Neutral Citation No. [2012] NIQB 61

Ref: **McCL8441**

Judgment: approved by the Court for handing down

Delivered: **19/04/12 & & 01/08/12**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISON

BETWEEN:

THE NORTHERN IRELAND COURTS AND TRIBUNALS SERVICE

Plaintiff:

and

THE OFFICIAL SOLICITOR TO THE COURT OF JUDICATURE OF NORTHERN IRELAND

Defendant:

NOTE

This judgment is distributed to the parties' legal representatives on 01 August 2012. It will become final on 4th September 2012. As recorded in paragraph [63], the parties are invited to provide an agreed draft order.

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Defendant:

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McCLOSKEY J

Preface

(i) The judgment of the court was originally handed down on 19th April 2012, with certain minor amendments which were duly incorporated after the parties had responded to the court's invitation to bring such matters to its attention. It was then formally promulgated on 18th May 2012. For reasons which will become clear, this original judgment has now been superseded.

(ii) During the process described above, certain further representations were made to the court on behalf of the Plaintiff, the Northern Ireland

Courts and Tribunals Service ("*NICTS*"). As this process advanced, two things became progressively clear. The first was that NICTS appeared to have in its possession further material evidence which had not previously been placed before the court. The second, linked to the first, was that the originating summons would require amendment.

(iii) I was satisfied that the principles contained in ***Paulin –v- Paulin*** [2009] EWCA. Civ 221 were in play. There, the English Court of Appeal held:

(a) A judge has an untrammelled power to amplify his reasons at any time prior to sealing of the court order.

(b) A judge has a similar power to reverse his decision, to be exercised only for "*strong reasons*" or where there are "*exceptional circumstances*".

Taking into account particularly that the order of the court had not been finalised, given the likely advent of new material evidence and having regard to a significant, emerging amendment of the Originating Summons, I determined to treat the hearing as incomplete and to proceed accordingly.

(iv) Having regard particularly to the character and purpose of this litigation, the course which I adopted was to permit the adduction of further evidence and the receipt of further written argument from both parties.

(v) Regrettably, due to some delay in reacting to the court's original judgment, it was duly published on the website, in the usual way. Following the developments noted above, I took steps to append an "Information Notice" to the judgment, intimating that it should be treated as provisional only and was not the subject of any final order.

(vi) The process of adducing further evidence and compiling further written argument was completed on virtually the last day of the Trinity term. Neither party sought the facility of a further hearing before the court and, having considered the fresh material, I was satisfied that this was not required.

(vii) The initial judgment of the court is hereby superseded.

I INTRODUCTION

[1] These proceedings are brought by originating summons whereby the determination of the court was initially sought in respect of the following question:

> "*Whether the deduction by the Court Funds Office of management fees from court funds in respect of payment for professional investment advice received in relation to those funds is lawful and intra vires*".

[See now the enlarged amended originating summons: paragraph [42], *infra*]. For convenience, I shall describe this as "*the impugned practice*" throughout this judgment. The protagonists in the litigation are the Northern Ireland Courts and Tribunals Service ("*NICTS*"), the Plaintiff; the Official Solicitor to the Court of Judicature of Northern Ireland ("*the Official Solicitor"),* the Defendant; and the Attorney General for Northern Ireland. The latter availed of the court's invitation to make a written submission following my earlier ruling that these proceedings raise a devolution issue under paragraph 1(b) of Part 1 of Schedule 10 to the Northern Ireland Act 1998, namely whether the impugned practice is unlawful under Section 24(1)(a) of the 1998 Act by virtue of being incompatible with the rights of minors and patients enjoyed under Article 1 of The First Protocol to the European Convention on Human Rights ("*the Convention*").

II STATUTORY FRAMEWORK

[2] NICTS is an agency within the Department of Justice ("*the Department*"), which is a Northern Ireland Department under the Departments (Northern Ireland) Order 1999, Schedule 1, as amended: see the Department of Justice Act (Northern Ireland) 2010 and the Northern Ireland Court Service (Abolition and Transfer of Functions) Order (Northern Ireland) 2010. The effect of the latter instrument was to abolish the Northern Ireland Court Service and to transfer its functions to the Department. These arrangements have been in operation since 12th April 2010. The Director of NICTS also holds the post of Accountant General of the Court of Judicature in Northern Ireland ("*Accountant General*"). This is a statutory office, by virtue of Section 77 of the Judicature (Northern Ireland) Act 1978 ("*the 1978 Act*"). The functions and duties of the Accountant General are found in the regime established by Part VII (*infra*). The Office of the Accountant General was renamed "Court Funds Office" ("*CFO*"), which is an office within NICTS, by the Courts Funds Rules (Northern Ireland) 1979. The Official Solicitor to the Court of Judicature is also a statutory office, by virtue of Section 75 of the 1978 Act.

The Irish 1783 Statute

[3] The written submission of the Attorney General drew to the attention of the court some of the relevant statutory lineage. The Office of Accountant General can be traced to a 1783 Act of the Irish Parliament bearing the following long title:

> "*An Act for better securing the monies and effects of the suitors of the Court of Chancery and the Court of Exchequer,* ***by depositing the same in the National Bank****; and to prevent the forging and any counterfeiting any draft, order or other voucher, for the payment or delivery of such money or effects and for such other purposes*".

[My emphasis].

The Preamble to the 1783 Act recited that these banking arrangements, for which the Accountant General had responsibility, "*… will manifestly tend to the safety and advantage of the suitors*".

The purpose of establishing the Office of Accountant General is identifiable in the following words:

> "*… to keep the accounts between the suitors of the said High Court of Chancery and the National Bank of Ireland and to accomplish and fulfil the purposes of this Act*".

The 1783 Act further provided that the Accountant General would operate "*under the direction of the* [Court of Chancery]" and stipulated in particular that –

> "*… nor shall the said Accountant General meddle with the actual receipt of any of the monies or effects of the suitors, further or otherwise than as he shall be ordered and directed by some express order of the said court, but shall only keep and control the account within the said bank*".

Thus the duty and function of the Accountant General entailed the simple, uncomplicated act of lodging the monies in question in the bank, subject to express order of the court. Based on my analysis of the current statutory regime, *infra,* the core of this model is readily identifiable in its contemporary successor, over two centuries later.

[4] In summary, it is clear from the provisions of the 1783 Act that the central function and duty of the Accountant General in relation to funds in court were to place same in a bank deposit account and to control such account, subject only to express order of the Court of Chancery. As I have observed, this was evidently an unsophisticated banking exercise. Both the text of the 1783 Act and the First Report of the Justice Commissioners, in 1817, make clear that the remuneration of the Accountant General and any person in his employment was strictly confined to authorised payments and, further, that the levying of any other fee or gratuity was

absolutely prohibited. The Accountant General was an appointee of the Crown. It would appear that from 1921 (at latest) in Northern Ireland, the office of Accountant General was occupied by a qualified accountant (see the MacDermott Report, *infra*, paragraph 291). While this is no longer the case, it is unclear when, or why, this practice ceased. The former practice was due, evidently, to extra-statutory arrangements rather than statutory requirement. In passing, the former practice appears an eminently sensible one. Furthermore, in the present era of unparalleled financial complexity, it appears a little incongruous that the bearer of the post "Accountant General" is not a qualified accountant.

[5] While the 1783 Act was substantially repealed in 1879 (by the Statute Law Revision (Ireland) Act) and, finally, in 1950 (by the Statute Law Revision Act), the office of Accountant General survived these statutory interventions, including that of the Supreme Court of Judicature Act (Ireland) 1877. Section 72 of the latter statute provided that the "Accountant-General in Chancery" (amongst other office bearers) would thenceforth be attached to the Supreme Court of Judicature, which consisted of the High Court of Justice and the Court of Appeal. The first material rule of court which I have been able to trace is Order 62, Rule 23 of the Rules of the Supreme Court (Northern Ireland) 1905, which reflected the basic scheme established by the 1783 Act. This rule provided:

> "*In the King's Bench Division an order for the payment of money to be acted upon by the Accountant General shall be in the* [prescribed form] *… and shall be signed by a Master or a Registrar, as the case may be.*"

Furthermore, Rule 71 provided:

> "*Cash under the control of, or subject to the order of the court may, by order of the court, or a judge, be invested in the following stocks, funds or securities, namely …*".

It is clear that the list of authorised investments which followed was amended subsequently. By Rule 65, the Accountant General was required to give effect to any order of the court directing the investment and accumulation of dividends accruing on securities in court or to be transferred into court or to be purchased with money in court or to be lodged in court. The collection of provisions contained in Order 62, consistent with the 1783 Act, confirm the basic philosophy that the Accountant General was at all times subordinate to the order of the judge or court. None of these rules conferred any choice or discretion on the office holder. Later, Section 133(1) of the Supreme Court of Judicature (Consolidation) Act 1925 provided:

> "*There shall be an Accountant General of, and an accounting department for, the Supreme Court.*"

By Section 133(4), all funds in court were vested in the Accountant General and were subject to the provisions of the statute and any rules made thereunder. These provisions were contained in Part VI of the 1925 Act, most of which was repealed by the Administration of Justice Act 1965 ("*the 1965 Act*") and, in substantial measure, re-enacted in Part I thereof. Section 133(1) survived. While Part I of the 1965 Act introduced the notable reform of Common Investment Funds "*for the purpose of the investment therein of monies in the Supreme Court, monies in the County Courts …*", under the management and control of the Public Trustee, this did not extend to Northern Ireland – though it was rendered capable of doing so by Order in Council made pursuant to Section 30.

The MacDermott Report

[6] One theme which emerges clearly from the above review of the relevant 18th and 19th century statutory provisions, both primary and secondary, is that of the dominance of the court in the matter of disposing of the funds of patients and minors and the subordination of the Accountant General to orders of the court. As the analysis which follows in this judgment demonstrates, I consider this to be an enduring theme, unchanged both in principle and in substance. By the advent of the 1970s, the office of Accountant General had been in existence for some two centuries. The MacDermott Report, which was published in the middle of this decade and was the genesis of the Judicature (Northern Ireland) Act 1978 ("*the 1978* Act"), described the office of Accountant General in the following terms:

> "*The Accountant General's Office has functions similar to those of the Pay and Vote Offices of the Supreme Court in England. It accounts for all funds lodged in court and deals with the capital and income in accordance with the order of the court. It also deals with the investment of funds ordered to be retained in court. It is responsible for the payment of the salaries and wages of the Supreme Court staff and it is maintained the Vote Account*".

At this juncture, it is appropriate to mention the relevant rule of court governing the handling and disposal of funds in court which prevailed when the MacDermott Report was compiled. As I have observed in paragraph [5], this, in its original incarnation, was Order 62, Rule 23 of the Rules of the Supreme Court (Ireland) 1905. At the time of preparation of the MacDermott Report, this had become Order 62, Rule 71 of the Rules of the Supreme Court (Northern Ireland) which provided:

> "*Cash under the control of, or subject to the order of the court, may,* ***by order of the court or a judge,*** *be invested in the following stocks, funds or securities, namely:*
>
> > *Any security issued under the authority of Parliament and charged upon the Consolidated Fund of the United Kingdom.*

Any security issued under the authority of the Parliament of Northern Ireland and charged upon the Consolidated Fund of Northern Ireland.

Any other security guaranteed by the Government of the United Kingdom or by the Government of Northern Ireland.

Bank of Ireland Stock.

Mortgage on freehold estates in Northern Ireland.

Stock issued by the Belfast Corporation and charged upon the revenues of and the rates leviable by the Corporation.

Stock issued by the Belfast City and District Water Commissioners and charged upon the revenues of and the rates leviable by the said Commissioners.

or be placed on deposit receipt in the Bank of Ireland or on deposit in the Post Office Savings Bank."

[My emphasis].

This version of Rule 71 differed from its predecessor of 1905 (see paragraph [5] *supra*) in two respects in particular. Firstly, during the intervening period, the list of authorised investments had altered significantly. Secondly, the original Rule did not include any "*placement*" option relating to either the Bank of Ireland or the Post Office Savings Bank. Accordingly, at this stage, the court was specifically empowered to order any of the authorised types of investment listed in Order 62, Rule 71. It would appear that there were no relevant provisions of primary legislation in this respect. [This was soon to change]. The MacDermott Report records [paragraph 298]:

"*For a long time in Northern Ireland the usual investment was 3½% War Stock or Defence Bonds, principally because the half yearly income was paid without deduction of income tax. But for many years now it has been the practice in the Northern Ireland Supreme Court for damages awarded to persons under a disability to be invested in dated United Kingdom and Northern Ireland Government stocks and Belfast Corporation securities so that those entitled receive the capital intact at the end of the appropriate period. It has also been the practice to have a periodic review of the investments of minors' money held in the Northern Ireland Supreme*

Court and investments are changed where a higher yield can be obtained without loss."

The stocks and securities identified in this passage are amongst the formerly authorised investments listed in Order 62, Rule 71. It is clear from these passages in the report that the agencies with which the Accountant General's Office was habitually dealing were the Bank of Ireland (Transfer Office), the Ministry of Finance (Savings Branch) and local stockbrokers. While engagement with stockbrokers is, in retrospect, unsurprising, having regard to the regime of Order 62, Rule 71, it is evident that this was conducted on an extra-statutory basis and, further, appears to have been unregulated by rules of court.

[7] The MacDermott Report recommended that the Office of Accountant General be established as one of a number of proposed departments of the Supreme Court of Judicature of Northern Ireland and that the office holder should have statutory qualifications. Its specific proposals were fourfold:

(a) The extension of the Common Investment Scheme, under Section 30 of the Administration of Justice Act 1965, to Northern Ireland, to embrace the investment of funds in court, to be used whenever appropriate.

(b) The maintenance of the Bank of Ireland "Special Account" in respect of lodgements and the continued payment of interest to The Exchequer.

(c) The empowerment of the Lord Chief Justice to designate the Supreme Court Bank, with the concurrence of The Treasury.

(d) Statutory regulation of the functions and office of the Accountant General, modelled on certain provisions of the 1925 and 1965 statutes.

The draft clauses incorporated in the MacDermott Report to give effect to its recommendations concerning the Accountant General's Office are worthy of attention. They included the following:

"*Except where otherwise provided by order and subject to any provision to the contrary contained in rules made under the next following section, a sum of money in court may be ordered to be invested:*

(i) In such of the securities designated for the investment of cash under the control of the High Court by rules made under Section …, as may be specified in the order;

(ii) In such one of the funds established by common investment schemes as may be specified in the order."

[Emphasis added].

Notably, in the next succeeding draft clause, it was proposed that rules may be made –

> "*(a) Requiring the Accountant General* ***to place or deposit or invest*** *monies paid into or transferred to the Supreme Court* ***in accordance with the order of the court*** *or prescribing or regulating in the absence of such order* ***the deposit or investment*** *of such monies;*
>
> *(b) Regulating the crediting of interest accruing on monies* ***placed on deposit*** *and the crediting of dividends accruing on shares in funds established by a common investment scheme and of interest or dividend accruing on securities in which money has been invested by the Accountant General* ***pursuant to an order of the court*** *and on other securities in court.*"

[My emphasis]

The draft clauses further proposed that the rules make specific provision for investment in specified securities. As the draft clauses make clear, the MacDermott Committee was proposing that the extant placement/investment dichotomy, enshrined in Order 62, Rule 71, be preserved. It was contemplated that, under the new regime to be established, the handling and disposal of funds in court would be regulated by two basic mechanisms, namely by order of the court and by rules of court. In passing, the Committee's recommendation that the officeholder should have specified statutory qualifications was not implemented in the event, the reason for this being unclear.

[8] Historically, the English regime governing the handling and disposal of funds in court took a course differing from its Northern Ireland counterpart. In England, pursuant to the main recommendation of the Pearson Committee on Funds in Court [Cmnd 818], a central fund was established for the purpose of investing monies in court in a wide range of securities. This proposal was implemented by the Administration of Justice Act 1965 ("*the 1965 Act*"), which established a common investment scheme wherein there were three Common Investment Funds. These were a gross income fund for beneficiaries in need of income and with little or no liability to income tax; a high yield fund for beneficiaries in particular need of income, entailing the payment of dividends after deduction of income tax; and a capital fund, with the same payment mechanism, designed mainly to increase capital value rather than secure a high annual return for beneficiaries. These funds were designed to cater for money likely to remain invested for a period of five years or more. They were administered by the Public Trustee, aided by an Investment Advisory Committee whose members had many years' experience in the City of London. I pause here to observe that the intention underpinning Section 81(2)(iv) of the Judicature (Northern Ireland) Act 1978 (paragraph [10], *infra*) must surely have

been to establish in this jurisdiction an independent committee possessed of comparable credentials and expertise: however, as I shall highlight presently, there has been no exercise of this discrete power. By Section 30 of the 1965 Act, the Common Investment Scheme statutory provisions were capable of being extended to embrace the investment of Northern Ireland Supreme Court funds *and* the funds of patients. However, as recorded in the MacDermott Report [paragraph 301], this step had not been taken, evidently on account of reservations about the advantages of participation. The analysis carried out by the MacDermott Committee indicated that the current yields from the funds routinely deployed in Northern Ireland were considerably greater than those available from the Common Investment Fund. The Committee noted the widespread acceptance that, given the prevailing state of the economy, ordinary shares were likely to provide a safer investment against inflation than gilt-edged or other fixed-interest bearing securities. The Committee further noted that while the jurisdiction in relation to **patients**' funds lay outwith the ambit of the Supreme Court of Judicature, in practice the Accountant General dealt with such funds in a fashion similar to the handling of funds in court.

[9] The differences between the Northern Ireland and English regimes governing the handling and disposal of funds in court are accentuated when one considers the relevant provisions of the Administration of Justice Act 1982 ("*the 1982 Act*"). The regime established in Part VI of this statute has characteristics which differentiate it clearly from its Northern Ireland counterpart, established under Part VII of the Judicature (Northern Ireland) Act 1978 ("*the 1978 Act*" - *infra*). In particular, the main power conferred by statute on the English Accountant General was a general power to *invest and reinvest* funds in court. Furthermore, the court's power to order investment by a specified mechanism was expressed by reference to investment mechanisms authorised by rules of court. The emphasis throughout Part VI is on investment, in contrast with the Northern Ireland statutory regime which, as I shall explain presently, established a clear dichotomy of placement/investment of funds in court. There were also clear pre-1978 differences between the court funds models prevailing in the two jurisdictions, as highlighted in the MacDermott Report. Furthermore, at the time when the 1978 Act was passed, Northern Ireland had no equivalent of the English Public Trustee or the related Investment Advisory Committee: it seems far from idle speculation to surmise that Section 81(2)(iv) of the 1978 Act was designed to establish a comparable body here.

The Judicature (Northern Ireland) Act 1978

[10] The statutory provisions which have regulated the Office of Accountant General during the past three decades and continue to do so are arranged in Part VII of the 1978 Act. Section 77(1) established the Office of Accountant General of the Supreme Court (one of several departments of what is now the Court of Judicature of Northern Ireland). The Accountant General was to be appointed by the Lord Chancellor and the office holder was not required to possess any prescribed qualifications. By Section 78(1), the Accountant General is required to "*keep proper accounts … and proper records in relation to the accounts*", to prepare a statement of

accounts as directed by the Treasury and to submit this annually to the Comptroller and Auditor General. By Section 79(1), the Accountant General is obliged to pay into the relevant authorised bank account all sums received by him. The effect of Section 80 is to require all relevant payments, deposits and transfers to be made to the Accountant General. Section 81, under the rubric "*Investment of Funds in Court*", provides:

> "*Save in a case in which it is provided by an order of the court that it shall not be placed or invested as mentioned in the following provisions of this section, and subject to any provision to the contrary made by rules made under the next following section, a sum of money in the* **[***F1Court of Judicature***]** *or in the county court –*
>
> *(a)may, if the High Court or the county court (as the case may be) so orders, be dealt with in such of the following ways as may be specified in the order, namely: –*
>
> *(i)it may be placed, in accordance with rules so made, to a deposit account or a short-term investment account (that is to say, to an account of one or other of two kinds such that, in the case of an account of either kind, there will, under rules so made, but subject to any exceptions thereby prescribed, fall to accrue on moneys placed thereto interest derived from the transfer to, and investment by, the National Debt Commissioners of the moneys placed to all the accounts of those kinds);*
>
> *(ii)it may be placed to a long-term investment account for transfer, under rules so made, to such one of the funds established by schemes made under* **[***F2section 42 of the M1Administration of Justice Act 1982***]** *as may be so specified;*
>
> *(iii)it may be invested by the Accountant General in such of the securities designated for the purposes of this paragraph by rules made under section 55 of this Act or* **[***F3Article 47 of the County Courts (Northern Ireland) Order 1980***]** *as may be so specified;*
>
> *(iv)it may be invested by the Accountant General in accordance with directions given by an advisory committee appointed by the Lord Chancellor in accordance with rules made under the next following section;*
>
> *(b)shall, if no order is made with respect to it under the foregoing paragraph, be dealt with as follows –*
>
> *(i)except in a case in which it was paid in under section 63 of the M2Trustee Act (Northern Ireland) 1958, it shall be*

placed, in accordance with rules made under the next following section, to a deposit account;

(ii)in the said excepted case, it shall be invested by the Accountant General in such manner as may be prescribed by rules so made."

Section 98 of the Justice (Northern Ireland) Act 2011 ("*the 2011 Act*"), which came into operation on 5th July 2011, added the following provision to Section 81:

"*(2) If the High Court or (as the case may be) the County Court so orders, the power of the Accountant General under subsection (1)(a)(iii) or (iv) to invest a sum of money in the Court of Judicature or the County Court in securities includes the power to pay out of that sum any fees or expenses which are –*

(a) incurred in connection with, or for the purposes of, investing that sum; and

(b) of an amount or at a rate approved by the High Court or (as the case may be) the County Court.

(iii) A court shall not make an order under subsection (2) unless the court considers it necessary and proportionate in all the circumstances to do so.

(iv) The High Court or (as the case may be) the County Court may, on an application made to it, order that all or part of any sum paid by way of fees or expenses under subsection (2) be refunded where it appears to the court to be in the interests of justice to do so".

I shall comment on the significance and effect of this new statutory provision *infra*.

Section 81 Analysed

[11] Section 81 is of unmistakable importance to the court's resolution of the issues raised in these proceedings. My analysis of it is as follows. Section 81(1) prescribes certain authorised methods of "placement" or "investment" of funds in court. In my view, there is nothing inadvertent regarding the placement/investment dichotomy established by these provisions. This assessment is reinforced by the terms of the MacDermott Report and the preceding rules of court (*supra*). Section 81 creates two placement options and two investment options. Each of the two placement options involves transmitting the monies concerned to an investment account (either short term or long term). They are to be contrasted with the third and fourth options, which I consider to be concerned with more sophisticated forms of disposal.

Moreover, significantly, the terminology "*invested by the Accountant General …*" is employed in respect of the third and fourth options only. Thus there are four prescribed disposal mechanisms. Section 81 clearly empowers the court to order that the funds be handled by a mechanism other than one of the four expressly prescribed mechanisms. I shall describe this as "*the fifth statutory option*". Furthermore, the prescribed mechanisms are expressed to be "*subject to any provision to the contrary made by rules*" under Section 82: this constitutes the sixth statutory option. In short, the menu of options available to the court consists of the following:

(i) The two prescribed investment account placement options.

(ii) The two prescribed investment mechanisms viz. either investment in securities designated by Rules of Court **or** investment in accordance with the Lord Chancellor's Advisory Committee's directions.

(iii) Such other disposal mechanism as the court, in the exercise of its power, may determine to adopt.

(iv) Such other disposal mechanism as may be available to the court consequential upon the "*subject to any provision to the contrary made by rules*" dispensation.

Electing for the fifth statutory option might be appropriate, for example, in the case of a minor Plaintiff whose eighteenth birthday is imminent. In practice, an order of this kind has also been made in cases where the representatives of the minor or patient concerned have been anxious to retain control over the disposal/ investment of the funds and, to this end, have formulated proposals and arrangements satisfactory to the court.

[12] Section 81 clearly contemplates that in every case the order of the court will specify the approved disposal mechanism. This is a reflection of the historically dominant role of the court in this sphere. As will become apparent, the "order" of the court to which Section 81 refers need not necessarily be the "final" order conventionally made by the judge at the conclusion of litigation – for example, when approving a minor's settlement. Rather, in the High Court, via a combination of the rules and the practices which have evolved, this order is, typically, merely the trigger for a further order (or further orders) of the relevant Master subsequently: see particularly paragraphs [13] and [22] – [23], *infra.* In contrast, in the County Court the relevant order/s must be made by the judge. As the amounts involved are smaller, it seems likely that, in the generality of cases, only one disposal order is required in the County Court. However, it is possible for a further order/s to be made subsequently.

The Courts Funds Rules 1979

[13] Section 82 of the 1978 Act empowers the Lord Chancellor, with the concurrence of The Treasury, to make rules regulating the deposit, payment, delivery and transfer in, into and out of the Court of Judicature and the County Court of relevant monies, securities and effects. [Section 82(1) is reproduced in full in Appendix 1 hereto]. Rules made pursuant to Section 82 have the potential to introduce new and different disposal mechanisms. Having regard to the statutory language, it is possible in principle for such rules to override, subordinate, modify or extend the four disposal mechanisms expressly prescribed in Section 81. In the event, the rules which materialised did not have any of these effects. The Courts Funds Rules ("*the 1979 Rules*") were made under the enabling provisions of Section 82(1). Some of the provisions of the 1979 Rules are worthy of highlighting. Firstly, by Rule 3, the Office of the Accountant General was renamed "Court Funds Office". Next, Rule 8 provides:

> "***Payment Schedule***
>
> *Where an order directs the manner in which any fund in court is to be dealt with by the Accountant General, a Payment Schedule shall be lodged with him*".

Next, per Rule 13:

> "***Authority for Dealing with Funds in Court***
>
> *(1) Except where these Rules otherwise provide and subject to paragraph (2), funds in court shall be dealt with by the Accountant General only in accordance with a Payment Schedule.*
> *(2) Where directions are signed by a Master instructing the Accountant General …*
>
> *(f) to invest money or place same on deposit …*
>
> *Such directions shall be sufficient authority to the Accountant General to deal with the funds accordingly".*

The topic of investment in the "common investment fund" was addressed in Rule 31, which was concerned with cases "*where funds are required to be invested in common investment fund units*". In such cases, the relevant authority would be the Public Trustee for the fund in question and not the Accountant General. Throughout the Rules, in particular in Part IV, a clear distinction is made between *the placement of funds on deposit* and *the investment of funds.*

Rule 47 provides:

> "***Charges on Purchase or Sale of Securities***

> "*Except where Rule 31 applies and subject to any directions of the court –*
>
> *(i) Where money in court is invested in the purchase of securities, the payment for the purchase shall include brokers' commission and Value Added Tax;*
>
> *(ii) Where securities in court are sold, brokers' commission and Value Added Tax shall be deducted from the proceeds of sale*".

I also draw attention to Rule 2(1) of the 1979 Rules, which provides that the term "*securities*" –

> "*includes units and investments effected by placing money on deposit*".

Order 80, Rule 15

[14] In addition to the specially designated regime of the 1979 Rules, certain material rules of court have been made under Section 81(1)(iii) [in tandem with Section 55] of the 1978 Act. This makes provision for the express designation of specified securities under the Rules of the Court of Judicature ("*RCC*"). For present purposes, the most notable fact is that this power was not exercised until 8th January 2007, with the result that during the previous thirty years (approximately) there were no designated securities for investment purposes. In retrospect ,this appears surprising and, as appears from the historical *excursus* in paragraphs [5] – [6] above, there had been no such *lacuna* during the previous seventy years. The subject matter of Order 80 RCC is "Disability". Rule 15 provides:

> *15. – (1) Moneys paid into Court may be invested in the following securities –*
> *(a) securities issued by Her Majesty's Government in the United Kingdom, the Government of Northern Ireland or the Government of the Isle of Man, being fixed-interest securities registered in the United Kingdom or the Isle of Man, Treasury Bills or Tax Reserve Certificates or any variable interest securities issued by Her Majesty's Government in the United Kingdom and registered in the United Kingdom;*
> *(b) any securities the payment of interest on which is guaranteed by Her Majesty's Government in the United Kingdom or the Government of Northern Ireland;*
> *(c) fixed-interest or variable interest securities issued in the United Kingdom by any public authority or by any nationalised industry or nationalised undertaking in the United Kingdom;*

(d) debentures issued in the United Kingdom by a company incorporated in the United Kingdom, being debentures registered in the United Kingdom;
(e) equity shares in a public limited liability company whose shares are listed in the Official List of the Stock Exchange;
(f) equity shares in an investment trust company;
(g) any units of a gilt unit trust scheme;
(h) any units of an authorised unit trust scheme;
(i) any shares in an open-ended investment company within the meaning of the Open-Ended Investment Companies Regulations (Northern Ireland) SR 2004/335 or the Open-Ended Investment Companies Regulations SI 2001/1228.
(2) Pending or in lieu of such investment, moneys so paid in may be lodged on deposit receipt in accounts held with the National Debt Commissioners or in accounts held with such bank as the Department of Justice may, with the concurrence of the Department of Finance and Personnel, designate under section 79 of the 1978 Act."

This Rule is directly related to Section 81(1)(a)(iii) of the 1978 Act, viz. the third of the four expressly prescribed disposal mechanisms. Rule 15 was inserted by Statutory Rule 2007 No. 486, with effect from 8th January 2007. It is clear that Rule 15 had no predecessor and I observe, in passing, that the impetus for and rationale of its introduction have not emerged clearly from the available evidence. Thus, for a period of almost thirty years, no designated securities for investment purposes existed. It follows that until 8th January 2007 this particular investment disposal could not, in principle, be ordered by the court *except perhaps* in the exercise of its general residual power, namely via the fifth statutory option. The situation which prevailed between 1978 and 2007 may be contrasted with the pre-1978 position. During this earlier period, by virtue of Order 62, Rule 71, investment in a menu of designated securities was possible, provided that this was specified in an order of the court or a judge. Based on the available evidence, it is unclear why, following the enactment of the 1978 Act, there was a securities investment lacuna for almost thirty years and, in particular, whether this was deliberate or inadvertent. At this remove, it seems likely that this lacuna was one of the contributory factors in the evolution of some of the practices, now entrenched, which these proceedings have highlighted.

Section 81 in Operation

[15] As appears from the above, Section 81(1)(iv), which is concerned with the fourth of the four expressly prescribed disposal mechanisms (and the second of the two authorised investment mechanisms), contemplated the appointment of an advisory committee by the Lord Chancellor pursuant to rules made under Section 82. The function of such committee would be to give investment directions. It is not difficult to deduce an underlying intention that the members of this committee would be equipped with the requisite skills, qualifications and expertise. Moreover,

it would be surprising if the legislature had in contemplation that the expenses of a body of this kind would be met from the funds of patients and minors, rather than public funds. Furthermore, the terms of Section 81(1)(iv), coupled with the readily ascertainable underlying intention, call into question the legitimacy of the extra-statutory alternative arrangement, involving private sector stockbrokers, which has evolved. The fact is that no committee of this *genre* has been established since the 1978 Act came into operation. Once again, the explanation for this is unclear. Notably, when Section 81 was amended recently, by Section 98 of the 2011 Act (effective from 5th July 2011), the power to appoint an advisory committee was preserved. It is not clear whether the preservation of this discrete power was underpinned by a specifically formulated intention that an advisory committee of this kind is to be appointed or was merely perfunctory. As I have already noted, the third of the three prescribed methods of disposal belonging to the menu enshrined in Section 81 could not be lawfully ordered by the court until 8th January 2007 at the earliest, subject to what I have acknowledged in paragraph [15] above, namely the *possibility* that orders of this kind were lawful under the umbrella of the fifth statutory option. Furthermore, the fourth of the Section 81 investment mechanisms was redundant - and remains so - given the absence of any Lord Chancellor's Advisory Committee. I consider that, strictly, as a result, until 8th January 2007 only the first, second and fifth of the five disposal mechanisms contained in Section 81 were available. However, in my view two qualifications must be added. The first, as acknowledged above, is that an order of the court directing investment of funds in securities was *conceivably* a lawful course, via the mechanism of the fifth statutory option. Beyond this tentative suggestion I do not venture, since this discrete issue does not fall to be determined and was not the subject of argument. The second qualification relates to the operation of the *omnia praesumuntur* principle, upon which I shall dilate presently.

[16] To summarise, until 8th January 2007, there were only three lawful disposal possibilities for funds in court:

(a) Placement of the funds in a deposit account or short term investment account.

(b) Placement in a long term investment account for transfer, under rules made under Section 82, to a specified fund established by schemes made under Section 42 of the Administration of Justice Act 1982[reproduced in Appendix 2 hereto].

(c) Disposal in some other manner ordered by the court via the fifth statutory option.

The second of the two "placement" options establishes a link with the Common Investment Fund/Schemes to which I have adverted in paragraph [7] above. As appears from Section 81(1)(a)(ii) of the 1978 Act, the route from payment into court to the Common Investment Fund was dependent upon rules to be made. In its

original incarnation, Rule 31 of the 1979 Rules, to which I have alluded above, made reference to the Common Investment Funds Scheme 1965. Subsequently, by Section 42 of the Administration of Justice Act 1982 ("*the 1982 Act*"), the Lord Chancellor was empowered to continue to make common investment schemes "*for the purpose of investing funds in court …*". This was one of the provisions of the 1982 Act specifically extended to Northern Ireland: see Section 77(2). In its current form, Rule 31 of the 1979 Rules makes reference to the Common Investment Scheme 2004. Having regard to the evidence before the court, it is unclear whether, since the enactment of the 1978 Act and the 1979 Rules, the Common Investment Fund disposal mechanism, which of course requires an order of the court, has been employed in practice. The evidence assembled in these proceedings suggests that it has not. The enactment of Section 81(1)(a)(ii) certainly gave effect to the MacDermott Committee recommendation. However, as already noted, the Committee had commented that, in Northern Ireland, investment in accordance with the mechanisms contained in Order 62, Rule 71 generated clearly superior yields. This would illuminate why the Common Investment Fund disposal mechanism may have been redundant in practice and, apparently, remains so.

III THE EVIDENCE

[17] All of the evidence received by the court was contained in affidavits sworn on behalf of the principal parties. Neither party sought to cross-examine his adversary's deponent and, in consequence, the key elements of the evidential framework were essentially undisputed. [As recorded in the Preface, the initial promulgation of this judgment proved to be the impetus for substantial further evidence: see Chapter VI, *infra*].

The Court Funds Office

[18] By some measure the most significant of the undisputed facts belonging to the matrix before the court is that the Court Funds Office ("*the CFO*"), the agency which carries out the functions of the Accountant General, routinely withdraws monies from funds held in court on behalf of minors and patients for the purpose of paying professional fees levied for investment advice and services procured from private sector stockbrokers in relation to such funds and has been doing so for many years. This, self-evidently, depletes the individual funds concerned. It was undisputed that this practice dates from 1996 at latest. [According to the latest evidence - see Chapter VI, *infra* - information belonging to the pre-1996 period is very sparse]. I have labelled this in paragraph [1] above "*the impugned practice*". I shall describe the providers of this advice and services as "*the CFO stockbrokers*". The Director of NICTS and Accountant General deposes, *inter alia*:

> "*The scheme of Part VIII of the* [1978] *Act is designed to secure and protect funds which are invested in court, with controls placed on means by which such funds can be*

> *invested (although with a considerable degree of discretion at least in relation to certain types of investment) and on the occasions on which, and the means by which, such funds can be paid out or dissipated. The reason for this is to protect and steward the funds for the benefit of the party ultimately entitled to them.*"

The functions of the Accountant General are performed for the benefit of, firstly, minors whose awards of damages are held in court until they attain their majority. The second category is that of patients, who are under the aegis of the Office of Care and Protection. The CFO currently manages some £260,000,000 on behalf of 14,000 minors and patients. The established practice is that when funds are received on behalf of minors or patients, investment advice is sought from a stockbroker. The CFO's retained stockbroker since 2008 has been Brewin Dolphin, described as one of the largest private client investment managers in the United Kingdom, authorised and regulated by the Financial Services Authority and having a "*premium listing*" on the London Stock Exchange. In every case, the CFO stockbrokers make individual recommendations which, in practice, are then reflected in the appropriate court order, following which the stockbrokers are directed by CFO to complete the requisite investment transactions. The evidence establishes that this is operated and achieved via the mechanism of an application by CFO (on behalf of the Accountant General) to the relevant court embodying the stockbrokers' disposal recommendation and requesting the court to approve same, followed by an approval order of the court. In the High Court, these orders are made by the appropriate Master. In the County Court, their author is the judge.

Remuneration of the CFO Stockbrokers

[19] Until the voluntary suspension of the impugned practice in April 2010, the CFO stockbrokers were remunerated out of the funds of patients and minors held in court. Payment to the stockbrokers took – and still takes - the following forms:

(a) A "transaction" charge, when funds in court are invested in securities and when securities are sold.

(b) Payment for "management" services, which "*… include the continuous review of the suitability of the portfolio and the provision of investment advice to the Accountant General*". According to the NICTS affidavit:

> "*The broker sends a quarterly invoice to the CFO in respect of the management charges. The CFO checks the accuracy of the invoice and, until recently, deducted the management charges due from the respective clients' accounts …*
>
> *The practice of deducting brokers' management fees from client funds began in or around April 1996 …*

Since April 2010, the management charges have been paid from Court Services' own funds rather than funds held to the account of CFO clients".

In short, the services provided by the CFO stockbrokers are essentially twofold, relating to [a] the initial investment of funds and [b] subsequent, periodic monitoring of investments which might, in some cases, give rise to reinvestment. The impugned practice was suspended in April 2010 (and remained so, until the operative date of Section 98 of the 2011 Act, 5th July 2011 – *supra*). Accordingly, the main period under scrutiny by the court is one of fourteen years, from 1996 to 2010. The evidence does not establish with any conviction or in any real detail what the practice was between 1978 and 1996. For the reasons outlined in the affidavits, the impugned practice was not a concealed one.

The Services Provided by the CFO Stockbrokers

[20] The range of services provided by the CFO investment brokers is described as initial investment advice for new cases; the review and management of investment portfolios; performance reporting; and the custody of investments using sponsored "CREST" membership. Approximately 20 – 25 new cases are referred to the stockbrokers weekly. The class under scrutiny consists of approximately 14,000 cases. These are divided into "*portfolio*" and "*sundry*" cases. Some 200 are of the "portfolio" variety, whereas the vast majority are characterised "sundry".

"Portfolio" Cases

Cases belonging to this substantially smaller category typically involve patients, rather than minors. The individual funds in question are normally substantial and the beneficiary has recurring financial needs. Before June 2008, the CFO stockbrokers conducted reviews at intervals at six months. Since June 2008, the intervals have been twelve months. The stockbrokers receive a percentage payment, based on the size of the individual fund, plus transaction charges.

"Sundry" Cases

Approximately 98.5% of the total cohort of 14,000 belong to this category. These cases involve smaller funds. Prior to July 2008, the CFO stockbrokers were remunerated by "transaction" charges. Since July 2008, most of the cases belonging to this category have involved investment in Government gilts only. Transaction fees continue to be paid to the CFO stockbrokers in respect of all purchases and sales of gilts. The CFO stockbrokers also levy "management" charges/fees for their services in cases belonging to this category. They receive an annual payment based on a percentage – 0.18% - of each individual fund. Their investment recommendations are made (a) initially and (b) subsequently, as part of their review services: many of the latter species of recommendations have been made in bulk. The services for which the CFO stockbrokers are remunerated are provided at the

stage when investments are made initially and, thereafter, for the continuous review of such investments. Their fees are charged quarterly. Since the engagement of the current CFO stockbrokers in 2008, following a competitive process, the number of individual clients on whose funds a "management fee" is levied has increased from around 200 to over 2,500, attributed to the "sundry" class of cases being charged a management fee, rather than differential transaction charges. It is apparent, therefore, that the financial drain on funds in court for the purpose of defraying the stockbrokers' fees escalated sharply between 2008 and 2010, when the impugned practice was voluntarily suspended.

Suspension of the Impugned Practice

[21] In April 2010, a policy decision was made by the Accountant General to discontinue the impugned practice. This was motivated by a perception that there was some doubt about its legality and, apparently, an expectation that legislative amendment would dispel the uncertainty. As recorded in paragraph [10] above, this expectation duly materialised, in the form of Section 98 of the 2011 Act which added a new provision to Section 81 of the 1978 Act. The propriety of the earlier voluntary suspension of the impugned practice by the Accountant General is both acknowledged and welcomed by the court. Since the operative date of the amendment of Section 81 of the 1978 Act, 5th July 2011, it has been lawful to remunerate the CFO stockbrokers for fees incurred in connection with the investment of funds in court *in securities*, by deductions from the relevant fund and subject to approval by the court. The position of NICTS is that following commencement of Section 98, there will be no enduring doubts or uncertainties about the legality of deducting fees and expenses of the CFO stockbrokers from the funds of patients and minors. While this is evidently common case, I shall offer some observations at a later stage of this judgment, particularly relating to the narrow compass of this new statutory power and the conditions to be satisfied.

The "Standard" Order

[22] The sample "Standard Orders" contained in the evidence initially before the court all post-dated January 2007. Pre-January 2007 orders were added when the evidence was augmented: see Chapter VI *infra*. The Standard Order is signed by the Master concerned. The terms of this order confirm that it is secondary, or ancillary, to an earlier order of the judge. Typically, the original order will have taken the form of what, from an *inter-partes* perspective, would be considered to be the *final* order of the court. To take the simple example of a conventional minor Plaintiff's case, such order records judgment in favour of the Plaintiff against the Defendant/s, specifies the amount of damages (whether as assessed, or approved, by the court), deals with costs and stay of execution and provides that investment of the damages will be in accordance with the directions of the Accountant General. The standard order provides for and specifies the following:

(i) Pursuant to the initial order of the Master, the monies have been placed on deposit pending further directions.

(ii) Having received further information (plainly a reference to advice from the CFO stockbrokers), the Accountant General is proposing "*to open a portfolio to be monitored by the contracted suppliers for the time being of investment services to the Accountant General (hereinafter referred to as 'the stockbrokers') for the benefit of the patient*".

(iii) The Accountant General is proposing to the court investment of the patient's or minor's funds under Order 80, Rule 15 "***upon receipt of advice from the stockbrokers***" and that "***the timing of individual investments will take place at the discretion of the stockbrokers and the Accountant General***".

(iv) The Accountant General further proposes that he be authorised "*… to pay such management fees and transaction fees to the stockbrokers as he may agree with them in respect of the patient's portfolio*".

(v) [In the example provided] the Accountant General further seeks authority "*… to register all equity and Gilt holdings in the above fund with Crest, through the stockbrokers, and to transact all future investment business within Crest*".

The practice clearly is that the Accountant General, having engaged with the CFO stockbrokers, formulates an investment proposal to the Master, formally and in writing. The ensuing order recites this proposal in the terms summarised immediately above and concludes as follows:

> "**Order to the High Court**
>
> *I have read the application made on behalf of the Accountant General, which is supported by recommendations received from the stockbrokers. It is ordered that the Accountant General is authorised to deal with all investment business of the above-mentioned patient in the terms set out in this application, in accordance with Order 80, Rule 15 …*".

It is not clear whether the "application" made by the Accountant General contains, or appends, the "*recommendations received from the* stockbrokers". This order is signed by the Master concerned, dated, and sealed. It is, presumably, expressed to be an order "***to***", and not "***of***", the High Court as it is directed to the appropriate agency of the High Court, mainly the statutory Court Funds Office. In practice, as the evidence demonstrates, the application to the court and the ensuing order merge to form a single instrument. It is appropriate to observe that the initial disposal of funds in court recorded in (i) above is beyond question *if it has been ordered by the court* (whether the judge or the Master). However, the converse proposition applies

with equal force: if this preliminary disposal is the product of a decision of any other agency, in my view it is unlawful. This follows inexorably from the dominance of the court in this sphere.

[23] In the specific case of minor Plaintiffs in personal injury actions, all practitioners are, of course, more than familiar with the long established convention whereby the order made by the relevant judge incorporates a provision that investment of the damages *shall be in accordance with the directions of the Accountant General*. I observe that, having regard to the framework of primary statutory provisions and rules set out and analysed in Chapter II above, this last mentioned provision in the order of the court, now (it seems) of almost two decades' vintage, may not be entirely accurate and, further, its origins are unclear. [The new evidence now adduced adds a little to this matrix: see Chapter VI, *infra*]. The reason for my reservations is that the Accountant General is not empowered by statute to give directions regarding disposal/investment of the monies in court. Rather, by virtue of a combination of Section 81(1) of the 1978 Act and Rules 8 and 13 of the 1979 Rules, I consider the effect of the statutory regime to be that the Accountant General is required to act in compliance with the relevant order/directions of the court and not vice-versa. In summary, I consider that the model and sequence envisaged by the statutory regime is as follows:

(a) The court makes an initial order, disposing finally of the litigation. This order may make explicit provision for one of the four disposal mechanisms prescribed in Section 81 or contain some other disposal mechanism in the exercise of the fifth statutory option. In cases where the sixth statutory option viz. disposal regulated by rules of court does not apply, I consider that the order of the court must be an exercise of one of the first five disposal mechanisms enshrined in Section 81 of the 1978 Act. Furthermore, for the avoidance of doubt, every order should specifically identify the selected mechanism, preferably citing also the specific statutory provision in play.

(b) By virtue of the regime established by the 1979 Rules, the initial order of the court (viz. the judge) may be followed by one or more further orders of the court, in the name of the Master concerned, giving specific directions to the Accountant General. In the County Court, all such orders must be made by the judge.

(c) In every case, the authorised method of disposal must be specified in the appropriate order/s of the court.

(d) (Self-evidently) the disposal mechanism must be one of the five mechanisms expressly authorised by Section 81 of the 1978 Act **or** some other mechanism contained in Rules of Court.

(e) The Accountant General must act in compliance with such order/s.

[24] However, as appears from the analysis which follows, this basic model has evidently undergone some metamorphosis with the passage of time, to the extent and with the result that significant aspects of the practice under scrutiny do not seem to me entirely faithful to the model established by Section 81 of the 1978 Act. Evidentially, the genesis of the long established order of the court (judge) that investment of a minor Plaintiff's damages be effected in accordance with the Accountant General's directions is unclear. While the point does not arise directly for decision in these proceedings, I have reflected on whether the *vires* of this particular order are rooted in the fifth of the five statutory options. If this is indeed the repository of this species of order, I would question whether its contemporary dominance gives effect to the underlying statutory intention expressed in the four expressly prescribed disposal mechanisms. Furthermore, the evidence creates an impression that, for many years, a general order of the judge to the effect that investment should be undertaken in accordance with the directions of the Accountant General may have been deployed as a mechanism for authorising investment in securities. The propriety of this practice seems to me questionable, for the simple reason that Section 81 of the 1978 Act provides that authorised securities are to be prescribed by rules of court – rather than the Accountant General, the CFO or private sector stockbrokers. Additionally, there were evidently cases in which the order of the relevant court specifically authorised investment in specified securities. Retrospectively, one might question the correctness of this discrete practice, having regard to Section 81(1)(a)(iii), for precisely the same reason. For the same reason. Notwithstanding the observations made and reservations expressed above, I would emphasize that in these proceedings this court is not reviewing the legality of any previous or extant order of the High Court or County Court providing for the disposal of the funds of patients and minors. Furthermore, it is appropriate to add that all such orders are, in any event, presumptively lawful, by the operation of the *omnia praesumuntur* principle. I shall elaborate on this in paragraph [36] *infra*.

[25] In my view, properly analysed, while the Accountant General must, in the placement/investment of the monies of minors and patients, act only in accordance with the order/directions of the court, the evidence discloses what is clearly a long established practice whereby the Accountant General, duly influenced by advice received from the CFO stockbrokers, is proactive in influencing the contents of the relevant order/s. The mechanism deployed is an application by the Accountant General to the Master concerned for a particular form of order, followed by the Master's order. The evidence strongly indicates that the orders which the Masters habitually make are based on proposals received from the Accountant General who, in turn, has considered advice from the CFO stockbrokers. These are important elements of the impugned practice which, when juxtaposed with the extant statutory regime, appear to me to give rise to some incompatibility therewith and, furthermore, frustration of the underlying intention as I have assessed this above. I consider that the clear legislative intention was that the Accountant General would be subordinate to orders of the court. However, by virtue of the practices which have evolved, these roles seem to have become confused. Moreover, I consider that

the statutory regime established by Part VII of the 1978 Act did not contemplate the role for private sector stockbrokers in the handling and disposal of the monies of minors and patients which has evolved. This analysis has two basic elements. The first is that Section 81 expressly contemplated that, as regards securities, the investment of minors' and patients' funds would be in securities specified in Rules of Court. The second is that Section 81 clearly intended that the Accountant General would have available to him an expert advisory committee appointed by the Lord Chancellor. It appears to me that the role which has ultimately evolved for private sector stockbrokers is not readily reconcilable with these particular statutory provisions. By the terms of the Originating Summons, the court is asked to rule on the further question of whether the practice described in this paragraph is lawful. For the reasons elaborated in Chapter VI *infra*, I have concluded, admittedly with some reservations, that the practice is a lawful one.

General

[26] In their affidavits, the parties are agreed, in terms, that the essential purpose of the legislation governing the funds of minors and patients in court is to safeguard the monies for the benefit of those vulnerable members of society concerned. The Accountant General contends, however, that there is a related statutory purpose entailing the prudent stewardship and investment of funds on behalf of the beneficiaries. He describes one of his responsibilities as that of ensuring that CFO clients secure a reasonable return on their investments. He highlights that the legislation makes provision for a limited menu of permissible investments only, consistent with the statutory purpose of safeguarding all funds in court. He also points to the specific statutory provision permitting investment in *securities* viz. stocks and shares. The statutory framework, he deposes, plainly envisages a range of investments other than simply placing funds on deposit. While a power to order investment of funds *out of court* is acknowledged, it is suggested that this should be reserved to exceptional cases. The CFO receives no financial benefit from the deduction of management fees from court funds. The Accountant General challenges the Official Solicitor's suggestion that, apart from cases where an out of court trust is established (and duly approved by the court), it would suffice to simply place all funds in court on deposit. This proposal is rejected on the ground that the duty of stewardship involves, as a minimum, consideration of investment in stocks and shares in certain cases, providing a demonstrably higher return than simple deposit arrangements.

[27] The Official Solicitor's affidavit explains that in the majority of cases where monies are paid into court on behalf of minors, the next friend is a parent or relative. In a minority of such cases, the Official Solicitor acts as the guardian of the settlement. Similarly, the Official Solicitor has no direct role in the cases of those patients who have an appointed controller to manage their property and financial affairs. However, where there is no one suitable, willing or able to discharge this appointment, the Official Solicitor consents to thus act and does so in around 400 cases. The evidence also includes the Public Notice (and associated correspondence

to clients) coinciding with the initiation of these proceedings. The text of this Notice, dated 9th June 2011, includes the following:

> "*The Court Funds Office … invests monies held in court within a range of investments permitted by law. In order to achieve the best results it can for its clients, the CFO uses professional stockbrokers to provide it with investment advice and keep the investments under review. Since 1996, the stockbrokers have charged management fees for this advice and the amount of these fees has been deducted from CFO clients' funds …*
>
> *A question has now arisen as to whether this practice was lawful …*
>
> *If the court decides that the deductions were not lawful, this may result in the deductions being refunded, although what precisely is required will be a matter for the court.*"

While the affidavit of the Official Solicitor highlights certain aspects of some individual cases, I observe that these do not appear to be germane to the court's determination of the question formulated in the Originating Summons.

IV THE PARTIES' COMPETING CONTENTIONS

[28] It was submitted on behalf of NICTS by Mr. Swift QC and Mr. Scoffield QC that the Accountant General has a statutory responsibility to ensure the prudent stewardship of all funds paid into court and that professional management advice should properly be viewed as an aspect of the discharge of this duty. Counsel acknowledged that the impugned practice has no express statutory authority. The submissions on behalf of NICTS acknowledged that there is no *express power* to remunerate the CFO stockbrokers out of the funds of patients and minors held in court. The argument advanced was that this power may be *implied* from Part VII of the 1978 Act and the 1979 Rules. It was emphasized that, based on the evidence, the professional, independent investment advice under scrutiny is not available in-house or within the wider Northern Ireland Civil Service. In argument, Mr. Swift QC developed three main propositions:

(a) By virtue of the statutory regime – specifically, Section 81(a)(iii) and Order 80, Rule 15 – there is express legislative authority for the investment of funds and the Accountant General must make a choice of investment. The legislation clearly contemplates *investment*, rather than (mere) protection of the funds of patients and minors, resulting in choices to be made by the Accountant General requiring expert investment advice.

(b) The cumulative effect of Section 81(a)(iii), Order 80, Rule 15 and Rule 13(2) of the 1979 Rules gives rise to a close and direct connection between this cluster of provisions and the impugned practice. The latter is a direct consequence of the former *and* the order of the court. Thus the impugned practice reflects the exercise of a necessarily implied statutory power.

(c) The implied statutory power for which NICTS contends satisfies the test devised by Lord Lowry in ***McCarthy –v- Richmond upon Thames LBC*** [1992] 2 AC 48; is not defeated by a mere principle of statutory construction; is intrinsically limited in nature; and entails conferring a benefit of the members of the class in question.

It was further submitted that the impugned practice does not entail the levying of a tax or charge payable to the Crown. It was also contended that implication of the power underpinning the impugned practice is necessary to avoid rendering redundant the court's express power to order investment of monies.

[29] Mr. Swift QC accepted, properly, that the impugned practice engages Article 1 of The First Protocol. Based on the principal submissions outlined above, it was submitted that this interference is in accordance with the law. Accordingly, the only question for the court to determine is that of justification. It was submitted that this particular Convention right confers a generous margin of appreciation on the State. It was further submitted that the impugned practice entails *a control of use,* rather than *deprivation of*, the "property" in question. The legitimate public interest invoked is that of safeguarding the interests of the vulnerable persons concerned by protecting and maximising the investment of their monies. Referring to the well known passage in ***Sporrong and Lonnroth –v- Sweden*** [1983] 5 EHRR 35, paragraph [69], it was submitted that the impugned practice strikes a fair balance between the demands of the general interest of the community and the protection of the property rights of patients and minors. This submission emphasized that the sole purpose of the impugned practice is to provide necessary advice for members of the cohort in question, does not impose an unfair burden on them and is regulated by the authority of court orders.

[30] The submissions of Mr. Horner QC (appearing with Mr. Gowdy of counsel) on behalf of the Official Solicitor formulated the following central propositions:

(a) The paramount purpose of Part VII of the 1978 Act is to ensure that funds in court are protected, rather than invested with a view to growth.

(b) Clear statutory authority is required to permit a public authority to levy charges on the property of citizens, a reflection of the common law principle of legality: see ***Attorney General –v- Wilts United***

Dairies [1921] 37 TLR 884 and [1922] 38 TLR 781 and (Sales) "The Principle of Legality and Section 3 of the Human Rights Act 1998" [2009] 125 LQR 598.

(c) The Accountant General has no implied statutory authority either to seek independent, private sector advice from professional stockbrokers *or* to defray the costs thereby incurred by a levy on funds in court. The powers of the Accountant General are exhaustively rehearsed in Part VII of the 1978 Act.

(d) The engagement of stockbrokers is explicitly confined to the function of purchasing and selling investments and does not extend to the provision of ongoing advice. The only express statutory provision regulating the remuneration of brokers is that contained in Rule 47 of the 1979 Rules, which expressly authorises the deduction of "*brokers' commissions*" in two specific cases viz. "*Where money in court is invested in the purchase of securities*" and "*Where securities in court are sold*". It is emphasized that where charging is concerned, the stricter test of "*necessary implication*" rather than that of "*reasonable implication*" applies: per Lord Lowry in ***McCarthy –v- Richmond-upon-Thames LBC*** [1991] 4 All ER 897 (at p. 903).

(e) The statutory construction contended for by NICTS is defeated by the maxim *expression unius exclusion alterius*.

[31] Developing these arguments, Mr. Horner QC emphasized that the ability of the Accountant General to invest funds in a designated security did not exist until January 2007 (when Order 80, Rule 15 RCC took effect). The Accountant General is a creature of statute, operating within an exhaustive statutory regime. He is not – and is not comparable to – a trustee. Drawing on the statement of Lord Bingham in ***R (Quintavalle) –v- Secretary of State for Health*** [2003] 2 AC 687, paragraph [8], the court was invited to place due weight on the statutory history. It was submitted that, historically, the role of the Accountant General has consistently to keep safe the funds in court, not to explore the breadth and complexity of stock market investment options. The manifestly broader investment powers of a trustee under the Trustee (Northern Ireland) Act 2001 (in Sections 3, 5, 15, 31 and 32) were highlighted by contrast. It was submitted that Section 81 of the 1978 Act makes no provision for investments based on professional advice. Furthermore, Section 81 prescribes no investment options which would require the engagement of stockbrokers. Absent any statutory power of engagement, it follows inexorably that there is no statutory power of remuneration. Mr. Horner submitted that insofar as the Accountant General engaged in the practice of investing court funds in securities prior to the operative date of Order 80, Rule 15, he was acting *ultra vires*. It was submitted that the impugned practice of levying the CFO stockbrokers' professional fees on the funds of minors and patients without their consent is two steps removed from the exercise of the express statutory powers enshrined in Section 81, thereby

confounding the NICTS argument founded on direct correlation and consequence. It was further argued that in the absence of express statutory words or necessary implication, the impugned practice infringes the common law principle of legality. It follows that the practice cannot be justified under Article 1 of The First Protocol, since it is not "*in accordance with the law*". In the alternative, the "*general interest*" justification is not established. The written submission of the Attorney General aligned itself with the argument advanced on behalf of the Official Solicitor.

V INITIAL CONCLUSIONS

[32] I have entitled this chapter "Initial Conclusions", to reflect the somewhat unusual course which this litigation took, as recorded in the Preface hereto. The conclusions which follow mirror those contained in the initially promulgated judgment, with the exception of my analysis of the compatibility of the impugned practice with Article 1 of The first Protocol ECHR, to reflect the additional evidence now received: see paragraphs [39] – [40] *infra*.

The Main Issue

[33] The first question formulated in the amended Originating Summons focuses mainly (though not exclusively) on the period preceding January 2007. It asks whether it was lawful for the Accountant General to make deductions from the funds in court of patients and minors for the purpose of remunerating the CFO stockbrokers for professional investment advice and services relating to such funds. The thrust and effect of the arguments of both parties were to address this question mainly from the perspective of *statutory authority*. In particular, the arguments of the parties, as refined, focussed substantially on the question of whether the Accountant General had/has *implied statutory authority* to indulge in the impugned practice. As appears from later passages in this judgment, I consider this approach to be somewhat one dimensional. For the reasons which I shall explain, I consider that the first issue raised in the amended Originating Summons must be viewed mainly through the prism of the authorisations contained in court orders, in tandem with the *omnia praesumuntur* principle. [See paragraph [37] *infra*]. The principal reason for my preferred approach is that the statutory regime, in the main – and, exclusively, until January 2007 – has had the effect of empowering the court, rather than the Accountant General and subordinating the latter to the former. The main orientation of the parties' arguments was reflected in a joint *excursus* through the leading authorities which establish the principles bearing on the issue of implied statutory authority.

[34] Amongst the decided cases, the principles to be applied by the court receive extensive treatment in the opinion of Lord Lowry in ***McCarthy and Stone –v-Richmond-upon-Thames LBC*** [1993] 2 AC 48. In that case, the Council concerned adopted a policy whereby it engaged in pre-planning application consultations with advice to putative developers *and* levied a charge for such service. It was common

case that the first aspect of this policy was *intra vires* the Council's statutory powers. The question for the courts was whether the second aspect of the practice satisfied the test of necessary implication. Lord Lowry, giving the decision of the House, reflected firstly on the decision in ***Attorney General –v- Wilts United Dairies*** [1921] 37 TLR 884 (Court of Appeal) and [1922] 38 TLR (House of Lords). While, in this court, both parties' counsel expended some effort in addressing this decision (and, in particular, Mr. Swift QC sought to distinguish it), there was no dispute about the correctness of Lord Lowry's adopted starting point, reflected in the following pithy sentence (at p. 68):

> "*My Lords, I have said that the power to charge a fee for the relevant service must, if it exists, be found in Section 111(1) either expressly or by necessary implication*".

Throughout the judgment of Lord Lowry, the test of *necessary implication* features prominently. At p. 71, he describes this as –

> "*… a vigorous test going far beyond the proposition that it would be reasonable or even conducive or incidental to charge for the provision of a service*".

Lord Lowry was clearly of the view that where the issue to be determined by the court is whether, absent an express statutory power, a public authority can levy a charge by necessary implication, the hurdle to be overcome is a steep one (see p. 71). Finally, Lord Lowry, noting that the statutory provision under scrutiny empowered the Council to do anything calculated to facilitate, or which was conducive or incidental to, the discharge of any of its functions (which codified the common law principle expressed in, for example, ***Attorney General –v- Great Eastern Railway*** [1880] 5 App. Cas 473) should properly be considered what he termed "*a subsidiary power*", added (at p. 75):

> "*To charge for the exercise of that power is, at best, incidental to the incidental and not incidental to the discharge of the functions*".

Insofar as Professor Bennion (Statutory Interpretation, 5th Edition, pp. 494-495) appears to espouse a somewhat diluted, less rigorous test of *necessary or proper implication*, I respectfully question whether this is correct, having regard to the consistent espousal by the House of Lords of the test of *necessary implication* [see more recently, for example, ***B and Others –v- Auckland District Law Society*** [2003] UKPC 38, paragraph 58].

[35] I refer to, but do not repeat, my analysis of the most important of the provisions of primary and subordinate legislation in Chapter II above. While I acknowledge that, historically, the factual jigsaw is incomplete, it is not in dispute that the Accountant General engaged in the impugned practice from April 1966 (at

the latest) to April 2010. To reflect the amendment of Order 80 RCC which was introduced in January 2007, I propose to express my conclusions by reference to two separate periods viz:

(a) 1996 to January 2007.

(b) January 2007 to April 2010.

The First Period : 1996 to January 2007

As my earlier analysis makes clear, only three of the five permissible methods of disposal of the funds of minors and patients in court were available throughout this period. The other two possible mechanisms were not available, since (a) rules of court had not established any designated securities and (b) no Lord Chancellor's Advisory Committee had been established. The first two of the three permissible disposal mechanisms are contained in Section 81(1)(a)(i) and (ii) of the 1978 Act. Each of these disposal methods is of the "placement" variety. The tenor of the evidence and the parties' submissions suggested that there is no serious contention on behalf of NICTS that services from – and consequential remuneration of – the CFO stockbrokers were necessary for either of these two simple disposals. The third permissible mechanism was an order of the court that the monies concerned (in the language of the statute) "*… shall not be placed or invested as mentioned in the following provisions of this section …*": per Section 81(1) [the fifth statutory option]. Accordingly, until 8th January 2007, the only conduct in which the Accountant General could lawfully engage in any given case was to place the monies in question in one of the accounts authorised by the first and second of the four prescribed methods of disposal, where duly ordered by the court, **or** to act in accordance with such other order as the court might make pursuant to the fifth statutory option.

[36] Having regard to the main emphasis in the parties' arguments I shall, firstly, address the first question in the amended Originating Summons from the perspective of implied statutory authority. With specific reference to the impugned practice, I consider that the test of necessary implication is manifestly not satisfied as regards both the retention and the remuneration of stockbrokers in connection with the only permissible methods of disposal which existed during this period. In my view, there can be no plausible or sustainable argument that the expert services of professional stockbrokers were required by the Accountant General for the simple purpose of effecting either of the "placement" disposals authorised by Section 81(1)(a)(i) and (ii) of the 1978 Act. Equally, there is no evidence before the court that such services were required in the third permissible category of case [the fifth statutory option] viz. those where the court ordered that the monies "*… shall not be placed or invested as mentioned in the following provisions of this section …*". I have observed earlier that there is a relative dearth of evidence illuminating the genesis and rationale of certain historical practices: this observation applies equally to the invocation by the court of the fifth statutory option. The evidence provides no reliable answers in this respect and I decline to speculate that resort, conscious or

subconscious, by the court to this option was, historically, the stimulus for orders permitting the investment of minors' and patients' funds in securities. Furthermore, Section 81 of the 1978 Act clearly contemplated that in those cases where the disposal of the funds in court of patients and minors was to be effected by investment (rather than mere placement), the necessary expertise would be supplied by a committee appointed by the Lord Chancellor. This undermines further the contention that the Accountant General had implied statutory authority to retain and remunerate private sector stockbrokers to provide precisely the same service. This contention is further weakened by the clearly expressed intention in Section 81 that investment in securities, where ordered by the court, would be in *securities designated by rules of court* – to be contrasted with securities selected by the Accountant General, the CFO or the CFO stockbrokers. Furthermore, the fact that the impugned practice, in my view, clearly involved the levying of charges on the property of citizens elevates the hurdle to be overcome in satisfying the test of necessary implication (the ***Wilts Dairies*** principle). I consider that the test of necessary implication requires a direct correlation, or nexus, between the implied power invoked and the powers and functions expressly created by the statute. Given the analysis above, I conclude that this correlation, or nexus, is manifestly lacking in the matrix under scrutiny. I further conclude that insofar as the less exacting test canvassed by Professor Bennion (*supra*) has any legitimacy, whether it be formulated as *necessary or proper implication* or *necessary or reasonable implication*, this is similarly not satisfied. [In Chapter VII of this extended judgment, I shall specifically address the question of the remuneration of CFO stockbrokers where expressly authorised by order of the court].

[37] Accordingly, I conclude that throughout the period 1996 to January 2007, the Accountant General had no statutory authority, express or implied, to deduct the professional fees levied by the CFO stockbrokers from the funds of patients or minors. Having made this general conclusion, I propose to address one discrete issue. Rule 47 of the 1979 Rules made clear provision for the payment of "*brokers' commission and Value Added Tax*" in respect of the purchase or sale of securities. I consider it plain that, from its inception, Rule 47 has been directed to *securities duly designated by rules of court* pursuant to the third of the four expressly prescribed disposal mechanisms enshrined in Section 81. Rule 47 is clearly designed to ensure that brokers, where engaged for these specific purposes, are paid for their professional services. The further evidence now adduced suggests that, in some cases, orders of the court expressly authorised remuneration of the CFO stockbrokers for certain services. I consider the effect of the *omnia praesumuntur* principle to be that all such orders were – and remain – presumptively valid. I conclude that **where orders of this kind were made, the remuneration of CFO stockbrokers was lawfully effected, insofar as and to the extent that it was strictly in accordance with the order of the court.** Some further breakdown of this discrete conclusion is necessary. If the order of the court was silent regarding *the source* from which the professional fees were to be paid, the monies could not, in my view, be lawfully collected from the funds of patients and minors. Conversely, I consider that this course was lawful in those cases where expressly authorised by order of the

court. The long established principle of presumptive regularity, which is an aspect of the doctrine of legal certainty, was expressed with particular clarity by Sir John Donaldson MR in ***R –v- Panel on Takeovers and Mergers, ex parte Datafin*** [1987] QB 815, where he alluded to –

> "*… a very special feature of public law decisions* [namely] *however wrong they may be, however lacking in jurisdiction they may be, they subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction*".

I refer also to ***R –v- Inland Revenue Commissioners, ex parte Coombs*** [1991] 2 AC 283 and, in a different context, ***R v Cain*** [1985] AC 46, p 55. In the modern judicial review textbooks, this principle arguably receives most attention in ***De Smith's Judicial Review*** [6th Edition], paragraph 4-061.

The Second Period: From 8th January 2007 to April 2010

[38] The distinctive nature of this discrete period is a reflection of two considerations. Firstly, from 8th January 2007, the newly introduced Rule 15 in the Order 80 regime (and its County Court equivalent) provided that monies paid into court in respect of a person under disability could be invested in a menu of specified securities. The second is Rule 47 of the 1979 Rules, which provides that brokers' commission and Value Added Tax are payable in two situations, viz. (a) where such monies are invested in the purchase of securities and (b) where securities in court are sold. The most important feature of Rule 47 is that the authority to remunerate stockbrokers which it creates is independent of (though consequential upon) orders of the court: in other words stockbrokers can be lawfully remunerated by the Accountant General in those cases where the conditions specified in Rule 47 are satisfied, without any further or corresponding authorisation by the court. The next question thrown up by Rule 47 concerns *the source* of the payments of stockbrokers which it authorises. In my opinion, the wording of Rule 47 is not felicitous. It could – and should – have spelt out with much greater clarity the source of the payments to be made to the CFO stockbrokers. Notwithstanding this criticism, I consider that Rule 47 reasonably yields the construction that the source is to be the fund in court of the patient or minor concerned. No other source or fund is identified, expressly or by implication. It follows that I conclude that in respect of the period 8th January 2007 to April 2010, the deduction of monies by the Accountant General from the funds of minors and patients was lawful only insofar as and to the extent that the services provided by the stockbrokers fell squarely within the parameters of Rule 47 viz. entailed the purchase or sale of designated securities. Insofar as the remunerated services were not of this kind, I consider that any such payments were unlawful.

Article 1, First Protocol ECHR

[39] As I have already recorded, this Convention right is plainly engaged in the matrix before the court. I am satisfied that the impugned practice had at all times the legitimate aim of providing stewardship for and protection of the funds of minors and patients in court. I reject the argument that the impugned practice merely entailed a control of the use of the property of the patients and minors concerned. The "property" to be considered, in my view, is that part of the monies to which they were entitled which was used for remuneration of the CFO stockbrokers. I find that there was outright deprivation of the monies deployed for this purpose. The first question to be addressed is whether this deprivation was in accordance with the law.

Article 1: The First Period

As regards the first of the periods under scrutiny, the answer to this question is supplied in paragraph [37] above. In short, I consider that the impugned practice:

(a) Was in accordance with the law, insofar as the remuneration of the CFO stockbrokers was expressly authorised by order of the court.

(b) Conversely, was not in accordance with the law in those cases where such authorisation was lacking.

(c) Insofar as it was, in any given case, an exercise, consciously or subconsciously, of the power of remuneration contained in Rule 47, was not in accordance with the law.

[40] The next issue to be addressed is that of proportionality. As the impugned practice constituted the most intrusive form of interference with the enjoyment of this particular Convention right, namely, deprivation of the monies deducted from the funds of patients and minors, I consider that the margin of appreciation available to the State was reduced and the proportionality of the impugned practice must, therefore, be evaluated with commensurate rigour. The ingredients of the principle of proportionality were articulated by Lord Steyn in a celebrated passage in ***R –v- Secretary of State for the Home Department, ex parte Daly*** [2001] 2 WLR 1622, at p. 16.. . Lord Steyn's test requires the court to ask itself:

> "*Whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective*".

As appears from the above, I consider that one must clearly distinguish between those cases in which orders of the court explicitly authorised the impugned practice and those in which no such orders were made. This distinction, in my view, has an

impact on the proportionality analysis. In this context, it is appropriate to observe that this judgment is in not concerned with the proportionality of orders of the High Court and County Court belonging to either of the periods under scrutiny. Furthermore, I note that, in any event, the rights protected by Article 1 of The First Protocol had no existence in domestic law until 2nd October 2000. [In passing, I record that this discrete issue did not feature in the parties' arguments]. In the former category of cases, I conclude that, in Convention terms and insofar as Article 1 of The First Protocol was engaged in any case , it was not disproportionate for the Accountant General to remunerate private sector stockbrokers from the funds of patients and minors where expressly authorised by the court to do so. In such cases, the first element of Lord Steyn's test is satisfied, the objective being to protect and enhance the funds in question **and, more prosaically but fundamentally, to obey the order of the court**. Furthermore there is no evidence warranting a conclusion that, pursuant to the court authorisation (where this existed), the Accountant General acted in a manner which was incompatible with the second and third elements of Lord Steyn's test. Fundamentally, I consider that the analytical tool of proportionality does not apply to the conduct of the Accountant General in those cases where orders of the court expressly authorised remuneration of the stockbrokers, given my analysis that the Accountant General was obliged to comply with such orders. Insofar as the Convention requirement of proportionality **was** engaged at any stage of the overall exercise, I consider that this arose at the stage when the court made the order/s in question. As I have observed, no court order is under review in this litigation. Accordingly, I conclude that, in this discrete category of cases, the impugned practice was proportionate.

[41] It is now necessary to consider the second category of cases viz. those where the remuneration of the CFO stockbrokers was not authorised by order of the court. Absent any such order and having regard to my rejection of the implied statutory authority avenue, I conclude that in this category of cases the impugned practice was not in accordance with the law. I further find that it was disproportionate on account of a combination of factors – the lack of proper consultation with the representatives of the members of the cohort in question viz. the minors and patients; the lack of any real choice to be exercised by these members and their representatives; the essentially compulsory nature of the practice; the apparent slavish application of the practice to all of the 'investment' cases, without exception; the lack of external accountability; the significant degree of power conferred on the stockbrokers; the *de facto* extra-statutory conferral on the stockbrokers of a role which was plainly designed to be undertaken by a duly appointed Lord Chancellor's Committee, with its ensuing lack of accessibility, transparency and accountability; and the absence of any truly effective supervisory role for the court. Furthermore, in this discrete category of cases, the impugned practice lacked the balances to which Section 81(2)(iii) and (iv) now give effect. In summary, I consider that there is a marked distinction between those cases where court orders authorised remuneration of the CFO stockbrokers and those where no such authorisation was granted.

Article 1: The Second Period

[42] I turn to consider the second of the periods under scrutiny. Once again, the first question is whether the impugned practice was in accordance with the law. Consistent with the analysis and conclusions contained in paragraph [39] – [41] above, I consider that the impugned practice:

(a) Was in accordance with the law in those cases where the remuneration of the CFO stockbrokers was expressly authorised by order of the court.

(b) Was in accordance with the law in those cases where the requirements of Rule 47 were satisfied.

(c) Otherwise, was not in accordance with the law.

Next, it is necessary to consider the question of proportionality. Consistent with my reasoning in respect of the first of the periods under scrutiny, I conclude that the impugned practice during this further period was proportionate in all cases where (a) and/or (b) applied. I refer to, and do not repeat, my reasoning and conclusions in paragraphs [40] – [41] above. In category (c) cases, I conclude that the impugned practice was disproportionate for the reasons expounded in paragraph [41] above. I have expressed the view that the analytical tool of proportionality does not readily apply in the context of category (a) and (b) cases. Insofar as this is incorrect, I consider that in respect of both periods legality is/was the pre-requisite of – and established - proportionality. The alternative analysis which thus arises is that in those cases where the impugned practice was lawful, its legality supplied all the key ingredients of proportionality. However, where legality was lacking, I find that the impugned practice was disproportionate.

VI THE FRESH EVIDENCE

[43] The fresh evidence received by the court in the circumstances outlined in the Preface to this judgment augmented substantially the pre-existing evidential jigsaw. It illustrated graphically the wisdom of the well established principle that in cases where the originating summons procedure is invoked *or* where the High Court is invited to make a declaratory judgment the evidential framework must be as full as possible. This is an aspect of the entrenched principle that the court does not conduct a moot. All of the further evidence adduced emanated from NICTS. It consisted of the following:

(a) A further affidavit of Mr. Lavery on behalf of NICTS, with 126 pages of accompanying exhibits.

(b) A letter dated 19th June 2012 written by Mr. Andrews, who apparently held the post of CFO Office Manager in the mid-1990s.

In tandem with this further evidence, pursuant to the court's direction an amended originating summons was prepared. The effect of the amendments was to seek the court's determination of the following **three questions**:

(i) Whether the deduction by the Court Funds Office of management fees from court funds in respect of payment for professional investment advice received in relation to those funds is lawful and *intra vires*.

(ii) Whether it is lawful for the Accountant General to apply to the appropriate court to make an order authorising investment and/or reinvestment of funds in court under Section 81 of the Judicature (Northern Ireland) Act 1978.

(iii) Whether, in the course of such an application, it is lawful for investment recommendations (particularly in the form of advice from expert investment managers) to be put before the court.

I have already addressed, and answered, the first of these questions: see paragraphs [33] – [42] above.

[44] In his further affidavit, Mr. Lavery deposes, on behalf of NICTS, that clarification is sought in respect of the following issues:

(i) The *vires* of the Accountant General to make investments prior to January 2007 (when Order 80, Rule 15 came into operation).

(ii) The legality of the payment of "transaction" charges from funds so invested pursuant to Rule 47 of the 1979 Rules prior to January 2007.

(iii) The legality of the practice whereby the Accountant General makes applications to the court for investment disposal orders.

The first and third of these issues are new and are duly reflected in the amended originating summons. I have already addressed fully the second of these three issues in my analysis and conclusions in Chapter V above.

[45] As Mr. Lavery's affidavit further explains, the court was bereft of evidence of the practice relating to and form of court disposal orders prior to January 2007 when its judgment was promulgated initially. It is convenient to recall that Order 80, Rule 15 came into operation on 8th January 2007 and had no predecessor. Until the swearing of this further affidavit, with its accompanying documentary exhibits, the only evidence available to the court consisted of four pro-forma documents, three of which are undated. These are combined instruments, each taking the form of an application to the court signed on behalf of the Accountant General and an order of either the High Court (signed by the Master) or the County Court Judge. In each of

the three High Court instruments of this kind, the Accountant General, in his application, invoked Order 80, Rule 15. I refer to, but do not repeat, paragraphs [14] and [22] above. The fourth of the four aforementioned instruments invoked Order 45, Rule 2 of the County Court Rules (Northern Ireland) 1981. This is the County Court equivalent of Order 80, Rule 15 and, notably, each came into operation on the same date. Each of these four instruments plainly postdates 8th January 2007. Accordingly, I proceeded on the basis that there was no available evidence of Accountant General's applications/ corresponding court orders beforehand. This assessment was reinforced by the terms of paragraph [73] of Mr. Lavery's first affidavit.

[46] In his further affidavit, Mr. Lavery, elaborating particularly on paragraph [73] of his first affidavit, deposes to his belief that the payment of "management" charges out of court funds has been "*generally*" expressly authorised by an order of the relevant court **both before and after 8th January 2007**. Mr. Lavery's new affidavit both describes and exhibits the following:

(i) So-called **"flexi" orders** which, he avers, were first introduced in 1996, coinciding with the practice of deduction of "*management*" fees from funds in court. The examples appended to his affidavit span the period 1996 to 2012. It is averred that the purpose and effect of these orders was to permit the Accountant General to invest *and reinvest* the funds of individual minors/patients "*at the discretion of* [the CFO stockbrokers] *and the Accountant General*". In short, by the mechanism of these particular orders, the court was asked to approve a proposed investment, based on the CFO stockbroker's recommendation, *and* to authorise the Accountant General to invest and reinvest the funds in the future at his discretion without further resort to the court – and did so. Mr. Lavery's affidavit continues:

> "*In light of the judgment of the court in these proceedings, the seeking of such orders and their use is to be reviewed*".

A further noteworthy feature of this species of order is that it authorised the Accountant General "*… to pay such management fees … to* [the stockbrokers] *as he may agree with them in respect of … the* [client's] *portfolio*". This is a paradigm example of the kind of order to which I have referred in paragraph [36] above. It is further averred that at some unspecified time between 2003 and 2006 this formula was revised to incorporate a specific reference to "transaction" fees. Mr. Lavery further deposes that prior to 2007 this species of order restricted investments to those falling within certain provisions of the Trustee Investment Act 1961. It would appear that this practice was discontinued with effect from 8th January 2007. Finally, Mr. Lavery

deposes that "flexi" –orders were generally considered inappropriate in County Court cases, having regard to the money amounts at stake.

(ii) "**County Court minor orders**", exhibited samples whereof (five in total) belong to the period 2000 – 2012. Although none of these orders authorised the deduction of CFO stockbrokers' fees from the funds in court, Mr. Lavery acknowledges that "transaction" fees were deducted in this way. Since 2007, these orders recite Order 45, Rule 2 of the County Court Rules.

(iii) "**Queen's Bench minor orders**", samples whereof spanning the period 1994 – 2012 are exhibited. In this discrete category of orders, in common with their County Court counterparts, there was no authorisation of the deduction of CFO stockbrokers' fees. However, it is acknowledged that "transaction" fees were deducted from the funds. Since 2007, these orders recite RCC Order 80, Rule15.

(iv) "**Patient orders**", one sample whereof, dated November 1994, is exhibited. The evidently tiny dimensions of this discrete category are attributed to the common deployment of "flexi" orders from 1996. While the single sample order exhibited did not authorise the deduction of CFO stockbrokers' fees, it is acknowledged that "transaction" charges would have been deducted.

I refer to, but do not repeat, my analysis and conclusions in Chapter V above. In brief compass, as regards all four of these categories of orders:

(a) The payment of the CFO stockbrokers' remuneration prior to 8th January 2007 was unlawful, unless expressly authorised by the court and duly effected in accordance with such authorisation.

(b) As regards the period 8th January 2007 until 5th July 2011, such payments were lawful either if expressly authorised by the court **or** falling within the ambit of Rule 47 of the 1979 Rules. They were unlawful otherwise.

[47] The further affidavit of Mr. Lavery also addresses specifically cases predating 1996. He deposes that orders of this vintage have been difficult to locate, adverting to alterations in working and storage practices. Only two sample orders of this vintage are exhibited. In one of these, dated March 1991, the High Court approved a minor's settlement of £6,500 and the order provided "*investment as Accountant General directs*". In the second of the two exhibited orders of this species, dated May 1992, the High Court approved a minor's settlement of £8,000 and the order specified:

> "*Investment in 9% Conversion Stock 2000 with interest to be reinvested in the Trustee Savings Bank, Court Funds Account*".

The affidavit is silent on the question of whether, in either of these sample cases, CFO stockbrokers' fees were, or would have been, deducted from the funds of the minor concerned. If any such deductions occurred, it follows from the analysis and conclusions above that I consider same unlawful.

[48] In his remaining affidavits, Mr. Lavery elaborates substantially on certain historical practices which the court had deduced from the previously limited fund of evidence, particularly the four court orders to which I have referred in paragraph [46] above. Mr. Lavery deposes to the practice whereby the Accountant General proactively applies to either a High Court Master or a County Court judge invoking the court's jurisdiction under Section 81 of the 1978 Act. Such applications invite the court to approve the investment recommendation of the CFO stockbrokers. It is suggested, in terms, that this latter aspect of the practice supplies the investment expertise which the courts do not possess. Mr. Lavery then addresses the separate practice whereby the CFO, via its stockbrokers, conducted investment reviews in all "portfolio" cases at intervals of six months, prior to 2008 and, since then, continuously. In the category of "sundry" cases, there has at no time been any equivalent review practice. According to the affidavit, a CFO review team was established subsequent to 2008. This appears to have given rise to greater interaction between CFO and the stockbrokers. It is averred that detailed reviews of all "portfolio" cases are conducted *once per year*. "Portfolio" clients are contacted at intervals of six months with a view to ascertaining whether their circumstances have changed, as this may have a bearing on investment strategy. Mr. Lavery avers that this review process now forms part of the Investment protocol devised by the Court Funds Judicial Liaison Group, which "*… plays a role in assisting with the CFO's review functions*". The affidavit continues:

> "*The Liaison Group … receives six monthly reports from the stockbrokers so as to be able to assess the performance of the investments held and review the overall investment strategy of the stockbrokers. If the role of CFO is simply to carry out the directions of the court in respect of investment … then there is no place for these reviews to be carried out by CFO. However, in order to ensure that client investments remain appropriate, the Plaintiff believes that it is essential for such reviews to be carried out on a regular basis. Accordingly, in seeking further clarification as to the Accountant General's role, the Plaintiff also seeks appropriate declaratory relief to make clear that it is lawful for the CFO to review portfolio investments and, as appropriate, make further application to the court for any change in investment which is required in order to protect and properly manage client funds*".

[49] The further evidence now available to the court includes a letter written by Mr. Andrews, who is described as a former CFO Office Manager in the mid-1990s. The Official Solicitor very properly did not object to its reception in evidence by the court. On behalf of NICTS, it is acknowledged, correctly, that this evidence is "*limited*". Mr. Andrews' letter contains, in the language of its author, certain "*high level recollections*". The introduction of "*investment management fees*" is one of three "*initiatives*" which Mr. Andrews recalls. Being a strategic investment policy, he suggests that this would have been scrutinised and approved by the NICTS Finance Committee, chaired by the NICTS Director. Mr. Andrews further recalls that there was "*an issue*" regarding CFO equity investments and "*an issue"* concerning court orders specifying that funds be invested "*as directed by the Accountant General*". Mr. Andrews further recalls some communication with the English CFO which, he explains "*… had the benefit of investment advice from the Lord Chancellor's Investment Advisory Committee* [which] *… was a distinguished committee drawn from City experts …* [and] *… developed and maintained an approved list of equity investments which had circa 100 approved investments*". Mr. Andrews proposed that an equivalent list be adopted in Northern Ireland, to which "*a form of generic order* [evidently a court order] *would give effect"*. This gave rise to the so-called "*flexi*" order of the court, the product of a process involving, *inter alios*, a High Court judge and which secured the approval of the Lord Chief Justice. Mr. Andrews' letter continues:

> "*In addition, the issue of stockbroker transaction charges was raised by the brokers as they wanted to ensure that they were not accused of simply 'churning' transactions to generate fee income. They offered to develop management fee proposals which they subsequently submitted.*"

Following some involvement of the Finance Committee, CFO concluded that the "management" fee mechanism was more cost effective and, further, that the proposed CFO stockbrokers' "management" fees were "*very attractive against industry standards*". Mr. Andrews describes this as "*a radical change from the previous regime*". Mr. Andrews expresses the personal opinion that these newly introduced "management" fees could legitimately be discharged under any rule of court permitting the remuneration of "transaction" charges, whether for gilt or equity investments.

[50] I would offer one particular comment on Mr. Andrews' letter. Its terms suggest that there may be in existence a fund of material evidence still not available to the court. This comment is prompted by Mr. Andrews' reference to a CFO file "*… which included the background to all the investment decisions and their approval, including notes of meetings with the judiciary and the Finance Committee …* [containing] *… a clear history of the approval process*". His letter suggests that the contents of this file "*might*" include records of quarterly meetings attended by Mr. Andrews, the High Court Masters and the former Official Solicitor, in the course of which the portfolios reviewed in the immediately preceding quarter and the fees deducted from patients'/minors' funds were considered. Given the obvious need for final judicial

determination of the revised menu of issues contained in the amended originating summons, and taking into account the generous opportunities which have been afforded to bring all material evidence to the attention of the court, I decline to take any course which might delay finalisation of this judgment further. However, those to whom this judgment is directed or otherwise affected thereby will doubtless be alert to the possibility that, post-judgment, some further relevant historical information might surface.

[51] The letter from Mr. Andrews reinforces the court's view that, in practice, insufficient attention appears to have been given to two key provisions in Section 81 of the 1978 Act, namely those relating to the designation of permitted securities for investment purposes by the mechanism of rules of court **and** the appointment of an expert advisory committee by the Lord Chancellor. For reasons which may never be fully explained, the first of these statutory provisions appears to have been largely overlooked until January 2007, while the second seems to have been neglected completely. It is tolerably clear that the redundancy which afflicted these two provisions was one of the main factors giving rise to a series of practices which, directly or indirectly, have a bearing on the three questions formulated in the amended originating summons.

VII OMNIBUS CONCLUSIONS

[52] In light of the events described in the Preface hereto, I announced in court on 18th May 2012 that the initial judgment of the court should be treated as provisional. It has now been augmented by two further chapters, stimulated by the new evidence adduced. The further evidence adduced has had a significant bearing on my approach to the first question enshrined in the amended Originating Summons. As a result, Chapter V above is a moderately revised version of its predecessor. I refer to, but do not repeat, the conclusions therein expressed. The analysis and conclusions in Chapter V are focussed on the first of the three questions to be determined. I elaborate thereon in paragraphs [53] – [55] below.

[53] I consider that the correct answer to the issues raised by the first question in respect whereof the determination of the court is sought is to be found by viewing the equation at three levels. At the first level, there is the framework of statutory provisions, both primary and secondary, empowering the court. The second level consists of the orders actually made by the court. At the third level, one is concerned with the conduct of the Accountant General in the wake of such orders. During the hearing the parties' arguments focussed very substantially on the first level. However, with respect, I disagree with this emphasis. The reason for this is that, in these proceedings, this court is not reviewing the legality of any previous court order made in the sphere under consideration. Any such review plainly lies outwith the questions framed in the amended originating summons and, hence, the purview of this court. In passing, as a matter of first principle, it would not, in any event, be possible for the High Court to conduct a supervisory review of earlier

orders of the same court. Having rejected firmly the implied statutory authority argument, I consider that the first question posed in the amended originating summons places the spotlight squarely on the second and third of the levels discussed immediately above. In my view, the answer to this question is to be found by reference to (a) the terms of the court orders belonging to the periods under scrutiny, (b) the conduct of the Accountant General pursuant to such orders and (c) *where appropriate* Rule 47 of the 1979 Rules [post-8th January 2007 only]. As I have already observed, all such orders were – and remain – presumptively valid, via the operation of the *omnia praesumuntur* principle: see paragraph [37] above.

[54] I consider that prior to 8th January 2007 the only lawful mechanism whereby the Accountant General could remunerate CFO stockbrokers out of the funds of patients or minors was in cases where an order of the court expressly authorised such payments. I further consider that in those cases where there was no such authorisation, these payments could not be lawfully effected under Rule 47, as this was intended and designed to authorise the payment of "*brokers' commission and Value Added Tax*" only in respect of **the purchase or sale of designated securities.** Since no securities were designated until 8th January 2007, I consider that CFO stockbrokers could not be lawfully remunerated under Rule 47 before this date. This, in my view, is the only legitimate construction which Rule 47 bears. I would offer two central reasons for this analysis. The first is the supremacy of the court in the statutory regime under question: this applies both to what the Accountant General was *obliged* to do vis-à-vis disposal of the funds in any given case and, where appropriate, was *permitted* to do vis-à-vis remuneration of the CFO stockbrokers. The second is the *omnia praesumuntur* principle. Even though the analysis in this judgment questions retrospectively the propriety of court orders authorising the investment of minors' and patients' funds in the purchase or sale of securities prior to the operative date of Order 18, Rule 15 RCC, 8th January 2007, together with broadly formulated orders of the court purporting to authorise the investment and/or reinvestment of the funds of patients and minors in accordance with the directions of the Accountant General, all such orders were (and remain) presumptively valid. The same analysis applies to any order of the court expressly authorising the remuneration of the CFO stockbrokers. Although the argument on behalf of NICTS was not formulated in this way, I consider this to be the correct analysis and approach. For the avoidance of any doubt, I draw attention to the distinction between the language of Rule 47, which restricts the remuneration of brokers to services entailing the purchase or sale of securities and the apparently wider terminology of the originating summons, which neither draws upon nor refers to Rule 47 in the words "*… payment for professional investment advice received in relation to those funds …*". It was not argued on behalf of NICTS that Rule 47 should be construed so as to authorise the remuneration of brokers for any service other than the two services expressly mentioned. This, in my view, is the correct approach: thus, in those cases where Rule 47 was not engaged and where there was no enabling order of the court, the remuneration of the CFO stockbrokers out of the funds of patients and minors was, in my opinion, unlawful.

The Period before 8th January 2007: summary

[55] I conclude that, as regards this period, any payment out of the funds of patients or minors by the Accountant General/CFO of CFO stockbrokers' fees levied in respect of professional investment advice and services concerning such funds was lawful only if and to the extent permitted by an order of the court in any individual case and not otherwise.

8th January 2007 – April 2010

To summarise, in respect of this discrete period, I consider that the payments under scrutiny were lawful only:

(a) If and to the extent permitted by an order of the court in any individual case; **or**

(b) If and to the extent permitted by Rule 47 in any individual case.

If otherwise, I consider that such payments were unlawful.

The Second Question

[56] The question posed in the amended originating summons is whether it is lawful for the Accountant General to apply to the appropriate court to make an order authorising investment and/or reinvestment of funds in court, under Section 81 of the 1978 Act. In the course of this judgment, I have expressed reservations about whether the trends and practices which have evolved are harmonious with the regime established by the 1978 Act and its ascertainable underlying intentions. In particular, I have drawn attention to certain key provisions of the statutory framework which were or remain redundant. I have some misgivings as to whether the legislature envisaged that the Accountant General would engage in conduct of this kind. Equally, I have reservations about the role which the CFO stockbrokers have assumed, having regard particularly to the mechanism in Part VII of the 1978 Act for appointing an expert advisory Lord Chancellor's Committee and designating, for investment purposes, permitted securities by rules of court. However, on balance, while I perceive some statutory disharmony in the practices which have evolved, I am satisfied that this conduct on the part of the Accountant General is not so alien to or incompatible with the statutory regime to be condemned unlawful. Furthermore, while this practice does not have express statutory authorisation, I consider that this is not necessary. Accordingly, I conclude that this practice is lawful.

The Third Question

[57] The third question posed in the amended originating summons, in my view, requires a little rephrasing: it asks, in effect, whether, if it is lawful for the Accountant General to make such applications, he can lawfully place investment recommendations before the court. I repeat the analysis, reservations and conclusion expressed in paragraph [56] above. Thus I consider this practice to be lawful.

General

[58] The historical practices exposed by these proceedings seem to me to disclose some distortion and misapprehension of the regime established by Part VII of the 1978 Act. In my view, the central tenet of Section 81 is that the Accountant General, in all matters of handling and disposal of the funds of patients and minors in court, must act in accordance with the directions contained in the relevant court order/s. The driving and dominant agency is plainly designed to be the court. However, this has been gradually distorted and eroded by the progressively influential role which the Accountant General has assumed. This trend, in my view, is inextricably linked to the increasing influence and power wielded by the CFO stockbrokers, who feature nowhere in the statutory regime. I would emphasize that this analysis does not entail the slightest suggestion of impropriety. In addition, there is no clear evidence that the impugned practice operated to the detriment of minors or patients. Beyond this limited observation the available evidence does not permit me to venture further and I decline to do so. Furthermore, as I have already observed, the evolution of certain practices seems to me clearly attributable to, *inter alia*, the unexpected – and, presumably, unplanned – redundancy which has afflicted certain key provisions in Section 81 of the 1978 Act. Fundamentally, the effect of the statutory regime is that the Accountant General is under a duty to comply with orders of the court. I rather doubt whether it was ever intended or envisaged that he would proactively influence the content of such orders, to the extent that orders of the court would simply endorse his investment proposals in full. Equally, the influence and control wielded by a non-statutory agency (viz. the CFO stockbrokers) in which the statutory regime invests no express or implied power are, in my view, alien to the regime established by Part VII of the 1978 Act. Moreover, the elements of control, discretion and choice – viewed from the perspective of the Accountant General - prevalent in the practices which have evolved are striking and, in my estimation, not easily reconciled with (a) the notion of the Accountant General's **statutory duty** to comply with the relevant orders of the court, (b) the subordination of the Accountant General to the court and (c) the overarching responsibility imposed on the court.

[59] In my opinion, the questionable trends and practices which have gradually evolved are reflected in - and possibly perpetuated by - the extended provisions of Section 81 of the 1978 Act introduced by Section 98 of the 2011 Act (paragraph [9], *supra*). In the dominant part of these new provisions, Section 81(2) speaks of "***the power***" of the Accountant General to act under Section 81(1)(a)(iii) or (iv). Insofar as this connotes any notion or element of discretionary power or choice, I consider that

it is clearly fallacious. Section 81, in my view, confers no powers on the Accountant General. Rather, the effect of Section 81 is to subject the Accountant General to *a duty to act in accordance with orders of the court.* Every such order must specify the authorised disposal mechanism. In this context, I would highlight that even the third of the five authorised disposal mechanisms confers no discretion or choice on the Accountant General, since the order of the court must "*specify*" one or more of the securities contained in the menu first created on 8th January 2007. In my opinion, the permissive "*may*", repeatedly employed throughout Section 81(1), reflects the discretionary choices available to *the court* in formulating its order/s. Some reflection on whether the new provisions contained in Section 81(2) are a faithful reflection of the fundamental tenets of the statutory regime, as I have assessed them, may be appropriate. I consider that the legality of the practice whereby the CFO stockbrokers are remunerated out of the funds of patients and minors is clearly established with effect from 5th July 2011, by virtue of the newly introduced Section 81(2), provided that the following conditions are satisfied:

(a) The investment in question must fall within the ambit of either the third or the fourth of the four prescribed disposal mechanisms viz. investment in securities designated by rules of court **or** investment in accordance with the Lord Chancellor's Advisory Committee. This latter mechanism is, of course, redundant in practice.

(b) Secondly, the remuneration of the CFO stockholders must be expressly authorised in the order of the court.

(c) Thirdly, such remuneration is permissible only for fees and expenses "*incurred in connection with, or for the purposes of*" effecting the authorised investment – and for no other services.

Furthermore, there is the not insignificant additional protection that the court must expressly apply its mind to whether it is "*necessary and proportionate in all the circumstances*" to include the requisite authorisation in its order.

[60] The agencies and authorities to whom this judgment will be of greatest interest may consider it appropriate to conduct a thorough review of extant practices in the handling and disposal of the funds of minors and patients in court. This will embrace important issues lying beyond the purview of this judgment , such as notice to and representation of directly affected parties. In particular, the reasons for and the propriety of the redundancy which, with the passage of time, has afflicted certain key provisions of Section 81 of the 1978 Act are matters which, in my view, call for careful evaluation. Furthermore, the MacDermott Report is now of some four decades vintage and, having regard to the supreme importance attaching to the protection of the welfare and interests of the members of these two vulnerable cohorts of society, a comprehensive review of Part VII of the 1978 Act and its offshoots may be timely.

Order of the Court

[61] The order of the court will reflect the conclusions expressed above. These are, in summary:

The First Question

(i) Between 1996 and 8th January 2007, the remuneration of the CFO stockbrokers out of the funds in court of minors and patients in respect of investment advice and services regarding such funds was lawful only if and to the extent permitted by orders of the court.

(ii) In respect of the period 8th January 2007 to April 2010, such remuneration was lawful only if and to the extent permitted by :

(a) Orders of the court; or

(b) Rule 47 of the 1979 Rules.

The Second Question

(iii) It has at all times been lawful for the Accountant General to apply to the court to make an order authorising investment and/or reinvestment of funds in court in accordance with Section 81 of the 1978 Act and Rules of Court.

The Third Question

(iv) It has at all times been lawful for the Accountant General, in making such applications, to request the court to take into account investment recommendations.

The Devolution Issue

(v) The focus of the devolution issue was Article 1 of The First Protocol ECHR. My conclusions on the Convention requirements of legality, legitimate aim and proportionality are expressed in paragraphs [39] – [42] above, duly broken down by reference to the two periods under scrutiny.

Effect of this Judgment

[62] This judgment determines certain questions of law in an abstract manner. It is not the function of this court to attempt any audit of what has actually occurred in the matter of the remuneration of the CFO stockbrokers since the 1978 Act came into

operation. Furthermore, it seems unlikely that a comprehensive audit will be possible, having regard to the limited evidence available. This judgment has the unambitious aim and function of establishing the barometers of legality to be applied by the parties to the periods and practices under scrutiny.

Disposal

[63] The parties should agree the terms of a suitable declaration to reflect the above answers to the questions formulated in the amended originating summons. The court is aware that neither party is seeking costs from the other. Accordingly, there will be no order as to costs *inter partes*.

APPENDIX I

Section 82, Judicature (Northern Ireland) Act 1978

"82 Rules as to funds in court.

(1) The Lord Chancellor, with the concurrence of the Treasury, may make rules regulating, subject to the provisions of section 80, the deposit, payment, delivery and transfer in, into and out of the ***[F1****Court of Judicature****]*** *and the county court of money, securities and effects which belong to suitors or are otherwise capable of being deposited in, or paid or transferred into, the XXX or the county court or are under the custody of the* ***[F1****Court of Judicature****]*** *or the county court, and regulating the evidence of such deposit, payment, delivery or transfer and, subject to the provisions of section 81, the manner in which money, securities and effects in court are to be dealt with, and in particular –*

(a) providing (subject to any exceptions prescribed by the rules) for the accruer of interest on moneys placed to deposit accounts and short-term investment accounts and prescribing the rate at which interest on moneys placed to deposit accounts and the rate at which interest on moneys placed to short-term investment accounts is to accrue;

(b) requiring the Accountant General –

(i) to transfer to the National Debt Commissioners all money paid into the ***[F1****Court of Judicature****]*** *or the county court which is not required by him for meeting current demands, except money placed to a long-term investment account or ordered to be invested in securities;*

(ii) to transfer money placed to a long-term investment account to that one of the funds

established by schemes made under ***[F2****section 42 of the* ***M1****Administration of Justice Act 1982****]*** *specified in the order pursuant to which it was so placed;*

(c) prescribing for the purposes of section 81(b)(ii) the manner of investment of money by the Accountant General and regulating the investment, pursuant to an order under that section, of money in securities;

(d) regulating the crediting of interest accruing on moneys placed to deposit accounts and on moneys placed to short-term investment accounts and the crediting of dividends accruing on shares in funds established by schemes made under ***[F3****section 42 of the* ***M2****Administration of Justice Act 1982****]*** *which have been allotted in consideration of the transfer of money in compliance with such provision of the rules as has effect by virtue of paragraph (b)(ii) and of interest or dividends accruing on securities in which money has been invested by the Accountant General pursuant to an order of the High Court or county court or to section 81(b)(ii) and on other securities in court;*

(e) providing –

(i) that, in such cases as may be prescribed by the rules, no sum of money (whatever its amount) shall be placed to a deposit account or a short-or long-term investment account or be invested in securities;

(ii) that, in no case, shall a sum of money of an amount less than such as may be so prescribed be placed to, or remain in, a deposit account, be placed to a short-or long-term investment account or be invested in securities;

(f) prescribing the time at which money which falls to be placed to a deposit account or short-term investment

account is to be so placed and the times at which interest on money so placed is to begin and cease to accrue and the mode of computing any such interest;

(g) *providing that, in such circumstances as may be prescribed by the rules, interest and dividends such as are mentioned in paragraph (d) shall be placed to deposit accounts or short-or long-term investment accounts;*

(h) *providing for dealing with accounts or effects which, subject to such, if any, exceptions as may be prescribed by the rules, have not been dealt with for such period (not being less than fifteen years) as may be so prescribed;*

(i) *prescribing the manner in which money is to be furnished to the Accountant General by the National Debt Commissioners and* ***[F4****the investment manager of a common investment scheme made under section 42 of the* ***M3****Administration of Justice Act 1982****]*** *respectively for the purpose of enabling him to comply with orders of the High Court and county court as to the payment of money out of court;*

(j) *providing for the discharge of the functions of the Accountant General under the rules by deputy;*

(k) *providing for the constitution and procedure of the advisory committee referred to in section 81(a)(iv) and for the remuneration of its members;*

(l) *providing for such matters as are incidental to, or consequential on, the foregoing provisions of this subsection or are necessary for giving effect to those provisions."*

APPENDIX II

Section 42, Administration of Justice Act 1982

42 Common investment schemes

(1) The Lord Chancellor may continue to make schemes ("common investment schemes") establishing common investment funds for the purpose of investing funds in court and money held by any person who in accordance with subsection (5)(b) below may hold shares in common investment funds.

(2) A common investment scheme shall provide for the fund thereby established to be under the management and control of an investment manager appointed by the Lord Chancellor.

(3) A common investment scheme shall make provision for the investment by its investment manager in accordance with the provisions of this section of funds in court transferred to the fund under rules made by virtue of section 38(7) above and of any sums of money transferred to the fund by persons who in accordance with subsection (5)(b) below may hold shares in the fund.

(4) A common investment scheme shall make provision—

(a) for treating the fund established by it as being divided into shares; and

(b) for treating a sum invested in the fund as being represented by a number of shares determined by reference to that sum and the value of the fund at the time the investment was made.

(5) Shares in a common investment fund—

(a) shall be allotted to and held by the Accountant General; and

(b) may be allotted to and held by the Accountant General of the [Court of Judicature] of Northern Ireland and any other person authorised by the Lord Chancellor.

(6) Where a person is authorised under subsection (5) above to hold shares in a common investment fund—

[(a) he may invest trust money in shares in the fund without obtaining and considering advice on whether to make such an investment; and]

(b) he may invest trust money in a common investment fund of which he is the investment manager.

(7) Moneys comprised in the fund established by a common investment scheme may, subject to the provisions of the scheme, be invested by the investment manager of the fund in any way in which he thinks fit, whether or not authorised by the general law in relation to trust funds.

(8) ...

(9) The investment manager of a fund established by a common investment scheme shall not be required or entitled to take account of any trusts or equities affecting any share in the fund whether or not he is also a trustee of any such trust.

(10) The investment manager of a fund established by a common investment scheme shall be remunerated at such rates and in such manner as the Lord Chancellor shall with the concurrence of the Treasury determine.

(11) The salary or remuneration of an investment manager and his officers and such other expenses of executing his office or otherwise carrying this Part of this Act into effect as may be sanctioned by the Treasury shall be paid out of moneys provided by Parliament.

(12) There shall be charged in respect of the running of a common investment scheme such fees, whether by way of percentage or otherwise, as the Lord Chancellor shall with the concurrence of the Treasury fix and such fees shall be collected and accounted for by such persons, and in such manner, and shall be paid to such account, as the Treasury direct.

(13) There shall be retained or paid out of a fund established by a common investment scheme any expenses which could be so retained or paid out of trust property if the investment manager of the fund were a trustee and such expenses shall be retained or paid in the same way as and in addition to fees charged in respect of the running of the scheme.

(14) Fees and expenses recovered under this section shall be paid into the Consolidated Fund.

(15) ***Money and securities held by an investment manager of a fund established by a common investment scheme shall vest in his successor in office without any assignment or transfer.***

(16) ***The power conferred by subsection (1) above to make a common investment scheme shall include the power to vary or revoke such a scheme.***