the Bill starts on 11 February, and it is likely that considerable focus will be placed on clause 3. In the meantime, this resources page may be useful in terms of keeping abreast of developments.

And, in other developments, the Assisted Dying Bill proposed by Alex Allinson MLC passed its final stage before the Legislative Council on the Isle of Man. The Bill will now go back to the House of Keys to consider the amendments made by the Legislative Council and, if they accept them, the Bill will then be sent for Royal Assent.

CCTV and care homes – a helpful perspective from Northern Ireland

MB v The Northern Health and Social Care Trust et al [2024] NIFam 10 (High Court (Rooney J))

Other proceedings – civil

Summary

This case in Northern Ireland, decided in the summer of 2024, but which recently appeared on Bailii,, concerned an application for an interim declaration that it was in P's best interests for CCTV cameras to be installed in his private apartment of a care home. P lacked capacity to make the decision and had 2:1 support 24/7 to reduce the likelihood of him engaging in behaviours of concern. During the night, staff sat in the lounge outside his bedroom with its "saloon" style doors kept ajar. The issue was whether it was in P's best interests for the CCTV to be switched on in the private areas of his bedroom and bathroom.

P had sustained a number of injuries, including bruising to his chest, arm and legs, of which the staff were unaware of the cause. On one occasion, he sustained significant injuries to his face, nose, neck and eyes which the family was told were self-inflicted. They were horrified and no satisfactory explanation had been provided by the care home. CCTV from the other areas of the apartment showed incidents of distress and significant self-injury during which the carers – only feet away – did nothing to intervene or attempt to distract P. Moreover, staff records of the incidents did not reflect the CCTV footage, exposed substandard and unacceptable care, without any effective attempts of intervention or distraction.

In evaluating P's Article 8 ECHR rights, Rooney J had to balance whether turning on the CCTV in his bathroom and bedroom, to be viewed only if necessary for safeguarding reasons, was a necessary and proportionate interference with his right to respect for privacy in order to protect his health. In *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39, Lord Reid formulated the test for justification in four questions, which Rooney J addressed on the facts of P's case:

1. "*whether the objective of the measure is sufficiently important to justify the limitation of a protected right*": in this case, the objective was to protect P's health, physical and mental welfare.

2. "*whether the measure is rationally connected to the objective*": the provision of CCTV was plainly rationally connected to that objective.

3. "*whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective*": this was the critical question in this case. The authorities proposed a number of additional safeguarding measures, namely: (a) an Interim Protection

Plan; (b) Trust staff from the Positive Behaviour Support team and the Community Learning Disability team would carry out frequent visits with P; (c) a team would provide oversight of the Protection Plan to ensure support to care staff in the home in relation to safeguarding concerns; (d) there would be enhanced implementation of the Positive Behaviour Support Plan and oversight by the Trust.

4. "*whether, balancing the severity of the measures effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter*".

Insofar as the third limb of the justification test was concerned, Rooney J held that:

> *57.* […] *it is my decision that an interim declaratory order should not be made at this stage to extend the operation of CCTV coverage to P's bathroom and bedroom. In coming to this decision, I am persuaded that the above-mentioned additional safeguards constitute less intrusive measures which should be capable of protecting P and providing him with high quality care, while preserving his private rights within his bedroom and bathroom.*

Comment

The use of CCTV is becoming an increasingly prevalent issue in health and social care. This decision, with its use of the 4-part test of necessity and proportionality, provides a useful worked example to help navigate consideration of the necessity and proportionality of proposed Article 8 ECHR interferences where there are legitimate safeguarding concerns. In England, the CQC has published guidance on the use of surveillance in care services, along with seven principles it uses to determine the human rights implications, namely:

1. Safeguarded: Recording equipment has appropriate safeguards (Reg 12 and 13 of HSCA 2014 Regs);
2. Secured: Recording equipment is housed securely and be appropriate to the purpose for which it is used (Reg 15 of HSCA 2014 Regs);
3. Privacy: Privacy and dignity of people is at the heart of any considerations when deploying recording equipment (Reg 10 of HSCA 2014 Regs);
4. Involved: People must be involved in decisions when using recording equipment in private rooms (Reg 9 & 11 of HSCA 2014 Regs: i.e. have appropriate consent and follow the MCA 2005 principles);
5. Lawful: Recording equipment has a specific legal basis for its use and complies with all relevant legislation and codes of practice (Reg 17 of HSCA 2014 Regs: i.e. GDPR, HRA 1998, ICO, SCC);
6. Trained: Staff are trained on the use of the recording equipment (Reg 18 of HSCA 2014 Regs);
7. Transparent: Recording equipment is used in a transparent manner (GDPR article 5 principles).

The Information Commissioner has also published guidance to assist with data protection issues. Given the very stark nature of the interferences with Article 8 rights involved in such cases, we strongly advise that legal advice is sought, and that applications to court are considered wherever there is any doubt as to whether the use of CCTV is justified.

"I got on the bus in one life and woke up in another": Pilot Project

When she was 17, Grace Currie sustained a catastrophic ABI after a road traffic accident and was told by doctors she would never be able to work or live independently, to give or receive emotion or affection, to be left alone, and would be a passive recipient of care for the rest of her life. Ten years later, she graduated from Chester University with a First-Class honours degree in Fine Art, exhibits her work across the UK and lives in her own home with her fiancé and Billy the cat. Grace receives support but is its architect, and was keen to explore the role of art in social work practice.



'Rage'

The UN Convention on the Rights of Persons with Disability considers communication to be a core aspect of accessibility. Article 21 requires States to "*take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice…*". To that end, in this project 52 social work students in focus groups at the Universities of Chester, Keele, Birmingham City and Warwick explored how Grace's experience could affect social care practice. Nearing the end of their degree, many reported that they had received no, or very limited, teaching about acquired brain injuries. Could social care professionals recognise the power of art as a means of expression in their practice? Could they incorporate visual art into their social work practice in assessment and ongoing work with clients?

A video of this 'Work in Progress' project portrays Grace's use of art to express herself, and the embedding of art in the students' study. The full report by Dr Sandra Dowling is available here. The key learning points from the project were:

1. Having an acquired brain injury does not mean that life is over, it is perhaps different, but can still be just as productive, engaged, creative and fulfilling if people are heard and given the support they need to live the life they want.
2. Visual art has the power to communicate emotions, desires, intentions when there is an attentive listener who is open to understanding the meaning behind the image.
3. Methods of communication are diverse. Non-verbal methods are valuable when words are not available or not enough.
4. Social work students would benefit from learning about diverse methods/non-verbal forms of communication during their training.
5. Social workers are open to embracing new approaches to communication in conducting assessments and in interaction with clients.

The MCA and the Sexual Offences Act 2003 – a problematic blurring?

In the context of the (extremely complicated) decision of Martin Spencer J in *Samrai & Ors v Kalia* [2024] EWHC 3143 (KB), concerning allegations of sexual abuse against a guru at a Hindu Temple, he had to consider the proposition that some of the claimants lacked capacity to give consent to sexual relations for purposes of s.74 Sexual Offences Act 2003. The proposition was advanced (at paragraph 297) that:

> the *test to be applied should be that used in cases of sexual offences: "...a person consents if (s)he agrees by choice, and has the freedom and capacity to make that choice" (see s.74 of the Sexual Offences Act 2003). Mr Jones submitted that none of the First to Fourth Claimants either had, or understood themselves to have, a choice and/or the right to refuse the Defendant's demands upon them. Accordingly, they lacked capacity, applying the dictum of Mrs Justice Parker in London Borough of Southwark v KA and Ors [2016] EWHC 661 (Fam): "The ability to understand the concept of and the necessity of one's own consent is fundamental to having capacity: in other words that P knows that she/he has a choice and can refuse." Mr Jones submitted that the Claimants' freedom to consent (or to refuse consent) was "impaired by the grooming, manipulation, control, and subservience that they allege. The Defendant, they would say, engineered each Claimant's dependency upon him, and each Claimant was required to submit sexually to him for that dependency to be satisfied. And if that's right, any purported or conceptual consent cannot have been genuine." He submitted that this can be the case, and was the case, even though they did not lack mental capacity within the terms of the Mental Capacity Act 2005. In this context, the religious aspect is, he submitted, critical: "If all these Claimants truly believed that to get closer to God they had to obey every command of the Defendant, and that they were led to believe by him that that was a necessary component of getting closer to God and being pure and being spiritual and all the rest of it, then they did not know that they had a choice, they in effect had no choice, and they did not know that they could refuse, they in effect could not."*

At paragraph 311, Martin Spencer J found that:

> *I am unable to accept that, applying the test for consent in s.74 of the Sexual offences Act 2003 (see paragraph 29*[7] *above), Ms Samrai lacked the freedom and capacity to consent. Ms Samrai joined the Temple as an adult in her 20s who had been married and who had a young child. She therefore had some experience of the world and of men, and would have understood that she had a choice whether or not to consent to sexual intercourse. I find that, when Ms Samrai met the Defendant at hotels, as she described, she went voluntarily and knowing that the purpose was for them to have sexual intercourse: she was not an automaton and retained her free will and ability to choose. In this regard, I accept the following comments made by Professor Maden in his report on Ms Samrai:*
>
> > *"From a psychiatric perspective, RS like all the other three Claimants is highly unusual because I have never before encountered adults denying responsibility for so many of their own actions and choices. In the absence of any impairment of the mind or brain required by the Mental Capacity Act 2005 to allow one to overturn the assumption of mental capacity, there is no psychiatric explanation for this behaviour, which was never apparent to any treating clinician. The only non- psychotic psychiatric diagnosis in which denial of*

> *responsibility for one's actions is a major feature is dissocial or antisocial personality disorder.*
>
> *I have of course encountered cases in which there has been coercion of adults into sexual activity. This would ultimately be a matter for the Court but in my experience it arises only when there is considerable control and restriction of freedom - as the ICD11 definition of cPTSD implies. It is not something that arises from simply asking people to do something while they are living and working at liberty."*

We would make the short observation that, as developed by Alex and his co-author, Allegra Enefer, in this paper, it is not obvious that the test for capacity to consent in the Sexual Offences Act 2003 is the same as that in the MCA 2005, and that it is not obvious that the 'diagnostic' element is, in fact, part of the test at all.

A litigation friend is not a party

Tendring District Council v Secretary of State for Work and Pensions & Anor [2024] EWCA Civ 1509 (Court of Appeal (Nicola Davies LJ, Stuart-Smith LJ, Cobb J))

Other proceedings – civil

This matter concerned an attempt to pursue a claim against a person whose role in proceedings had been as the representative of a person who lacked capacity to defend himself in an application in the First-Tier Tribunal. It related to the recoverability of an overpayment of Housing Benefit. The people involved were 'AB' and his wife, 'CD.' CD received Housing Benefit on behalf of AB as his DWP appointee; she had also been his MCA deputy for a period of time until the Court of Protection discharged her appointment. AB's litigation capacity and discharge from these proceedings had been considered in a separate Court of Appeal decision ([2024] EWCA Civ 1248).

Tendring District Council appealed a decision of Judge Perez sitting in the Upper Tribunal, Administrative Appeals Chamber ('UT') which overturned in part a determination of the First tier Tribunal ('FTT') that an overpayment of £67,421.79 of Housing Benefit was recoverable from both 'AB' and his wife, 'CD'. In the Upper Tribunal, a decision was taken that the overpayment was recoverable from AB only, and not CD. Tendring Council argued that the payment should be recoverable from CD.

The background to this matter was a fraud investigation into AB's benefits (as Housing Benefit had been collected despite AB and CD jointly owning the relevant property between 2000-2012). The fact of their ownership of the property was not disclosed by AB or CD; AB had initially made the claim, but after AB suffered a stroke in 2007, CD acted on his behalf. The incident resulted in CD's criminal conviction and sentence of imprisonment. Attempts were first made to recover the funds from AB (of approximately £67,000) and no funds have been paid by either AB or CD. Following protracted proceedings, the Upper Tribunal found that AB was liable for the Housing Benefit overpayment but CD was not. In the Upper Tribunal, Judge Perez found:

1. The local authority had not notified CD that the overpayment was recoverable from her personally (with AB's decision notice dating to 2012).
2. CD had never been issued with a decision notice that Housing Benefit was recoverable from her.
3. CD had maintained that she had been litigating in the FTT on behalf of AB, and had

not had an opportunity to present her own case.

In the Court of Appeal, the local authority argued that there was a recoverable overpayment from CD arising from relevant regulations, and CD had notification of decisions relating to AB which were sent to her. "*The Benefit Decision Notices should be read as notification to CD in relation to a claim registered in the name of AB, as AB and CD are husband and wife and Tendring had to nominate one claimant*" (paragraph 38(d)).

The Court of Appeal noted at that outset that "*the fundamental difficulty for Tendring is that its documentation, which is the only evidence of its asserted decision to recover overpayment, indicates that the person against whom the claim for overpayment was being made was AB. We also note that before the FTT, the Secretary of State made the point that Tendring had wrongly understood that AB and CD could be jointly and severally liable in respect of an overpayment claim*" (paragraph 49). Housing benefit can be claimed by only one person; here, it was AB who claimed it. While the decision notices were addressed to CD, they were directed at AB, and it was AB who had been overpaid housing benefit. The Court of Appeal agreed with the Upper Tribunal that there had been no decision to recover the overpayment from CD. Subsequent correspondence and statements referring to a joint liability held by AB and CD "*cannot overcome the fact that a single decision was made to recover from the claimant AB. In our judgment, the UT was correct to conclude that narrating a different position retroactively* […] *cannot change the original decision*" (paragraph 54) Tendring's 'mindset' that it was trying to recover from both AB and CD also fell "*far short of the sound evidential basis required to satisfy the court that there was a specific decision to recover overpayment from CD or any notification of such a decision to her*" (paragraph 55).

The Court of Appeal also considered CD's authority to represent AB's interests in the tribunal and Court of Appeal, where AB lacked capacity to conduct proceedings as a result of his stroke. The judgment summarised the position:

> *59. It appears that neither the FTT nor the UT formally ruled on AB's litigation capacity, and/or on his need for a representative or litigation friend, in order for him properly to participate in the proceedings before the tribunals. The issue of litigation capacity was not as far as we know even investigated; in any case where there is reason to suspect a lack of capacity an investigation would and should generally be the practice…Within this litigation, before the FTT and/or the UT, CD was never formally appointed as AB's Litigation Friend.*
>
> *60. The Deputyship status which CD had acquired by orders of the Court of Protection in January 2008 and in March 2014 in relation to AB's property and financial affairs (the latter order in similar terms to the former, but joining the parties' son as an additional Deputy) did not expressly confer on CD any rights to conduct litigation for or on behalf of AB. Expert medical opinion prepared in late-2014 revealed that AB was sufficiently capacitous to grant a Lasting Power of Attorney to CD and the parties' son in relation to his property and financial affairs; such a document was therefore executed in early 2015 and registered with the Office of the Public Guardian in June 2015. The Lasting Power of Attorney did not give CD (as attorney) the power to litigate on AB's behalf…While we have no doubt that CD conscientiously fulfilled her duties as a Deputy and as an Attorney for AB outside of the tribunal system, we do not believe that the duties imposed on her by the court orders or the Lasting*

Power of Attorney extended to conducting litigation on AB's behalf.

The Court of Appeal thus considered that it was unclear who had been acting for AB in the previous proceedings were no one had been formally appointed to do so, and AB lacked capacity to conduct proceedings. Noting that the Tribunals were more informal and that '[t]he orders and decisions/reasons which have been made in the FTT and UT in this case reassure us that the judges were acutely aware of the need for AB's interests to be protected, and were alert for any risk that they were not' the lower courts appear to have taken CD as AB's 'representative' "*and acquiesced in the informal arrangements which were long established by the time of the 2022 UT determination against which this appeal is brought*" (paragraph 65). However, CD was never a party to these proceedings in her own right, and it was not sufficient for the local authority and tribunal to have treated CD as a 'de facto party' and 'made clear' that Tendring was pursuing CD specifically to allow recovery. The Court of Appeal found that:

> *75.* […] *Tendring's submissions fail to take properly into account the following points:*
>
> *i) As a non-party, CD did not have the opportunity to avail herself of independent legal representation before the tribunal;*
>
> *ii) As the UT observed (when considering the fleeting appearance of a representative for AB by his appointee, CD):*
>
> *"… being involved, even intimately involved, in another person's appeal does not of itself mean that the person who is not a party must, when instructing a representative for the appellant, be taken to have put every point that the non-party wished to make in defence of the non-party. Giving instructions for someone else is simply not the same as giving them for oneself… indeed, in the present case, instructions given on [AB]'s behalf would necessarily be different from those given on [CD]'s behalf…"; (Emphasis by underlining added);*
>
> *iii) It is recorded by the UT that CD had informed the UT that AB's wider family were effectively instructing her, and it was "not she who was making decisions on [AB]s' behalf";*
>
> *iv) CD had a right not to incriminate herself when giving evidence before the tribunal. A representative acting in AB's best interests may however have wanted to ask her questions which may have incriminated her. CD could not realistically fulfil that role;*
>
> *v) There was at least the potential for a conflict of interest between AB and CD, as to liability for the return of the overpayment, and/or enforcement of any award; this had been flagged by CD at an earlier stage of the process;*
>
> *and finally, for present purposes, as the UT observed:*
>
> *vi) "… without [CD] being a party to the appeal, there could not be a binding adverse result on her. The solution was in Tendring's gift; Tendring could have rectified the position by making a decision that the housing benefit overpayment was recoverable from [CD]."*

At all times, CD was exercising "'*vicarious*' *functions on behalf of AB, and was not participating in the litigation in her own right. Put shortly, she was not a party to nor treated as a party to the proceedings*" (paragraph 76). Where the remedy was sought against CD, "*it was incumbent upon Tendring to ensure that it could*

make good its demand against her" (paragraph 77). The appeal was dismissed.

Comment

The length of the summary above shows just how complicated things can get if (to be blunt) basic steps are not taken at the outset to work out (a) whether a party has litigation capacity; and (b) if they do not, what to do to make sure that the litigation can proceed properly.

Care home costs

Two recent cases have flagged up the extent to which the system is under strain.

In *The Julie Richardson Ltd & Anor v Oxfordshire County Council* [2024] EWHC 3233 (KB), two care homes, the Julie Richardson Limited and Banbury Heights, brought claims against Oxfordshire County Council ('the local authority') for unpaid care home fees for two individuals, on the basis that the local authority was legally obligated to pay these fees pursuant to the Care Act 2014. The local authority made a strike-out and summary judgment application on the basis that the individuals had respectively:

1. In the case of JS, been financially assessed and found to be a self-funder; and
2. In the case of MH, family members had refused financial assessment by refusing to provide required financial information, and OCC were thus entitled to treat MH as a self-funder.

The claims had originally been brought in the District Registry 2021, and had a lengthy procedural history, which eventually led them to a one-day substantive hearing of the strike-out application in the KBD in November 2024.

The care homes alleged that they had an 'underlying contract' with the local authority, and had cared residents previously placed with them by the local authority. The claims related to two individuals, MH and JS.

1. MH was placed in Banbury Heights by the local authority in 2015; it was agreed she required a care home placement. The local authority paid for her care and support for approximately 7 months, after which time she was treated as a self-funder. Her brother arranged for the payment of her care home fees for approximately two years, after which time he stated that her funds were exhausted. The care home continued to care her pending a financial reassessment by the local authority.
2. JS was placed in Banbury Heights by NHS intermediate care in 2018, but with her care funded by the local authority for the first 12 weeks (due to the 12-week property disregard). She was then assessed as being a full self-funder. In 2020, her family paid £50,000 in what would likely have been a debt owed to the care home for her care, and her family asserted that she was again financially eligible for support under the Care Act 2014. The local authority undertook a financial assessment, and agreed to backdate payments for JS's care to the date after the £50,000 payment. However, this left a period of approximately 9 months' worth of care for which time the care home had not been paid.

The care home argued that the local authority was liable to pay for the care which had not been paid for privately. It was common ground that both JS and MH had eligible needs under the Care Act 2014, and required care and support to meet those needs. It was argued that the local authority had a duty to conduct financial assessments, and a duty to meet needs from the time that the person met the financial threshold. It was argued that the local authority had been

unjustly enriched at the expense of the care home for the unpaid periods.

The strike-out application proceeded on the basis that there was no 'underlying contract' between the local authority and care homes, but instead were numerous specific funding agreements in respect of particular individuals. The local authority argued that "'[t]*he idea of a statutory obligation arises from mistakenly assuming that because the Defendant has obligations to individuals under the Care Act 2014 it therefore also has obligations to the homes that accommodate them. The Care Act creates no funding obligations*" (paragraph 29). The local authority also argued that "*the private provider bears the risk of the private funding running out and that the exclusivity principle as set out in O'Reilly & Ors v Mackman & Ors [1983] 2 AC 237 means that the proceedings brought against Oxfordshire CC (whether in the original form of the Particulars of Claim or in the amended form) are abusive because any claim ought to have been brought in judicial review proceedings*" (paragraph 37).

HHJ Walden-Smith, sitting as a High Court Judge, concluded that the local authority had a statutory duty to assess whether JS and MH had needs for care and support, what those needs were, and to meet eligible needs under s.13 Care Act and the Eligibility Regulations. HHJ Walden-Smith found that for the periods for which the care home sought repayment, neither MH or JS 'had funds,' and that there was thus a s.18 Care Act obligation to meet needs. The needs were being met by the care home, and there was a shortfall in payment between what was being provided by the local authority and what was being provided by family.

HHJ Walden-Smith found that there was no obligation to use judicial review, and noted the Court of Appeal decision in *Richards v Worcestershire CC, South Worcestershire Clinical Commissioning Groups* [2017] EWCA Civ 1998 where Jackson LJ, giving the judgment of the court, refused to allow an appeal against the decision of Newey J. (as he then was) refusing to strike out a private law claim in similar circumstances to this case. HHJ Walden-Smith also noted the authority of *Surrey County Council v NHS Lincolnshire Clinical Commissioning Group* [2020] EWCA Civ. 3550, Surrey County Council successfully brought a private law claim in restitution against the Defendant, NHS Lincolnshire Clinical Commissioning, to recover sums paid by the Council for the costs of accommodation and care of JD, a young man with autism spectrum disorder.

HHJ Walden-Smith found that "'*Oxfordshire CC have been enriched to the extent to which the Julie Richardson and Banbury Heights have provided care and accommodation for Mrs Hayward and Mrs Smith, to whom Oxfordshire CC owed statutory duties*" (paragraph 44). She concluded that

> *45. This determination is based upon fundamental equitable principles which robustly protect the rights of those who fill in the gap that was created by Oxfordshire CC not fulfilling their statutory duty. The factor making the enrichment of Oxfordshire CC unjust is rooted in public law. The right to restitution and the obligation to make restitution are part of the private law of obligations. Just as there is no requirement that the time limit for judicial review applies to the tort of misfeasance in public office, so also it should not apply to claims seeking restitution against public bodies.*

HHJ Walden-Smith concluded that it was "strongly arguable that Oxfordshire CC have been unjustly enriched by reason of the Julie Richardson and Banbury Heights fulfilling the statutory duties of Oxfordshire CC" (paragraph

46). She dismissed the summary judgment and strike-out applications.

This matter came before the court as a summary judgment and strike-out application, and the summary of the Care Act is relatively high-level. However, we would consider that there is likely more nuance than appears to have been recognised in the judgment as to whether MH and JS were eligible under s.18 Care Act (particularly JS); several of the relevant points interact with the capacity of the person to make their own care arrangements, or engage in a financial assessment. In this regard, we note that:

1. S.18 Care Act sets out a number of criteria to trigger the duty to meet needs for care and support. A person must have eligible needs, be ordinarily resident (or present but of no settled residence) and either there is no charge for meeting needs, or insofar as there is a charge, one of three conditions are met. It is important to note that charges can be made on income or capital. While the judgment appears to assert that there was no charge for meeting needs, it would appear unlikely that pensioners living in care homes would not have had to pay the vast majority of any pension income towards their care, as well as a tariff income. S.18 would thus only be triggered if one of the three conditions were met:
    a. Condition 1 is that 'the local authority is satisfied on the basis of the financial assessment it carried out that the adult's financial resources are at or below the financial limit.' The financial limit is defined in the Care and Support (Charging and Assessment of Resources) Regulations 2014 as £23,250, which has not been adjusted since the implementation of the Care Act nearly a decade ago.
    b. Condition 2 is that the local authority has financially assessed and concluded the person is above the financial limit, but the adult nonetheless asks the authority to meet the adult's needs. As set out below, this only applies for self-funders in the community, not in care homes.
    c. Condition 3 is that 'the adult lacks capacity to arrange for the provision of care and support, but there is no person authorised to do so under the Mental Capacity Act 2005 or otherwise in a position to do so on the adult's behalf.'
2. There is a general exception to s.18 eligibility for self-funders living in care homes in s.3 of The Care Act 2014 (Commencement No. 4) Order 2015 (UKSI 2015/993). It states that:

    > *3. 1st April 2015 is the day appointed for the coming into force of section 18(1)(a) and (c), (2), (3), (4), (6) and (7) of the Act (duty to meet needs for care and support) except insofar as it imposes any duty on a local authority to meet an adult's needs for care and support by the provision of accommodation in a care home in a case where Condition 2 in section 18(3) is met.*

3. If the individuals in this case had individuals either authorised under the MCA or 'otherwise in a position' to make arrangements for their care and support, there was no s.18 Care Act duty to these

individuals for so long as they were self-funders.

4. It does not appear to us that prior to the period that the £50,000 payment was made in JS's case, she actually ceased to be a self-funder. She plainly had £50,000 in assets, and there is no provision in the Care Act charging regulations to 'net out' unsecured debts against assets for the purposes of determining financial eligibility. However, if no one was making arrangements for her care and support (by failing to pay bills or secure her care), it is possible that a s.18 Care Act obligation might have risen by this route. It is, however, difficult to see any real fault on the part of the local authority if neither the family nor the care home was alerting the local authority to this situation.

5. It is also not clear what consideration had been given to the local authority's argument that it had no obligation to fund care where there had been a refusal of assessment, which would appear to us to have been a relevant consideration as to whether a s.18 obligation actually arose. Under Regulation 10 of the Charging Regulations, a refusal of financial assessment by the adult can be a lawful basis for the local authority to treat the person as being above the financial limit (and thus falling outside of Condition 1 of s.18 Care Act):

> *10.—(1) A local authority is to be treated as having carried out a financial assessment in an adult's case and being satisfied on that basis that the adult's financial resources exceed the financial limit where—*
>
> *(a)the adult has refused a financial assessment; or*
>
> *(b)the authority has been unable to carry out a full financial assessment because of the adult's refusal to co-operate with the assessment and the local authority nevertheless decides to meet some or all of the adult's needs for care and support, or for support.*

6. However, the local authority must always be alive to the capacity of person to engage in financial assessment, and it is very difficult to see that a refusal to engage by family members with no MCA authority to act on behalf of the person could be treated as the person refusing assessment.

In *(SARCP) v Stoke-on-Trent City Council* [2025] EWHC 18 (Admin), an association of care home providers brought a challenge to a decision by the local authority to set a below-inflation uplift in care home fees. The local authority had a contract with providers dating to 2021 that set out a mechanism for annual adjustment of standard rates, which was to take place following consultation with the providers (which had a minimum uplift of 1.4%). The Council initially wanted to have no uplift; however, when it was pointed out that this was contrary to the contract, the Council agreed to made an uplift of 1.4% (following a year in which the CPI rose by 2.3%). The care home providers suggested that due to the effects of inflation and other factors in the costs of care, a 9% increase should be made. The judgment included the context that the local authority's budget had shrunk almost 30% in real terms from the 2010-11 fiscal year to the 2023-24 fiscal year, and its support from central government had fallen from 42% of its budget to 10% of its budget (without any corresponding increase in its Council Tax, as it is a relatively poor area). Adult social care had been relatively protected in budget cuts; the judgment states at paragraph 21 that "*the Defendant is being*

squeezed by growing demand with which its budget cannot grow to keep up." Most care homes in the area (including the vast majority of those caring for residents placed by the local authority) signed an agreement accepting the rates.

An application for judicial review was brought on primarily the basis of inadequate consultation, failure to consider material considerations and failure to follow statutory guidance.

HHJ Tindal, sitting as a High Court Judge, found that pre-Care Act case law on care home rate-setting continued to be relevant, and particularly noted that "*the authority is also entitled to take into account its own resources, provided its fees do not set an 'arbitrary ceiling', especially if that ceiling undermines the provider's ability to provide the agreed care packages with the agreed quality of care*" (paragraph 42(a)).

After determining preliminary issues regarding the availability of an alternative remedy, the standing of the Claimant to bring the application (with a conclusion that the Claimant did not have standing to bring an Article 8 ECHR challenge on behalf of the residents of the relevant care homes) and whether there was a sufficient public law issue for this claim to appropriately be brought as a matter of public law rather than private law, the HHJ Tindal considered the standard of review for a decision of this nature. HHJ Tindal found at paragraph 63 that "*it will take a very clear case of irrationality, having made full allowance for that respect, to justify interference with an authority's decision on standard fees for care homes…*"

Consultation: HHJ Tindal found that while there was no statutory right to consultation, there was a legitimate expectation of consultation created by the local authority's promise to consult, and there was a 'long-established prior practice' of consulting the provider association about contracts and feels which created a legitimate expectation it would again be consulted. The consultation had also been promised as being on *Gunning* principles, while proposals were still at a formative stage. HHJ Tindal found that the local authority had failed to conscientiously consider the evidence gathered in the consultation, breaching the fourth *Gunning* principle. "*I have no statement from the decision-maker to explain what they knew (and Mr Tomlin's knowledge or reasoning cannot be attributed to them: NAHS - even if they were less senior than him as it appears), or how they 'conscientiously considered the consultation', even if that had been admissible to amplify their reasoning*" (paragraph 73). HHJ Tindal did not reach a decision as to whether to quash the consultation and order it re-run in light of its findings on the other grounds.

Failure to follow guidance and/or consider relevant statutory factors: After confirming that it may be open to a local authority to depart from statutory guidance if there are 'good reasons' for doing so, HHJ Tindal noted that it was not suggested by the local authority that there were such reasons in this case. The Claimant relied on the following points in Annex A of the Care and Support Statutory Guidance:

> […] *…4) Local authorities should also be mindful of their duties under Section 1 of the Care Act 2014 to promote individual wellbeing'…*
>
> *11) In all cases the local authority must have regard to the actual cost of good quality care in deciding the personal budget to ensure that the amount is one that reflects local market conditions… In addition, the local authority should not set arbitrary amounts or ceilings for particular types of accommodation that do not reflect a fair cost of care. Guidance on market shaping and commissioning is set out in Chapter 4..*

> *34) Arrangements will need to be reviewed from time to time, for example in response to …a change in provider costs…….*

It was argued that the local authority failed to have regard to the actual cost of good quality care; and/or set arbitrary amounts or ceilings for particular types of accommodation that do not reflect a fair cost of care, or change in provider costs.

HHJ Tindal agreed. While accepting that these were not the only relevant considerations (and a local authority was free to consider other sources of income for the care homes, and its own resources), he also noted the importance of the s.5 Care Act 'market-shaping' duty, which requires a local authority to have regard to: *"(d) the importance of ensuring the sustainability of the market; and (e) fostering continuous improvement in the quality of services and efficiency and effectiveness with which they are provided*," as well as the new guidance in paragraphs 4.31 and 4.35 CA Guidance Fordham J summarised in *R(CNE)* at paragraph 12:

> *(i) First, there is the importance of local authorities assuring themselves and having 'evidence' that contractual fee levels are appropriate to provide the delivery of agreed care packages with agreed quality of care (para 4.31).*
>
> *(ii) Secondly, there is the importance of local authorities understanding that a reasonable fee level allows for a reasonable rate of return by independent providers that is sufficient to allow the overall pool of efficient providers to remain sustainable in the long term (para 4.31). [Lavender J in R(Care England) at [6] called this and s.5(2)(d) CA 'the sustainability factor']*
>
> *(iii) Thirdly, there is the point that local authorities must not undertake any actions which may threaten the sustainability of the market as a whole - the pool of providers able to deliver services of an appropriate quality - by setting fee levels below an amount which is not sustainable for providers in the long term (para 4.35).*

HHJ Tindal made robust findings at paragraph 77 that the local authority's:

> [d]*ecision utterly failed to take into account any of this relevant CA Guidance, even leaving aside the Claimant's consultation response discussed under Ground 1. The Decision did not refer to any statutory guidance expressly or impliedly, still less explain how it considered a 1.4% uplift was consistent with it. This is reflected in five quite separate failures to follow guidance, any one of which individually would have vitiated the Decision, but together plainly do so:*
>
> > *a. Firstly, in setting a fee increase of 1.4%, the Decision did not expressly or implicitly 'have regard to' the actual cost of good quality care' under para.11 Annex A (or what evidence it relied on for that under para.4.31 CA Guidance), if only to explain how that was outweighed by other factors such as over-capacity in the residential care home market or the Defendant's budgetary constraints, as Mr Tomlin's Cabinet reports had done.*
> >
> > *b. Secondly, the 1.4% minimum uplift in Clause 1.4% effectively acted as an 'arbitrary ceiling' on the Decision rather than a 'contractual floor', since it reflected inflation of 1.4% three years earlier and lacked justification as to its consistency with having regard to 'the actual cost of good quality care'.*

c. Thirdly, the Decision did not just 'take into account' the contractual minimum uplift in Clause 18.3, it appeared to focus exclusively on the contractual dimension of the relevant Decision rather than the duty under s.78 CA to have regard to the statutory guidance. Like the Defendant's argument on 'the public/private law divide', it focussed on the contractual dimension to the exclusion of the statutory and guidance dimension.

d. Fourthly, whilst the Defendant 'did not want to lose any provision from the local market' and mentioned potential packages of support, it failed to acknowledge that a reasonable fee level (as opposed to other mitigating measures) allowed for a reasonable rate of return to allow efficient operators to remain sustainable in the long-term as required by para.4.31, or at least explain why that factor was outweighed by others such as budgetary ones.

e. Fifthly, the Decision implicitly recognised that the sustainability of the market was at risk by acknowledging the risk of loss of provision and by offering support. However, it failed to recognise that the decision to limit fee uplift to 1.4% was the action threatening that sustainability, again if only to explain how it was outweighed by countervailing factors like budget.

Therefore, I uphold Ground 4 as the Decision failed to follow the CA Guidance.

HHJ Tindal made similar findings with respect to the market-shaping duty, which the court found must be a 'relevant consideration' in setting the care home rates. He found the following at paragraph 79:

[E]*ven if I am wrong on Ground 4, the Decision's lack of 'due regard to the actual cost of care' and 'the need to avoid setting arbitrary cost ceilings' in the sense in paras.5.2.4 and 5.2.7 LAC (2004)20 are implicitly 'statutory factors' to be taken into account under s.5(2)(d) and (e), which the Defendant failed to do. Alternatively, the Decision failed to take into account expressly statutory factors:*

a. Firstly, the Decision failed to take into account its duty under s.5(1) to promote the efficient and effective operation of a market with a view to ensuring a variety of providers and high-quality services…

b. Secondly, whilst the Decision acknowledged the risk of some providers leaving the market and so the impact on market sustainability, it failed to take into account under s.5(2)(d) the importance of ensuring the market remained sustainable, e.g. by setting fees at sustainable level, not just offering other support […]

c. Thirdly, the Decision failed to have regard under s.5(2)(e) to the importance of fostering continuous improvement in the quality of care services and indeed the ability of providers to comply with CQC standards and improve quality given the pressures on overheads by low fees […]

d. Fourthly, the Decision failed to have regard under s.5(2)(f) to the importance of fostering a workforce able to deliver high-quality care, in particular by failing to have regard to how a 1.4% rise in fees could absorb a 9.8% rise in the National Living

> *Wage when staff costs were typically c.70% of actual costs of care* […]
>
> *e. Finally, the Decision failed to have regard under s.5(4) of the importance of promoting the well-being of care-home residents due to the 'indirect impact' on them of Defendant fees not covering the provider's actual costs of care, either inhibiting providers from meeting all their needs and/or leading them to increase the level of 'top-ups' from residents or their families* […]
>
> *Therefore, insofar as it adds anything to Grounds 1 and 4, I also uphold Ground 2.*

HHJ Tindal additionally found the decision was irrational in light of the lack of any reasoning for the 1.4% uplift.

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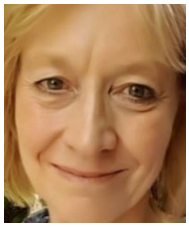
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Alex also does a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

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