THE SUPREME COURT

[Appeal No. 551/12]

MacMenamin J.
Dunne J.
Noonan J.

IN THE MATTER OF A WARD OF COURT MO'B AND IN THE MATTER OF HIGH COURT PROCEEDINGS

BETWEEN:

MO'B, AO'B,
BO'B (A MINOR) SUING BY RO'C

PLAINTIFFS/APPELLANTS

-V-

WESTERN HEALTH BOARD, EO'D, DJO'G AND B.S.D.

DEFENDANTS/RESPONDENTS

Judgment of Mr. Justice John MacMenamin dated the 6th day of December, 2019

Background

1. This Article 64 appeal is brought by AO'B, who is married to MO'B. By order of the High Court dated the 18th December, 2013, MO'B was made a ward of court. Two immediate consequences flow from the making of the wardship order. First, the title of this appeal should be amended accordingly. Second, this judgment should be suitably redacted to protect the rights of the ward and other persons who are not represented in this appeal.

Article 64

2. This appeal is brought against a judgment and order of the High Court (McCarthy J.), made on the 15th November, 2012. In that judgment, McCarthy J. refused to vacate orders of Quirke J. made on the 14th June, 2011, whereby he set aside his previous ruling that the plaintiffs' claim should be ruled as settled for €4.5 million, and instead approved a settlement figure of €4.2 million in claims brought by the plaintiffs against the defendants. In this appeal, Ms. AO'B appears without legal representation. In circumstances now to be set out, she seeks to represent the interests of her husband, MO'B. I wish to make clear that I am entirely satisfied that throughout the lengthy litigation considered in this judgment, AO'B has acted as a devoted wife who has had as her primary concern the welfare of her husband and their two children, RO'B and BO'B.

3. By reason of medical misdiagnosis a number of years ago, MO'B suffered substantial cerebral damage resulting from undiagnosed viral encephalitis. As a result, he now suffers serious mental and physical disabilities. He is incapable of conducting his own affairs and is now under permanent medical care. What occurred had a most serious and lasting effect both on him and his family.

4. A professional negligence case against the clinicians followed. This appeal concerns the settlement negotiations which took place in the proceedings. In essence, AO'B contends that the case was settled for €4.5 million. The defendants do not accept that it was

settled for €4.5 million. Their case, rather, is that their legal advisors actually offered €4.2 million plus an additional sum of €300,000 in the event that the Health Service Executive ("HSE") made a claim for medical expenses against MO'B. They say that, ultimately, the HSE abandoned any claim, and that, consequently, the "contingency element" of the offer lapsed.

5. For the proceedings, AO'B consulted with K, a firm of solicitors, who thereafter represented each of the plaintiffs in their respective claims. The proceedings were issued on the 2nd July, 1998. The defendants delivered full defences. Ultimately, it was decided that the defendants would be represented by one firm of solicitors, M and Co.

Negotiations

6. The case was set down for trial on the 3rd May, 2011. Pre-trial negotiations were arranged for the 4th April, 2011. The plaintiffs and defendants were represented by senior counsel. It is hardly necessary to emphasise that, in what follows, there is no suggestion of *mala fides* on the part of either counsel or the respective solicitors who were instructing them.

7. A number of discussions took place between senior counsel for the plaintiffs and senior counsel for the defendants. Mr. K, solicitor for the plaintiffs, but who no longer acts for her, has sworn an affidavit in the notice of motion setting out his recollection of events. Ms. H, solicitor for all of the defendants, for her part has sworn two affidavits.

8. The dispute about what transpired in the negotiations centres around one issue: the question as to whether the HSE, which was caring for MO'B, would make a claim against the ward for medical and hospital expenses going back many years. It appears that, through no fault of the lawyers on either side, this issue was unclear and remained so up to a critical point of the 1st June, 2011, despite the fact that the HSE was actually one of the defendants in the case.

9. For reasons set out below, it is not necessary to go into all the details of the negotiations. This judgment refers only to some salient points in order to set out what occurred then in the High Court and the appeal before this Court. What is actually said and contained in the affidavits will be essential to a fuller understanding of the case.

10. For clarity, in the negotiations the plaintiffs were represented by two senior counsel, the defendants by one senior counsel. The same two counsel for each party were involved in those negotiations however.

The Defendants' Solicitor

11. Ms. H says the settlement was for €4.2 million with a contingency allowance of €300,000. She says that on the day of negotiations referred to later, she instructed her senior counsel to settle the plaintiffs' case for the sum of €4.2 million, with a contingency figure of €300,000 in the event that the HSE made a claim for costs. She states that she was informed by her senior counsel that he conveyed to senior counsel acting for the plaintiffs that, if the HSE made no claim for medical costs, or if the judge opened the question of any potential HSE claim, the additional offer of €300,000 would be "off the table" and the

offer would revert to €4.2 million. Her narrative set out that, later, on the 27th May, 2011, senior counsel for the plaintiffs ruled the case in front of the High Court. She states that she and her junior counsel attended on behalf of the defendants to consent to judgment, but that, at that stage, junior counsel did not go into details regarding the breakdown between the €4.2 million and the €300,000, leaving that aspect to senior counsel for the plaintiffs. Ms. H deposes that, having consented to the figure of €4.5 million, her junior counsel, as is customary, left the court and was not present for the ruling. Ms. H deposes that she did not know what senior counsel for the plaintiffs said in court, but she contends it should have been pointed out to the Court that the figure of €300,000 was subject to a proviso regarding any potential HSE claim. Ms. H says it appears that, while senior counsel for the plaintiffs did advert to the potential claim by the HSE, he did not appear to have explained to Quirke J. that the sum of €4.5 million was based on an identified sum of €4.2 million and the potential value of the HSE claim of €300,000. Her belief is that the only sum mentioned was simply €4.5 million.

12. It appears that Quirke J. was not satisfied with regard to the uncertainty of the potential claim by the HSE. The matter was put back to Thursday the 2nd June, 2011.

13. Subsequently on the 27th May, 2011, the defendants' junior counsel approached senior counsel for the plaintiffs. She asked whether the ruling been successful. Ms. H deposes that senior counsel for the plaintiffs told her junior counsel that Quirke J. had ruled the matter for the sum of €4.5 million on the basis that the HSE was to confirm that they did not intend to seek compensation for retrospective care, and that the matter had been put back to Thursday, 2nd June, 2011 for mention. Ms. H deposes that her junior counsel approached senior counsel for the plaintiffs for the second time on the same day, the 27th May, 2011, about 20 minutes later, as she was concerned that he had not mentioned to Quirke J. the proviso in the breakdown between €4.2 million and the additional €300,000.

14. Ms. H says that, when junior counsel raised this with senior counsel for the plaintiffs, he replied: "That's not what the letter says". It can be assumed that here he was referring to a letter from Ms. H to Mr. K prior to the ruling. Ms. H's junior counsel stated to senior counsel that she understood the matter had been agreed between senior counsel for the plaintiffs and senior counsel for the defendants. Ms. H deposes that senior counsel for the plaintiffs stated he had informed the Court that the €4.5 million included an unspecified sum to reflect the uncertainty of the HSE's position.

15. Ms. H deposes that, prior to the for mention date of the 2nd June, 2011, she contacted the plaintiffs' solicitors on the evening of the 1st June, 2011, to find out if there had been any answer from the HSE. She was informed that they had not given a decision. She deposes that she pointed out then that, should the HSE confirm they were not claiming for care to date, the settlement figure should be for €4.2 million rather than €4.5 million.

16. Ms. H further deposes she and her junior counsel attended the High Court on the 2nd June, 2011, where the matter was listed for mention. She states that, when questioned as to position of the HSE, senior counsel for the plaintiffs advised the Court that the HSE

had given an undertaking not to pursue any claim against the plaintiffs. She says that, up to that moment, neither she, nor anyone representing the defendants, was aware that the HSE had made this decision.

17. Ms. H further deposes she was informed by her senior counsel that he had been told by senior counsel for the plaintiffs that, prior to going into Court on the morning of the 2nd June, 2011, the plaintiffs had not heard from the HSE. Ms. H deposes that Quirke J. then indicated he would approve the figure of €4.5 million. Junior counsel for the defendants objected to this on the basis of their understanding of the agreement made between senior counsel, and advised the Court that the appropriate amount should now be €4.2 million in light of the HSE's undertaking.

18. Ms. H deposes that the High Court judge then stated that the figure of €4.5 million had been ruled on consent. Therefore, he was going to go ahead and rule the matter. Accordingly, the matter was ruled in the sum of €4.5 million, when Ms. H contends the settlement sum should have been €4.2 million.

19. Ms. H deposes that she wrote to Mr. K, the plaintiffs' solicitor, on the 3rd June, 2011, setting out the position as she understood it following discussions that she had with her senior counsel. She indicated in the letter that she had instructed her senior counsel to appear before Quirke J. on the 7th June, 2011, to apply to have the settlement figure amended to €4.2 million to reflect what she had understood was agreed between the parties, or to apply for a stay on any order for payment in excess of €4.2 million. She further requested that the plaintiffs arrange for their counsel to be in attendance.

20. On the 7th June, 2011, senior counsel for the defendants attended before Quirke J. The judge noted that, in the absence of consent from the plaintiffs, the Court was not in a position to amend or vary the order, but gave liberty to reapply on consent. Ms. H states that on the 8th June, 2011, she again wrote to Mr. K setting out what had transpired before the Court on the 7th June, 2011, and stating that, in the absence of consent from them within seven days, she would advise the defendants to proceed by way of motion on notice. On the 15th June, 2011, Mr. K responded by letter, advising that the plaintiffs were not in a position to consent to the order being amended or varied. Ms. H's contention is that the parties were never *ad idem* to settle the case at €4.5 million. She contends that, at the time of the final ruling, any uncertainty relating to the claim of the HSE had "vanished", and as a result of what the HSE indicated, "there was no offer of €4,500,000".

21. As is self-evident, what was actually said between counsel and the solicitors, and what is contained in the correspondence, lies at the centre of this unfortunate dispute. As a consequence of this area of uncertainty and other factors, this Court will not express any view, or make any finding, on what was said in a letter from Mr. K's firm of the 17th May, 2011, the fax in reply from Ms. H's firm, dated the 20th May, 2011, a response to that fax from Mr. K's firm dated the 22nd May, 2011, a response from Ms. H's firm dated the 3rd June, 2011, a letter of the 8th June, 2011, or responses from Mr. K's firm, dated the 15th June, 2011.

The Plaintiffs' Case

22. AO'B seeks to have Quirke J.'s later orders set aside. The legal consequences of making such an order are by no means clear. AO'B has sworn a detailed affidavit. There, and in an affidavit sworn on the 12th July, 2011, by Mr. K, the plaintiffs'/appellants' case is set out. What now follows is a summary, sufficient for the purposes of this judgment but no more. Mr. K deposes that, at the beginning of October 2010, an application was made to have the case specially fixed. By then, MO'B had been looked after by Rehab Care since the year 2000 or thereabouts, and it was his understanding that the costs of care had been met by the HSE. Mr. K deposes that his firm had received some information from Rehab Care in relation to the cost of care to date, but that the figures were somewhat confusing. Consequently, he wrote to Rehab Care on the 20th August, 2010, enquiring as to the actual cost of the care provided up to that time. Mr. K received a reply from Rehab Care dated the 10th December, 2010. However, this simply indicated that his queries had been referred to the HSE and that he was likely to get a response from the HSE rather than Rehab Care.

23. Mr. K states that he was concerned about the delay in getting the relevant information from the HSE. Consequently, he again wrote to the HSE by letter of the 18th January, 2011. He looked for detailed information in relation to the costs of the care to date. In the course of that letter, he enquired as to whether, in the event that MO'B received a significant award of damages, the HSE would seek to recover the costs of care to date. He also enquired as to what was the legal basis upon which the HSE would seek to recover these costs of care in the event that they did, in fact, seek to recover them.

24. Mr. K deposes that he received a letter from a Ms. MO'D of the HSE dated the 7th February, 2011. There she set out the costs of care to date and the estimated cost of care in the future. She indicated that the question as to whether the HSE would make a claim against MO'B had been referred for legal advice and that she would revert to him when she received that advice.

25. Mr. K deposes that he then wrote to Ms. H's firm in a letter dated the 22nd February, 2011. He attached thereto a copy of the letter he received from MO'D and gave up-to-date figures in relation to the costs of care to date. He stated that the letter set out that the estimated costs of future care could amount to €1,234,837. Mr. K stated he advised Ms. H's firm that he had enquired as to whether the HSE would be seeking to recover the costs of care to date, that the HSE had indicated that they were seeking legal advice, and that when he heard from them he would notify Ms. H's firm. Mr. K refers to a note on his file to the effect that there was a telephone call from MO'D's secretary on the 3rd March, 2011, confirming that the HSE had written to its legal advisors and was awaiting legal advice.

26. Mr. K deposes that he again wrote to the HSE and Rehab Care by letter dated the 29th March, 2011. He complained about the delay in getting information from the HSE as to whether it intended to seek to recover the costs of care to date, and, if it so intended, the legal basis of such a claim. He set out that, unless he received some indication of their stance by close of business on the 1st April, 2011, his firm would not seek to recover the

costs of any care provided by the HSE to date, either in any forthcoming litigation, or specifically in the settlement talks that had been arranged for the 4th April, 2011.

27. Mr. K then deposes that his file indicates that his firm received a fax from solicitors for the HSE, RG Solicitors, at a date which is unclear. This indicated that the HSE would be seeking to recover the costs of future and past care. He states that, prior to then, the HSE had not previously advised him as to what their intentions were.

28. It is necessary next to briefly outline Mr. K's account of the negotiations. He says these lasted approximately three hours. The plaintiffs were represented by two senior counsel and one junior counsel. The actual negotiations were dealt with by the senior counsel, who negotiated with senior counsel for the defendant.

29. Mr. K deposes that as he was by then aware that the HSE was likely to be making a claim for €1.2 million or thereabouts, he advised his senior counsel, and he understood from him that, at all times in the course of the negotiations, he made his opponent aware that one of the terms of settlement would be that they would require an indemnity in relation to any claim that may be made by the HSE in relation to the costs of past care. To the best of Mr. K's recollection, a copy of the fax received from RG on the 1st April, 2011, was furnished to senior counsel for the defendants.

30. Mr. K deposes that the defendants' initial offer was in the sum of €3.5 million and was subsequently increased to €4 million. At that stage, counsel for the defendants was advised that the plaintiffs' claim would not settle for less than €4.2 million.

31. Mr. K deposes that senior counsel for the defendants obtained instructions and after some considerable time came back and indicated that he was prepared to pay the sum of €4.2 million and also to provide the plaintiffs with an indemnity in relation to any claim by the HSE. Senior counsel stated that, if that stipulation was to be accepted by the plaintiffs, they, the plaintiffs, would have to concede that they were receiving two-thirds of the value of the claim. Mr. K states that he presumed that the purpose of this was to assist the other defendants in negotiating a settlement of any potential claim by the HSE at a maximum of two-thirds of the value of the claim. Senior counsel for the plaintiffs advised Mr. K and the plaintiffs as to the offer which was made. The lawyers had no hesitation in advising that the offer was acceptable and that it could be agreed that the plaintiffs were getting 60% of the full value of the claim. AO'B was happy to settle on those terms and so instructed her lawyers who then conveyed that the offer was acceptable.

32. Mr. K's position is that, so far as they were concerned, the claim was settled. But, he deposes, a conversation then took place between the two senior counsel. Mr. K contends that senior counsel for the defendants indicated that one of the defendants' insurers had a difficulty with the indemnity. It was open-ended. They were unsure as to what, if anything, it was likely to cost them. They would simply prefer if they could settle the case on a basis which would allow them to walk away knowing exactly what it would cost them in damages.

33. Mr. K deposes that, such being so, senior counsel for the defendants indicated to senior counsel for the plaintiffs that the defendants were prepared to pay an additional amount on the basis that the plaintiffs would accept any risk relating to any claim the HSE might make concerning past care. Senior counsel for the plaintiffs reverted to his solicitor and clients, advising them of this development. He indicated that, strictly speaking, they could, if they wished, insist on settling the case on the basis of the acceptance of the previous offer of €4.2 million plus an indemnity. However, at all times, it was the considered view of each of the plaintiffs' lawyers that there was little prospect of the HSE bringing any claim and that in the event of any claim being brought, it would be unsuccessful.

34. Mr. K points out that, since his catastrophic brain injury, MO'B has been dependent on social welfare and is a medical card holder. On that basis alone, he is entitled to be cared for by the HSE. Because of his limited means, and the fact that he is a medical card holder, he was entitled to be taken care of free of charge. The lawyers took the view that there was no real risk in such a "buy off", and that any additional sum that might be paid to MO'B would, therefore, be solely for his benefit.

35. Mr. K states that counsel for both sides again spoke. There was an offer of €4.5 million with no indemnity. Counsel for the defendants indicated to counsel for the plaintiffs that, in the event that the HSE was to bring proceedings in relation to past care, any claim would have to be dealt with by the plaintiffs without recourse of any kind to the defendants.

36. Mr. K's position is that, in that situation, they reverted to their clients. The lawyers advised the family that, in the light of these developments, they had no hesitation in recommending the settlement offer of €4.5 million to them. The first-named plaintiff's family inquired as to the potential size of the risk that a claim might be made by the HSE. Mr. K deposes that his senior counsel advised him that approximately 50% of any potential claim by the HSE would be statute barred, which in itself would have the effect of reducing any potential claim to approximately €600,000. It was common case that MO'B was recovering approximately 60% of the full value of his claim. Consequently, even if the HSE was fully successful, the maximum that it would be entitled to would be a total of €360,000.

37. The O'Bs were advised that in the unlikely event of the HSE bringing proceedings, it was almost certain that any claim could be dealt with by a figure significantly less than €360,000. As such, the lawyers advised that the settlement offer of €4.5 million was significantly better from the plaintiffs' point of view than the offer of €4.2 million plus an indemnity. The plaintiffs were more than happy to accept the offer of €4.5 million and had no hesitation in instructing the lawyers to accept the offer subject to approval by the Court.

38. Mr. K deposes that his counsel then reverted to senior counsel for the defendants and confirmed the settlement subject to the approval of the Court. He also indicated that they would let the defendants know when the matter would be ruled. It is said that in the

course of negotiations senior counsel for the defendants indicated that he had written an opinion in relation to the HSE's entitlement, if any, to recover the costs of past care. Subsequent to the matter being settled, his senior counsel requested that he might be given a copy of the opinion and he was, in fact, given a copy of it. He is unsure as to whether he was given this on the evening of 4th April, 2011, or within some days thereafter.

39. Mr. K deposes that, while he had spoken to Ms. H on a number of occasions over the phone, he had never actually met her in person. On the day, he availed of the opportunity of introducing himself to Ms. H and thanking her for the manner in which she had dealt with the case.

40. Initially, it was hoped that the case might be ruled on 14th April, 2011. Mr. K so advised the HSE's solicitor, Mr. D of RG Solicitors. He indicated that he anticipated that the Court would probably wish to know what, if anything, the HSE was doing. Mr. K enquired as to whether Mr. D might be in a position to advise prior to 14th April, 2011. Mr. D requested copies of all the pleadings and medical reports. Mr. K refused to provide him with these. He suggested that Mr. D could get them from Ms. H's firm who were also representing the Western Health Board/HSE in the proceedings. Despite repeated requests, Mr. K says that Mr. D was unable to give any indication as to what the legal basis of a claim by the HSE would be in the event that such a claim was to be made. He mentioned that he had referred the matter to counsel and was awaiting senior counsel's opinion.

41. In the light of what follows, I pause here to pose the rhetorical question as to what would have been the position had the case been ruled on the 14th April, 2011, or early in the month of May 2011? This can only be a matter of speculation.

42. Mr. K deposes that it did not prove possible to proceed with the application to rule the case on 14th April, 2011. However, on that date, senior counsel for the plaintiffs advised the Court that the case would not be proceeding on 3rd May, 2011, that it had been settled subject to approval, and that it should be left in the list for mention. His counsel's recollection is that, shortly after the matter was mentioned on the 14th April, 2011, he was approached by somebody, possibly solicitors for RG Solicitors representing the HSE, who indicated that they had understood that the matter was to be ruled on that day and they wished to indicate to the Court what their position was in relation to the costs of past care. Nothing developed from that, other than that counsel for the plaintiffs made counsel for the defendants aware of the situation and that the case had been taken out of the list.

43. Mr. K deposes that his counsel advised him that he had no further significant discussion with counsel for the defendants but may have mentioned the matter to him on the 3rd May, 2011, after the Court had been again advised the case had been settled, and would be ruled on within a matter of weeks. Senior counsel for the plaintiffs informed Mr. K that he has no recollection of counsel for the defendants saying words to the effect that the offer of €4.5 million would be "off the table" if it should turn out that the HSE did not have any valid claim, or if there was going to be some investigation by the Court into the rights of the HSE to maintain that claim or into the amount of the claim. Senior counsel for the

plaintiffs states that, if counsel for the defendants had raised any such contention, he would have strongly opposed it and would have brought the matter to Mr. K's attention. The affidavits also describe other conversations which are said to have taken place between counsel, but this Court has not direct evidence of these conversations.

44. Mr. K deposes that AO'B was not in a position to attend court prior to 20th May, 2011. The matter was to be ruled on 26th May, 2011. Mr. K wrote to Ms. H's firm by letter dated 17th May, 2011. He confirmed that it was their intention to have the matter before the Court on 26th May, 2011. The letter sets out "terms of the settlement". Mr. K indicated that the solicitors for the HSE had not yet confirmed whether or not they intended to recover the costs of care provided by the HSE to date. He says this was, in fact, not correct. In the course of the settlement talks on the 4th April, 2011, they had furnished the defendants with a copy of the fax from RG Solicitors dated the 1st April, 2011. Strictly speaking, what he should have said in his letter of 17th May, 2011, was that the solicitors for the HSE had not yet written to them setting out any legal basis on which they were entitled to recover the costs to date.

45. Mr. K deposes that he received a faxed letter from Ms. H's firm of solicitors dated the 20th May, 2011, noting that the matter was to be ruled on the 26th May, 2011, and clarifying certain aspects of the order that was to be made. He says there was no mention whatsoever of any kind of condition attaching to any part of the €4.5 million.

46. It appears that a problem arose in relation to having the matter ruled on the 26th May, 2011. It was agreed that the matter be ruled on the 27th May, 2011. Mr. K wrote to Ms. H's firm of solicitors by fax dated the 22nd May, 2011, confirming the date of the proposed ruling and repeating what they had said in their faxed letter to him on the 20th May, 2011. Mr. K raised the issue of costs incurred by the plaintiffs in pursuing the matter against those defendants in respect of whom the claim was being abandoned. Thereafter, he received a letter dated the 25th May, 2011, from Ms. H's firm of solicitors, clarifying the position in that regard.

47. Mr. K states that the correspondence exhibited with the affidavits was the only communication that passed between his two offices. He denies that there was any other contact between himself and Ms. H in relation to the HSE claim in the intervening period, and gives details of incoming and outgoing calls during that period.

Application to Rule the Case

48. The plaintiffs' case is that the application to approve the settlement came before Quirke J. on the 27th May, 2011. Mr. K deposes that junior counsel for the defendants indicated that she was consenting to judgment in the sum of €4.5 million, together with an order for costs, and that the judgment was to be against the fourth-named defendant, BSD. The action was to be struck out against the other defendants. Mr. K states that junior counsel also confirmed that what had been previously agreed; that is to say, that the last-named defendant, BSD, would discharge the wardship costs and would recover the costs that he had incurred in pursuing the action against those defendants in relation to whom the action was being struck out. Mr. K deposes there was no mention whatsoever

about any kind of conditions attaching to the figure of €4.5 million in relation to which there was consent to judgment.

49. Mr. K states that when the matter was listed for ruling on the 27th May, 2011, his senior counsel opened the facts of the case to Quirke J., setting out the history, the nature of the injuries, and how they continued to affect the first-named plaintiff, MO'B. Senior counsel indicated to the High Court that a claim was being brought by AO'B for loss of consortium and that a claim was also being brought on behalf of the children, RO'B and BO'B. Counsel conceded that the law did not make provision for such a claim by the children. He set out the strengths and weaknesses of the plaintiffs' case, indicating that liability remained an issue, though they were confident that they would succeed on that issue. A more worrying issue was that of causation. The case would be that the defendants should have commenced treatment no later than the 31st March, 1996, whereas the actual treatment had not commenced until the 4th April, 1996. Part of the defence being put forward by the defendants was that, even if MO'B had been treated as and from the 31st March, 1996, there was a distinct possibility that he would have been damaged in any event. Mr. K states that his senior counsel indicated to the Court that his experts were of a similar viewpoint, and that, in effect, they would have to concede that some damage would probably have been caused regardless of when MO'B had been treated, and the real issue to be determined was the extent of that damage. Senior counsel also outlined to Quirke J. that the defendants had made the case that, for various reasons, MOB's life expectancy had been reduced somewhat, which would have the effect of reducing the claim for the costs of future care and possibly the claim for future loss of earnings, and this was another factor which had to be taken into account.

50. Mr. K deposes that senior counsel then specifically stated that there was an issue regarding a potential claim by the HSE in relation to the costs of care which they had financed for the first-named plaintiff from the year 2000 up to the date of the application. He outlined the total potential HSE costs as being in the region of €1.25 million. He stated that it was the view of each of the plaintiffs' lawyers that the HSE was not entitled to recover any of those costs, and that in the event he was wrong, approximately 50% of the claim would be statute barred which would immediately have the effect of reducing the maximum potential amount to about €600,000.

51. Mr. K states that senior counsel informed the Court that it was accepted by both sides that the claim was being settled for approximately 60% of its full value and, that being so, it would have the effect of further reducing any amount which the HSE might recover. He stated that he was of the view that the maximum amount which the HSE could recover would be in the region of €3.6 million, but he reiterated that it was his strong view that the HSE had no legal entitlement to recover that, or indeed any amount. Counsel informed the Court that there had been ongoing correspondence with the HSE seeking clarification in relation to any claim which they might make, and requesting details of the legal basis of any such claim, and that, while indicating that it was their intention to recover the payment, the HSE was singularly unwilling or unable to set out the legal basis on which they were entitled to recover.

52. Mr. K states that Quirke J. enquired as to whether an indemnity was available in relation to any potential claim. Senior counsel for the plaintiffs advised the Court that, in the course of negotiations, there had initially been a provision for an indemnity in relation to any claim from the HSE, but that the indemnity had subsequently been withdrawn. He advised that, subsequently, an increased offer was made by the defendants, and that increased offer was on the basis that the plaintiffs would assume any risk in relation to any potential claim by the HSE. He indicated to the Court that, if the Court wished for him to specify the additional amount, he would do so. Quirke J. indicated that he did not require that information.

53. Mr. K deposes that, in the course of the application, Quirke J. commented that the HSE was a party to the action, and he was quite surprised they had not indicated the basis upon which they were entitled to recover the costs of past care. He stated he was quite happy to approve the settlement, and he so approved it. However, he stated that it was in everybody's interest if there could be certainty in relation to the position being adopted by the HSE. He indicated that he proposed to adjourn the matter to the 2nd June, 2011, and indicated that he anticipated that either the plaintiffs' lawyers, or the Court, would hear from the HSE prior to that date.

54. There were certain members of the media present in Court, and Quirke J. suggested to them that, in reporting the case, they could indicate that the settlement had been approved, but that he wished to obtain clarification of a technical matter. The matter was then adjourned to the 2nd June, 2011. The matter received considerable media attention thereafter.

55. Mr. K states that they left Court and senior counsel for the plaintiffs spoke to counsel for the defendants to advise him as to what had transpired. He says that almost immediately thereafter he was approached by Ms. H, solicitor for the defendants, who indicated to him that, if it was the case that the HSE confirmed that it was abandoning any claim, all the defendants would seek to recover the sum of €300,000. Mr. K says that his reply to Ms. H were words to the effect that "… you must be joking".

56. Mr. K states that, in a letter from Ms. H's firm to Mr. K's firm on the 3rd June, 2011, it was suggested that he had not disputed Ms. H's contention in this regard. He entirely disagrees with this contention and says that he made it abundantly clear to Ms. H that he entirely disagreed with her contention.

57. Mr. K contends that if, as Ms. H contended, there had been various telephone conversations between the 5th April and 17th May, 2011, regarding the HSE issue, it was strange that Ms. H found it necessary to restate what was apparently the agreed position immediately after the hearing on the 27th May, 2011. Thereafter, Mr. K states there was a further conversation between senior counsel for the plaintiffs and senior counsel for the defendants.

58. Mr. K's contention is that the first indication that any lawyer representing the plaintiffs received in relation to any alleged condition on part of the settlement figure of €4.5

million was what was said to him by Ms. H outside court on the 27th May, 2011. Up until then, there was no suggestion made to him, or indeed to his senior counsel who had conducted the negotiations, that any part of the settlement figure was contingent, or that somehow or other the entire settlement figure would not be paid over in the event that it was approved by the Court.

59. Mr. K deposes that he left the country on the 28th May, 2011, and did not return for approximately eight days. Prior to the matter coming back before Quirke J. on the 2nd June, 2011, he says that he did not receive any correspondence from Ms. H's firm to the effect that if the HSE abandoned its claim for the costs of past care, the sum of €300,000 should be recoupable to the defendants. Indeed, he says, no correspondence at all was received from Ms. H's firm in relation to the case prior to the matter being dealt with by Quirke J. on the 2nd June, 2011.

60. Mr. K deposes that, in the course of the case, he was assisted by Mr. DMcG, a solicitor in his firm. Mr. K deposes that Ms. H says in her affidavit that on the evening of the 1st June, 2011, she contacted Mr. K's firm to find out if there had been any answer from the HSE. When she contacted Mr. K's firm, she spoke to Mr. McG. It was Mr. McG's recollection that this call came through early in the morning of Wednesday the 1st June, 2011, and Mr. K says it was so logged in the log of incoming calls as being the first call that day. Ms. H enquired whether they had heard anything from the HSE in relation to the issue of the potential claim. Mr. McG confirmed he had not heard from the HSE or its solicitor. He said that in the course of the conversation Ms. H stated that, if the HSE abandoned its claim, then the settlement figure would be €4.2 million, rather than €4.5 million. Mr. McG is said to have responded by stating that the matter was being dealt with by Mr. K and that he was out of the country.

The HSE Fax of the 1st June, 2011

61. Mr. K deposes that at 14.32 p.m. on the afternoon of the 1st June, 2011, his firm received a fax from RG Solicitors, representing the HSE, in relation to the costs of past care. That fax confirmed that the HSE would not be seeking to recover such costs from MO'B. On receipt of that fax, Mr. McG contacted his senior counsel by phone and read the contents of the fax to him.

62. The matter came before the Court on Thursday the 2nd June, 2011. Mr. K was not in attendance. Mr. McG dealt with the matter and senior counsel for the plaintiffs also attended. His counsel was aware since some time in the afternoon of the 1st June, 2011, that a fax had been received from the HSE's own solicitors confirming they did not propose to bring any claim and that a copy of that fax was given to counsel for the plaintiffs at 10 a.m. on the 2nd June, 2011. Mr. K states that his senior counsel informed him that he had had a relatively brief conversation with counsel for the defendants at about 7 a.m. on the 2nd June, 2011. He confirmed that the subject matter of the conversation was the case at hand.

63. Senior counsel for the plaintiffs stated that he was subject to correction, and would accept what senior counsel for the defendants said, but his recollection is that he indicated to

counsel for the defendants that the HSE had confirmed that it would not be proceeding with any claim. Senior counsel for the plaintiffs also told Mr. K that he had indicated to senior counsel for the defendants that a letter to that effect had been received by Mr. K's firm, but that he, counsel for the plaintiffs, had not been furnished with a copy of this.

64. Mr. K deposes that the matter came before Quirke J. that morning and he was advised that confirmation had been received from the HSE that it would not be making a claim in relation to past care. Mr. K deposes that counsel for the plaintiffs and Mr. McG were of the view that the Court then indicated that it was confirming the order previously made approving the settlement.

65. Mr. K does not dispute that junior counsel on behalf of the defendants then sought to address the Court and contended that the figure to be approved was €4.2 million rather than €4.5 million. The Court indicated that it could not adopt any course unless there was consent, that the matter had already been approved, and that the Court was affirming the order as previously made.

66. Mr. K states it is clear that, when the matter first came before the Court, that Quirke J. approved the settlement in the sum of €4.5 million and simply adjourned the matter to seek clarification as to whether the HSE intended to bring proceedings. That being so, therefore, the HSE did not abandon its claim prior to the approval of the settlement by the court on the 26th May, 2011. Mr. K states the HSE abandoned its claim when it notified his firm by fax on the 1st June, 2011, of its intention of doing so, and at that stage the settlement offer had been approved by the Court.

67. He deposes that, on the 2nd June, 2011, the High Court made an order approving the settlement and ordering that the plaintiffs should recover against the fourth-named defendant the sum of €4.5 million to include reserved costs, the costs of discovery, and other costs. The fourth-named defendant was to forthwith pay into Court to the credit of the action the sum of €4.5 million, and out of that sum, the amount of €675,000 was to be paid to the plaintiffs' solicitors to be dispersed amongst various family members, including the minor plaintiffs. The balance was to be paid in the BIAMGUR cash fund.

68. Mr. K deposes that, on the application of the defendants, the matter then came before Quirke J. on the 14th July, 2011. By then, the parties were represented by different counsel. Mr. Fitzgerald S.C. appeared for the defendants. The transcript of that hearing indicates that Quirke J. heard submissions from Mr. Fitzgerald S.C., and Mr. X S.C. for the plaintiffs, as to the appropriate course of action. Ultimately, Quirke J. appears to have concluded that it was he who had made a mistake (p. 12 of the transcript) on the basis of accepting that the order was by consent. He held that there was no consent. On behalf of the plaintiffs, Mr. X S.C. submitted that the matter had been ruled and concluded. On behalf of the defendants, Mr. Fitzgerald S.C. stated that the offer had been a contingent one, dependent upon the stance adopted by the HSE. Quirke J. held that he had erred. He set aside the earlier orders. AO'B complains that the affidavits were never fully opened before Quirke J.

69. Subsequent to Quirke J. reaching that decision, it appears that further negotiations took place between counsel for the plaintiffs and counsel for the defendants. AO'B states that, while she was not there on the day, her solicitor contacted her and, ultimately, she settled the matter for €4.2 million but considered she had been "blackmailed" or put under pressure to accept that sum, in circumstances where she was advised that running the case might by then present difficulties to the plaintiffs' side.

70. AO'B's contention is that Quirke J. had no jurisdiction to embark on the latter application, but did so. She says she herself wrote to Quirke J. and to Ms. H expressing unhappiness. Subsequently, it transpired that Quirke J. was ill. AO'B was in contact with the solicitors for the defendants, saying that she was dissatisfied by the manner in which the matter had been dealt with in the High Court, and that she wished for the order of the 14th July, 2011, approving the settlement of €4.2 million, to be vacated and set aside. It appears there was then, to some extent, a parting of the ways between AO'B and Mr. K, who nonetheless appears to have remained on record for all the plaintiffs, including MO'B. Again, it is necessary to say that Ms. AO'B makes a number of points in her affidavit which are more in the nature of submissions on which side should be believed.

71. It appears that this impasse resulted in a delay in bringing MO'B into wardship. In the meantime, AO'B brought the present application to the High Court. She sought various reliefs, in particular, a declaration that the settlement was for €4.5 million. The matter was mentioned before Kearns P. and appears to have been transferred for hearing before McCarthy J. on the 15th November, 2012. The question of MO'B's intended wardship, and any issues arising from that position, appear not to have been fully considered prior to the matter being sent to McCarthy J.

72. The Court has considered the transcript of that High Court hearing. The judge obviously gave the matter great care and attention. His concern as to what had occurred is evident. In the course of his ruling, McCarthy J. observed:

> *"… Now you can argue that the manner in which the learned judge, Mr. Justice Quirke, addressed the matter was not as other judges might have done so, but nonetheless when the matter came before him he dealt with it. And he decided even without hearing the barristers involved to see what actually happened he decided to vacate his order" (p. 60 of the transcript).*

73. McCarthy J. went on:

> *"Now, just reading the transcript, it is not quite clear whether what he envisaged was in terms of a separate subsequent action being commenced. But he had vacated his order on the basis that there was no true consent to the settlement. Now, that was an unsatisfactory position from the point of view of Ms. O'B, because, if you like, two things had happened. The substance of what had happened was that Mr. Justice Quirke took the view that this case certainly wasn't settled for €4.5 million, and indeed the case wasn't settled at all. Now, I might have taken a different view, and might not have. He took a certain view, and I can't*

gainsay what one of my High Court colleagues has done. I can't go back on this on this type of application certainly, and perhaps not at all come back to that …" (pages 60 and 61 of the transcript).

74. McCarthy J. mentioned there may be reasons why one might enter into fresh negotiations. He pointed out that Mr. X S.C. had strongly submitted on her behalf in submitting to Quirke J. that the case had actually been settled for €4.5 million. McCarthy J. observed that he could not advise as to whether or not AO'B should issue separate proceedings in relation to what had happened. He said that the circumstances in which orders of this type could be set aside were very rare. He advised AO'B to exercise the greatest thoroughness, legally speaking, before she embarked on such a course. He observed that "*it may well be that an alternative course of action is available to you, because I cannot advise you about that, but procedurally speaking, in the light of what appears to be the situation at the moment on the evidence, and admitted settlement, which brought the case to a conclusion, there could not be any basis for me interfering with those orders by another judge"*. AO'B said the only reason why she embarked on this process in the first place was that she believed she was in the right, and that her husband was entitled to the €4.5 million. AO'B stated she intended to take further steps.

75. McCarthy J. dismissed AO'B's application but made no order as to costs. He concluded that the matter had, ultimately, been settled for €4.2 million and had been ruled. The trial judge was obviously faced with a difficult situation. A number of complex legal issues potentially arose as to whether there was a settlement, and if so, its terms, and whether Quirke J. had jurisdiction to vacate his earlier orders. The question of MO'B's status as an intended ward of court appears not to have arisen for consideration.

Observations

76. Mr. K, solicitor for the plaintiffs, was acting for a number of parties, some of whom were minors, and one of whom was an intended ward of court. The solicitor for the defendants was also acting for a number of defendants. Such situations can present difficulties when the interests of the various parties may be different.

77. As Quirke J. pointed out, one of the defendants originally sued was actually the Western Health Board, by then reconstituted as part of the HSE. It is odd that the very entity which had been asked to decide whether or not it would bring a claim against MO'B was actually one of the defendants to the proceedings. It is likely that the HSE was indemnified which may have added to the complexity. The manner and timing in which the HSE's position eventually emerged was, to say the least, unfortunate. No further comment is appropriate at this stage.

78. On the 22nd May, 2013, the Office of Wards of Court wrote to Mr. K inquiring why MO'B had not been made a ward of court. Mr. K explained that in view of what had occurred there had been a parting of the ways between himself and AO'B subsequent to the negotiations which took place after Quirke J.'s order. Ultimately, MO'B was made a ward of court only on the 18th December, 2013.

79. Although the circumstances were unusual, there are areas of concern. This Court is not satisfied that, even prior to McCarthy J. being asked to take on the hearing, the correct procedures were adopted. MO'B was a person who was, and should have been, made a ward of court in a timely manner, thereby permitting appropriate decisions to be made in his best interests at the earliest opportunity. In fairness to Mr. K, it can be said that, apparently, AO'B was only prepared to allow Mr. K to make the wardship application if she could reserve her right to process this appeal to this Court. But an antecedent question is whether in law this was her decision to make, even then, or whether it was more proper that an application should have been made under the wardship jurisdiction for a consideration of what was best in the interests of MO'B? This Court considers that, whatever issues or problems arose, that course should have been adopted.

80. The Court has not heard from all the parties involved. A number of matters appear still to have remained unresolved. The other plaintiffs did receive monies due to them by way of damages. But the recurrent question nonetheless arises: why was MO'B not made a ward of court in a timely way? Perhaps this was due to the impasse between AO'B and Mr. K. There may yet remain other difficult legal questions to be resolved.

81. McCarthy J. heard the application concerning MO'B on the 15th November, 2012. This was before MO'B was actually brought into wardship. Whatever may have been the position at that time, the question as to the appropriate course of action *now* arises in an even more acute form. The question *now*, prior to considering any other legal or factual issue that might arise, is whether AO'B, although she is the ward's committee, is entitled to process this appeal to this Court? The Court must have regard to the best interests of the ward. But before any other question arises, the question as to *who* should decide whether this appeal ought now to proceed must be determined. If the appeal does proceed further, a number of complex factual and legal issues may, or may not, arise. But this preliminary question must be decided first. The person to make that decision is the President of the High Court.

Conclusion

82. AO'B has put her side of the case with great force and deep conviction. She sees herself as duty bound to do the best she can for her husband. This view must command considerable respect. Mr. Fitzgerald S.C. has succinctly and clearly outlined the position of his clients.

83. When the matter first came before this Court on the 19th November, 2019, members of this Court expressed concerns about the position and best interests of MO'B. The Court was reluctant to take further steps without AO'B at least being legally represented. There was then correspondence. AO'B put in further written submissions. It appears that Mr. K assisted her in preparing submissions for this Court. But the Court's concerns are more acute, as, when the matter came back before this Court, AO'B indicated she wished to continue arguing the appeal herself. She contends that Quirke J. had no jurisdiction to vacate the first order. She feels she was pressured into settling for €4.2 million on her husband's behalf. While her views on these issues are due great respect, in truth, the question which arises first is not *whether* the case was settled for €4.5 million or €4.2

million, or whether Quirke J. had jurisdiction to do what he did; rather, it is as to what the law provides should be done so as to protect the best interests of MO'B, now a ward of court.

84. It must be understood that to proceed with any other issue may involve potential risks as well as potential benefits to the ward of court. As the law provides, what lies in MO'B's best interests can only be determined by the President of the High Court who is vested with all the powers necessary to deal with wards of court matters (see, *AM v. Health Service Executive* [2019] IESC 3 and *C and Anor. v. Cork University Hospital and Anor.* [2019] IESC 73). The orders provided to this Court do not fully set out the balance of monies actually paid into Court on account of the ward. This, too, must be clarified.

85. In the circumstances, therefore, the only appropriate order which the Court can make is to refer this entire matter to the President of the High Court for his early consideration. This appeal has been outstanding for a very long time. It is imperative that there should be resolution of the issues, one way or the other. The Court directs that this matter will remain in this Court's list for mention until the 10th February, 2020, at which time the Court will be advised of the situation, and would hope to be in a position to make such further orders on the appeal as may arise, or then be necessary.