NEUTRAL CITATION NUMBER: [2010] EWHC 543 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Case No: FD98D01856

Royal Courts of Justice
Strand

Thursday, 4th February 2010

Before:
MR JUSTICE BENNETT

B E T W E E N:

B

v

B

Transcript from a recording by Ubiqus
Cliffords Inn, Fetter Lane, London EC4A 1LD
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JUDGMENT
(Approved)

MR JUSTICE BENNETT

This judgment was handed down in private but the judge hereby gives leave for it to be reported in this form

MR JUSTICE BENNETT:

1. This is an application by the Official Solicitor for an order that Mr B do pay the Official Solicitor's costs, on an indemnity basis, of acting on behalf of Mr B as his guardian *ad litem*, until the Official Solicitor was discharged by order of 19th August 2009.

2. The application arises out of matrimonial proceedings between Mrs B and Mr B. In 1980 they married and had six children. The marriage foundered in 1998 or thereabouts. In April of that year Mrs B issued a petition for divorce. A *decree nisi* was pronounced later that year. There followed protracted proceedings in relation not only to the children, but also in relation to the parties' assets and liabilities.

3. By 2000 there was reason to believe that Mr B might be incapable of managing his property and affairs, and particularly in conducting litigation. On 3rd July 2000 the President in the matrimonial proceedings, in which the wife was legally represented and Mr B appeared in person, invited Dr Holt to examine Mr B as to his fitness basically to conduct litigation. On 11th August 2000 Dr Holt examined Mr B, and on 18th August gave a report that he was not capable of conducting litigation due to a mental disorder. He commented in his certificate Mr B was still capable of making his general views known to the solicitor who was acting on his behalf. Accordingly on the 23rd October 2000 the Official Solicitor having been requested to act as Mr B's guardian *ad litem* gave his written consent in the ancillary relief proceedings. Dr Holt gave another certificate on 7th December 2000 stating that Mr B lacked litigation capacity for the contact proceedings. On 11th January 2001 the

Official Solicitor consented to act as Mr B's guardian *ad litem* in those proceedings.

4. On the 19th June 2001 the matter came back before the President when Mr B was represented by a person from the 'Litigants in Person Society.' It would appear that the application that was made to the President was for the Official Solicitor to be dismissed, and for the Litigants in Person Society to represent Mr B. The President dismissed Mr B's application. The order states, 'For the avoidance of doubt the Official Solicitor do continue to act on behalf of Mr B.'

5. During the course of the ancillary relief proceedings Mr Justice Wilson, as he then was, appears to have been allocated to conduct the ancillary relief proceedings. On 30th April 2003 the Official Solicitor wrote to the Judge asking him to make an order that the Official Solicitor was authorised, in the name and on behalf of the patient, i.e. Mr B, to obtain various financial documents, including trading accounts, tax returns and bank accounts of Mr B. The basis of that application is set out in the letter,

> 'To date Mr B has not supplied the Official Solicitor with the relevant information necessary to complete the affidavits as outlined above, such as his bank account details, confirmation of his income, etc. The time-table has already been varied once by consent to enable the Official Solicitor more time to obtain the necessary information, but Mr B still refuses to supply the information requested.'

On 1st May 2003, as appears from G79, Mr Justice Wilson granted that order.

6. In June 2003 Mr Justice Wilson heard the ancillary proceedings. At C26 is his approved judgment, given on 11th July 2003. I am not going to set out what he said in paragraph one, but it is, for anybody who may be hereafter connected with this application raised today is, I would respectfully suggest, required reading.

7. The consequence, as Mr Justice Wilson made plain, of Mr B's mental problems was;

> 'In the first instance the Official Solicitor has found it almost impossible to attract the husband's cooperation in the presentation to the court on his behalf of relevant financial information.'

8. On 28th January 2004 the Court of Appeal rejected Mr B's application to discharge the Official Solicitor. In January 2004 it would appear that the Children Act proceedings came to an end. However as Mr Pitblado, the Official Solicitor, explains in his first statement of 25th February 2009, that was not the end of the matter. In paragraphs five to seven inclusive of that statement it says as follows,

> '5. Following the conclusion of both the ancillary relief and Children Act proceedings of 2003 and 2004 respectively, the lawyers at my office continued to provide legal services for Mr B both in relation to matters arising from his contact to his children and also in relation to matters arising in respect of the matter of the final ancillary relief order.
>
> 6. The lawyers at my office kept Mr B's litigation capacity under review and have arranged for him to be assessed periodically, the last assessments having been undertaken by his treating psychiatrists on 29 March 2006, 08 May 2007, 01 May 2008 and 12 December 2008. Prior to the latest report, all assessments have confirmed that Mr B lacked litigation capacity due to his delusional thought disorder. However all reports from at least 2006 have pointed to an improvement in Mr B's mental health. Dr N in her report on 08 May 2007 advised that Mr B was likely to recover capacity of the future and that his litigation capacity should be kept under regular review. Dr L in his report of 30 April 2008 advised that Mr B was "closer to achieving full capacity" but "not quite at that point" and should be reviewed from time to time.
>
> 7. A copy of the latest report on Mr B's litigation capacity by Dr S, his current treating psychiatrist, is now exhibited as "**OS1**". In that report Dr S concludes that Mr B now has litigation capacity and that he no longer requires a guardian ad litem to conduct proceedings.'

9. What Mr Pitblado says comes from a bundle of correspondence before me . I refer to this correspondence because it is apparent that (for instance see the letter of 7th March 2006) the Official Solicitor was telling Mr B, in a number of matters, but principally in relation to his (that is the Official Solicitor's) costs:-

> '…as drafted (and they have yet to be brought up to date or finalised) come to £91,242.29 including VAT and third party disbursements. The overall bill is likely to be higher. On assessment however a

costs' officer will consider whether the costs incurred are reasonable and can, if appropriate, reduce the bill.'

One sees from this correspondence that Mr B was certainly aware of the claimed amount, approximately speaking, of the Official Solicitor's costs for representing him as his guardian *ad litem*.

10. As a result of Dr S's report, on 25th February 2009 the Official Solicitor applied for his discharge as guardian ad litem, and for an order that Mr B do pay his costs on an indemnity basis during the time of the guardianship. On 3rd April 2009 that came before me. In respect of the application for costs I ordered that within 14 days, excluding Good Friday, Easter Sunday and Easter Monday, the Official Solicitor was to file and serve the skeleton by setting out (i) why he was seeking costs, (ii) whether the costs sought are on the indemnity basis or on the standard basis, and if so, the reasons therefore, and (iii) the amount of costs sought. I also ordered that within 14 days thereafter, excluding the May bank holiday on May 4th, the respondent file and serve a skeleton argument setting out his position in answer to the Official Solicitor's skeleton argument.

11. Both parties complied with the time in which they were to put in their skeletons, and the Official Solicitor duly made clear as to why he was seeking costs and why on the indemnity basis. So far as the amount of costs sought, Mr Edwards of counsel representing the Official Solicitor, in his skeleton on 8th May said as follows

'**<u>The amount of the costs sought</u>**

20. The Official Solicitor will have to finalise his bills of costs once a final order is made in respect of his role in these proceedings. Draft bills of costs in relation to both ancillary relief and Children Act proceedings were last revised in July 2008 and indicated that the total amount of the costs being sought was £95,313.29. It is anticipated that there will be additional costs to be added to the bills but that the sums are unlikely to be substantial and that total liability is likely to be around £100,000. Draft bills revised as at July 2008 are attached herewith.'

Those bills, as I understand it, are at section E. One of the bills is in the sum of £20,377.77, and relate to the Children Act proceedings. The other bill has in fact no total, but extends to many many pages, and presumably is the basis for Mr Edwards's assertion about the costs in the ancillary relief proceedings.

12. On 12th May Mr B put in his skeleton, and I think in fairness to him I shall read it aloud. It is very short.

> 'My mental incapacitation developed in the mid nineteen nineties It may have been the cause or indeed have been caused by my marital breakdown.
>
> That mental incapacity had reached such a state that by July 2000 the President of the Family Division ordered me to be mentally examined by Dr Hoult and the result was that The Official Solicitors was made my guardian ad litem.
>
> Prior to this order I had been representing myself in the various matrimonial proceedings. Unfortunately, it is now clear that my mental incapacity had led me into a whole series of misfortunes to say nothing of my not having presented my case to the best advantage.
>
> Once I was declared to have mental incapacity, I believe that the Official Solicitor should have sought legal aid on my behalf, or else acted himself in that capacity. The terms of my divorce from Adele were such that combined with my reduced ability to operate my business at that time was such that I fully believe I would have met the requirements.
>
> The Official Solicitor not having so acted, I therefore challenge that the costs being claimed against me are valid.
>
> Throughout the past 8 years I have been under the care and control of psychiatrists and social workers, who until this year repeated that I still lacked the necessary capacity. However, I have worked hard with them and feel that substantially improvement in my condition has taken place with which the latest psychological reports concur and that it will now be in my best interests to act independently of the Official Solicitor and seek my own legal advice which could well include an application for legal aid.'

13. On 19th August 2009 the question as to whether or not the Official Solicitor should be

discharged as Mr B's guardian *ad litem* came before the Senior District Judge. Having heard the parties, and having read [inaudible] report, the Official Solicitor was duly discharged. However the Senior District Judge referred to a High Court Judge the question of the Official Solicitor's costs.

14. Mr Edwards's submissions are set out, as I have said, in his skeleton argument. He submits that the Official Solicitor is entitled to his costs against Mr B because, as guardian ad litem, he, the Official Solicitor, is entitled, subject to the court's discretion, to be indemnified as to the costs that he has incurred on behalf of Mr B whilst acting in the course of his appointment. The Official Solicitor, as Mr Edwards rightly submits, came in to this case pursuant to Rule 9.2 of the Family Proceedings Rules 1991. 9.2 (1) provides as follows,

> "(1) [Except where rule 9.2 (a) or any other rule otherwise provides, a child or protected party] may begin and prosecute any family proceedings by his next friend and may defend any such proceedings by his guardian ad litem and, except as otherwise provided by this rule, it shall not be necessary for a guardian ad litem to be appointed by the court."

Rule 9.2(4) provides, where relevant:

> "Where a person entitled to defend any family proceedings is a [protected party] and there is no person [with authority as a deputy] to defend the proceedings in his name or on his behalf, then-
>
> > (a) the Official Solicitor shall, if he consents, be the [protected party's] guardian ad litem, but at any stage of the proceedings an application may be made on not less than four days' notice to the Official Solicitor, for the appointment of some other person as guardian.
> >
> > (b)…
>
> and there shall be filed in support of any application under this paragraph the documents mentioned in paragraph (7)."

15. So it is submitted by Mr Edwards that once appointed, or once he had consented to act, the Official Solicitor acted as the agent of Mr B, and is entitled to be indemnified by Mr B.

16. To that end I have drawn to my attention three authorities. The first is *Steeden v Waldon*

[1910] 2 Ch 393. In that case an infant, acting by his next friend, brought proceedings in which he was unsuccessful. In subsequent proceedings the next friend sought to recover from the infant's estate his, that is the next friend's, own costs, and the damages and costs that had had to be paid to the defendants in the unsuccessful action brought by the plaintiff. In the course of giving his judgment Mr Justice Eve, at page 397, referred to a passage in the judgment of Lord Brougham in Nalder *v Hawkins* [1833] 2 My & K 243, 247. Mr Justice Eve said:

> 'The general attitude of the Court towards the next friends of infants is stated by Lord Brougham in *Nalder v Hawkins(1)* in the following terms:- "It is undeniable that the habit of the Court has been to encourage persons to come forward as next friends, for the purpose of obtaining its aid on behalf of parties incapacitated to sue for themselves. The language of the books is frequently, that next friends should not be discouraged; but there are cases which go much further, both in their language and in their tendency; cases which, both by the words used, and the things done, give great encouragement to undertake the office. In *Whittaker v Marlar(2) Lord Thurlow* says, that 'Whoever will stand forward in that character, is to be encouraged to every possible extent, while he can be supposed to intend the infant's benefit.' This seems to go as far as possible; it is as much as to say, that any one may do what he pleases as next friend, until he does something which cannot by any possibility be supposed to be done bona fide for the infant's advantage. It must however be observed, that this is rather the language of the case than the point decided; for there the court, on a full review of the circumstances, dismissed the bill, and made the next friend pay the whole costs of that proceeding and of the application. But it had been referred to the Master to enquire whether or not the suit was necessary, and he had reported against it; and the book does not state the facts upon which the report and the decision are grounded." '

17. Eve J. then goes on to consider other authorities at page 398, 399 and 400, and in the middle of page 400 continues as follows,

> 'In the present case, as I have already stated, proceedings were commenced under the advice of counsel properly instructed, and although they proved unsuccessful and the infant has derived no benefit thereby, the ultimate event, depending mainly as it did on the extent to which the title of the defendant mortgagees was affected by the fraudulent conduct of the infant's father, remained a matter of

> uncertainty until all the evidence had been produced at the trial.
>
> Had I been administering the estate of the infant, and had an application been made to me to sanction the institution of the action and its prosecution to a hearing, I should have acceded to the application, and might even have gone so far as to authorise the raising of money to provide for the costs on the security of the infant's property outside the subject of the action.
>
> I think, therefore, this is eminently a case to which I ought to apply the principles underlying the decisions I have referred to, and I propose to make an order declaring that the defendant is bound to indemnify the plaintiff against the costs and damages which he was ordered to pay by the judgment on February 18 1909, and the order of July 29 1909, made in the action of *Walden* v. *Edmonton Freehold Land and Building Society and Mercer*, and the costs, charges, and expenses properly incurred by the plaintiff on the defendant's behalf in and in relation to such action. As I am not administering the infant's estate, I do not see my way to make any such declaration of charge as the plaintiff asks for, but I give liberty to apply, and I order the defendant the costs of this action.'

18. The next authority referred to by Mr Edwards is *Wallersteiner v Moir (No.2)* [1975] 1 QB 373. It is not necessary to go into the facts or the decision in that case. However Mr Edwards cites it for the passage at page 403 E in the judgment of Lord Justice Buckley where he said,

> 'But there are circumstances in which a party can embark on litigation with a confident expectation that he will be indemnified in some measure against costs. A trustee who properly and reasonably prosecutes or defends an action relating to his trust property or the execution of the trusts is entitled to be indemnified out of the trust property. An agent is entitled to be indemnified by his principal against costs incurred in consequence of carrying out the principal's instructions: *Broom v Hall* (1859) 7 C.B.N.S. 503; *Pettman v Keble* (1850) 9 C.B. 701 and *Williams v Lister & Co. [1913] W.N. 295*. The next friend of an infant plaintiff is *prima facie* entitled to be indemnified against costs out of the infant's estate: *Steeden v Walden [1910] 2 Ch. 393*. It seems to me that in a minority shareholder's action, properly and reasonably brought and prosecuted, it would normally be right that the company should be ordered to pay the plaintiff's costs so far as he does not recover them from any other party. In all the instances mentioned the right of the party seeking indemnity to be indemnified must depend on whether he has acted reasonably in bringing or defending the action, as the case may be: see, for example, as regards a trustee, In *Re Beddoe, Downes v Cottam* [1893] 1 Ch. 557.'

19. The final authority is a decision of Sir Robert Megarry V-C in *Re E(mental health patient*) *[1984] 1All E.R. 309*. In that case the patient then only five months old had suffered a cerebral haemorrhage. The Official Solicitor acted on her behalf. The infant successfully brought a claim for damages for negligence against the relevant health authority and two doctors. The patient's parents lodged an appeal, which was subsequently abandoned. Thereafter the parents consulted new solicitors with a view to appealing out of time, and wrote to the Official Solicitor asking him to disclose the various documents. The Official Solicitor declined to disclose certain documents. The Master ordered they be disclosed. The Official Solicitor appealed. Sir Robert Megarry dismissed it.

20. In the course of his judgment at page 312 Sir Robert Megarry said as follows:-

> 'As I have indicated the foundation of the master's decision was that the next friend's papers were the property of the patient; and this of course led to a discussion of the position of the next friend. Certain authorities were put before me, but they did not carry the matter very far. I have since been able to look into the books, and it seems to me that some assistance is to be found in *Seton's Judgments and Orders* (7th edn, 1912) pp 932 – 935, *Simpson on infants*, (4th edn, 1926) pp 293 – 306 and *Daniell's Chancery Practice* (8th edn, 1914) pp 99 – 121, and in certain of the authorities there cited. Much of the learning relates to infants rather than patients; but there does not seem to me to be any difference between them that is relevant to this case.
> The main function of a next friend appears to be to carry on the litigation on behalf of the plaintiff and in his best interests. For this purpose the next friend must make all the decisions that the plaintiff would have made, had he been able. The next friend may, on behalf of the plaintiff, do anything which the Rules of the Supreme Court require or authorise the plaintiff to do, though the next friend must act by a solicitor: see Ord 80, r 2. It is the next friend who is responsible to the court for the propriety and the progress of the proceedings. The next friend does not, however, become a litigant himself: his functions are essentially vicarious. Nevertheless, it is an important part of his functions that by acting he makes himself personally liable to the other party to the litigation for the costs of unsuccessful proceedings, and also for any damages under an undertaking in damages. On the other hand, if it was proper to institute the proceedings, and they have been conducted with propriety, the next friend will be entitled to be indemnified in respect of the costs by the plaintiff, or at least out of the plaintiff's estate: see eg *Steeden v Walden [1910] 2 Ch 393*, and the books that I have

already mentioned.'

21. Mr Timothy Deal, counsel, appearing for Mr B, has submitted a concise and helpful skeleton argument of 3rd February 2010. His central submission, as I understand it to be, appears in paragraph five. He submits that the fundamental question is the extent to which an incapacitated patient should be liable for costs. The medical NHS Trust authorities, he submits, give guidance. If the Official Solicitor is necessarily involved in every case affecting an incapacitated party, to that extent the Official Solicitor is exposed to costs in every case. Accordingly, he submitted, it would seem appropriate that those cases guide me in the instant case, with one of the consequences being that it would be right, if the Official Solicitor is entitled to his costs, nevertheless Mrs B should be ordered to pay half the Official Solicitor's costs. To that end Mr Deal specifically drew my attention to *X NHS Trust v J* [2005] EWHC 1273 Fam, a decision of Mr Justice Munby as he then was. In that case the Trust had brought proceedings for a declaration in respect of J, who was an elderly patient suffering from breast cancer. She lacked the capacity to make her own decision as to medical investigations and treatment. The Official Solicitor applied for an order that the claimant, *X NHS Trust*, pay one half of his costs incurred acting as a litigation friend of J. Mr Justice Munby granted that application. In so doing he held that in medical treatment cases it was usual for a claimant, such as NHS Trust, to pay a proportion of the Official Solicitor's costs. Where the Official Solicitor acted as a litigation friend for someone who was incapacitated, it was in the court's discretion to order costs against the claimant even where the claimant had not been unsuccessful as such. If the Official Solicitor, who was necessarily involved in every such case, was unable to recover the costs from NHS Trust the burden would be beyond his budget. In the circumstances it was appropriate to make the order sought by the Official Solicitor.

22. A similar point came before the Court of Appeal in *Northampton Health Authority v The*

Official Solicitor and the Governors of St Andrew's Hospital [1994] 1 F.L.R. 162. I refer in particular to the passage in the judgment of Sir Thomas Bingham, Master of the Rolls, as he then was, at page 169, and in particular to a passage cited from part of a judgment given by Mr Justice Sheldon in October 1986 in the case of *Re H (A minor)* in which Mr Justice Sheldon said,

> 'In each case, in my opinion, the decision lies in the unfettered discretion of the trial judge, to be exercised in accordance with similar general principles. One of these, in my view, is that, as the parties, in whatever the circumstances, have become involved in a situation in which it has become necessary to seek the assistance of the Official Solicitor, it is not unreasonable for him to ask that they should meet or contribute towards the costs of his intervention.'

23. In the alternative, Mr Deal submits that in any event the Official Solicitor has acted unreasonably, and thus should not be entitled to his costs. The first ground is that at the outset of the guardianship in 2000 and/or 2001 the Official Solicitor should have written to Mr B setting out the terms of the Official Solicitor's retainer, in particular as to costs, i.e. hourly rates, estimate of how much might be payable, and various matters like that. That would have enabled Mr B if he did not like, or was unhappy with the terms of the retainer as to costs, to have the opportunity to seek out and/or apply to appoint his own solicitor to act for him. Mr Deal submits that the terms of Dr Holt's certificate was that although Mr B was incapable of conducting litigation, nevertheless he could manage his own business, and thus the course of writing to Mr B should have been followed. As it was not, Mr B was deprived of the opportunity of instructing somebody who might have been a great deal cheaper, and thus any liability that he and Mr B would have would be that much less.

24. The second ground is that in any event the Official Solicitor should have made an application to the Legal Services Commission for public funding of Mr B's case. If that had been done, and if it had been granted, then to a greater or lesser extent Mr B would not have been exposed to a liability to indemnify the Official Solicitor for his costs.

25. The third ground of alleged unreasonable conduct was that the Official Solicitor should have taken steps to try to persuade the appropriate authority, presumably the Legal Services Commission, against granting Mrs B public funding, and/or to seek to persuade the Legal Services Commission to withdraw public funding from Mrs B. It is submitted that had public funding been denied to Mrs B, and/or had public funding been obtained for Mr B, the proceedings would not have come so protracted, and the costs would have been very significantly lower. It is submitted in paragraph seven of the submissions of Mr Deal that a preliminary step that the court is invited to take is to order an investigation of Mrs B's public funding status, or alternatively to order Mrs B be charged for the part of Mr B's costs to the Official Solicitor.

26. The fourth ground of alleged unreasonable behaviour is that it is submitted the Official Solicitor has failed to comply with that part of my order of April 2009 requiring them to set out their costs. It is submitted by Mr Deal that the paragraph in Mr Edwards' skeleton argument, to which I have referred, is much too brief, and the bill to which I have referred incomplete. In any event there is only one bill, namely for the contact proceedings, which has any final total. Thus it was submitted that the Official Solicitor has failed to comply with that part of my order.

27. Allied to that is a submission that by reason of section 69 of the Solicitors Act 1974 the Official Solicitor has failed to comply with its provisions. Section 69 provides that no action can be brought to recover any costs due to a solicitor before the expiration of one month from the date on which the bill of costs is delivered, unless certain requirements are met, one of which is (see sub-section two) that the bills were signed by the solicitor, and must be delivered to the party to be charged with the bill. The section was not complied with and accordingly no action can be brought by the Official Solicitor against Mr B.

28. The fifth ground of unreasonable conduct, or perhaps it is a freestanding point, I do not

think it matters, is that Mr Deal submits that there has been delay in this case such as to disadvantage or prejudice Mr B in disputing the bills that have now been, or are in the process of being, presented for taxation. Mr Deal submits that the contact and the ancillary proceedings have been over for at least six years, and here we are six years, later about to, if I grant the order, embark on a perhaps lengthy and costly and difficult taxation of these bills. Thus, by reason of delay, Mr B will be prejudiced in disputing either the reasonableness of any individual amounts, and/or whether it was reasonable for any particular work to be undertaken.

29. Finally, Mr Deal submits that in any event Mrs B should pay to the Official Solicitor 50% of any costs ordered to be paid by Mr B to the Official Solicitor.

30. In my judgment Mr Edwards' submissions on the law are correct. Under the Family Proceeding Rules of 1991 once the Official Solicitor has given his consent he is under a duty to act as guardian ad litem to the protected party. I say under a "duty" because rule 9.2(4)(a) states that if he consents the Official Solicitor "shall" be the patient's guardian ad litem. Once the guardian is appointed the protected party may only bring or defend proceedings by his guardian ad litem. In my judgment once a guardian is appointed the protected party is not free to act in the litigation as he thinks appropriate for the obvious reason that he is not fit to conduct the litigation for himself. The Official Solicitor must of course act in the patient's best interest. By definition the patient is not capable of determining what are his best interests. That must be left to the Official Solicitor as his guardian ad litem.

31. I respectfully adopt the dicta of Lord Brougham as set out by Mr Justice Eve in *Steeden v Walden* [1910] 2 Ch 393. Furthermore the observations of Sir Robert Megarry in *Re E*, to which I have referred, particularly as to the main function of a next friend, seem to me to be highly relevant.

32. The Official Solicitor, as I understand it, is funded out of public revenue. When acting as a guardian ad litem the Official Solicitor may be able to have recourse to two sources for the purpose of funding the litigation for the patient for whom he acts. The first source would be public funding. The second source may be the assets of the patient. In my judgment in the instant case the Official Solicitor could not have sensibly applied for public funding because of Mr B's attitude to the Official Solicitor, which no doubt, because of his then mental difficulties manifested itself to the Official Solicitor in hostility and non-cooperation. The letter that the Official Solicitor wrote to Mr Justice Wilson and Mr Justice Wilson's observations in paragraph one of his judgment confirm that. Furthermore, and Mr Deal does not suggest to the contrary, it was not appropriate for the Official Solicitor to attempt to obtain funding from the patient's assets during the litigation because Mr B was still a patient. Thus for the purposes of this case the litigation costs of Mr B fell to be funded by the Official Solicitor. Thus, putting it in its legal language the Official Solicitor bore out of his own monies the costs of his principal, namely Mr B.

33. In my judgment the authorities cited by Mr Deal do not assist me. They relate to a discrete situation, that is to say where an NHS Trust brings a claim for a declaration in respect of a person, probably in a hospital, who may not have the capacity to consent to medical treatment, or indeed in some extreme cases, to the withdrawal of life support. In those cases invariably the NHS Trust pays 50% of the Official Solicitor's costs with, I am told by Mr Edwards, the Ministry of Justice paying the other 50%. In the instant case the situation is quite different. Although there were, of course, adversarial proceedings between Mr and Mrs B in respect of the children, and in respect of ancillary relief, this is an application, as I said, by the Official Solicitor for the reimbursement of his costs from a person in whose interests he was acting.

34. I therefore turn to consider whether or not there has been unreasonable conduct by the

Official Solicitor, such as to deprive him, in whole or in part, of his entitlement to his costs, the amount of which would have to be determined hereafter, in default of agreement, by the taxing master. As to Mr Deal's first ground, I do not believe he can possibly be correct. I find difficulty in following what practical benefit there would be to any patient if the guardian ad litem set out how his costs were likely to be incurred, i.e. the hourly charge, the level of solicitor that was to be engaged, and so on and so forth. Mr Deal submits that if the Official Solicitor had written to Mr B that he would have been able to take action by getting his own solicitor appointed. That, to my mind, is fallacious. It seems to be to be rather odd that a guardian should be under a duty to write, in this respect, to the incapacitated person who, because he is incapacitated is by definition not fit to conduct his own litigation. Mr Deal says that what should then have happened would have been that the Official Solicitor would then have had to have ceased to be Mr B's guardian and another guardian would have had to have been appointed. It seems to me that, with great respect to Mr Deal, his submission that the Official Solicitor should have been under a duty to write to Mr B in the terms I have indicated, to be unarguable.

35. The second ground, equally, in my judgment is unarguable. In my judgment, there was no obligation in the circumstances of this case for the Official Solicitor to have attempted to obtain public funding for Mr B. Why? For the reasons set out by Mr Justice Wilson.

36. The third ground is that the Official Solicitor failed to persuade, or even attempt to persuade, the Legal Services Commission to withdraw, or not to grant, Mrs B legal aid. With great respect to Mr Deal I also consider this to be a point that is unarguable. I am going to put it shortly. The reason I do so is that I do not wish to inflame the situation. The background to this case and the protracted litigation is the character and the behaviour of Mr B, who appears to have been the person responsible for the protracted proceedings. As Mr Edwards has pointed out there have been many costs orders made in favour of Mrs B

against Mr B.

37. So far as my order of April 2009 is concerned I repeat what I said during submissions that I have no memory of why I made the order that I did in 2009. But it would not appear from the face of that order that I was intending that the Official Solicitor would have to set out in detail what his costs were. The point of my order was to give an indication of the likely size of the costs. In any event if I grant the order asked for it would be open to Mr B to dispute on taxation the reasonableness of any item or work carried out, and/or the quantum of any item..

38. As to section 69 of the Solicitors Act 1974. I can deal with this shortly. Mr Edwards, in my judgment, is correct when he submits that this is not an action being brought by the Official Solicitor. It is seeking an order within the proceedings from the court that Mr B pay the Official Solicitor's costs.

39. As to delay, I said that there has been a lapse of time between the conclusion of the contact and ancillary proceedings and the application to discharge, and therefore the application for the costs to be paid. It seems to me that it was not possible for the Official Solicitor to have been discharged as guardian until such time as the treating psychiatrists of Mr B said that he was fit to resume conduct of the litigation. That did not occur until late on in 2008. Thereafter it seems to me that the proceedings to discharge the Official Solicitor could not be brought before a certificate was available from the treating psychiatrist. In any even it is quite apparent from reading the correspondence to which I have referred that Mr B knew at least in 2006 that proceedings might taken in respect of the costs, and I can see, with all due respect to Mr Deal, no prejudice that he was going to suffer by reason of the lapse of time.

40. Finally it is submitted that Mrs B should pay 50% of any costs recoverable by the Official Solicitor. With respect to Mr Deal I completely disagree. The costs were incurred on behalf of Mr B, not Mrs B. That is obvious. I do not see that there is any basis in the

NHS Trust cases for saying that Mrs B should have to pay any part of the Official Solicitor's costs. The instant situation is quite different.

41. The final matter is the basis upon which any order should be made, should it be indemnity or standard. Mr Edwards in his paragraph 19 puts it succinctly,

> 'The costs order on the indemnity basis, cases speak of the right of the next friend to be indemnified. The normal rule for the assessment of costs to someone who has acted as a trustee is that his costs are assessed on the indemnity basis, CPR 48.4(3). The situation is here analogous in its premise.'

I agree.

Accordingly I shall order that Mr B do pay the Official Solicitor's costs incurred by him in acting as guardian ad litem for Mr B in the proceedings between Mrs B and Mr B until the Official Solicitor was discharged on 19th August 2009, such costs to be the subject of a detailed assessment on the indemnity basis, unless agreed.
