ThirtyNine
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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: June 2013

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Introduction

Welcome to the June 2013 newsletter. Until its last days, May was a very quiet month on the CoP front, at least in terms of reported decisions. Whether that is a sign of things to come in the new post-1 April 2013 legal aid desert is something that only time will tell.

In the final days of May, though, two important decisions became publicly available, the first relating to capacity to undergo a termination, and the second to disclosure. We discuss these below, together with cases decided in other courts which shed relevant light upon matters MCA related.

By way of a bonus, we also include with this newsletter a paper presented recently by Alex to the Court of Protection Practitioners Association in Manchester on statutory wills and testamentary capacity.

As per usual, we include not only hyperlinks to publicly accessible transcripts of the judgments where they are available at the time of publication,[1] but also a QR code at the end which can be scanned to take you directly to the CoP Cases Online section of our website, which contains all of our previous case comments.

[1] As a general rule, those which are not so accessible will be in short order at www.mentalhealthlaw.co.uk.

Re SB [2013] EWHC 1417 (COP)

Mental capacity – assessing capacity – medical treatment

Summary

The central issue in this case was whether the mother (P) had the capacity to decide to terminate her pregnancy at the twenty-third week of its term.

P was a 37 year old woman who suffered from bipolar disorder which had at times been controlled by medication, although she had also suffered from relapses and remitting symptoms. She became pregnant in December 2012 and her evidence was that at that point she had wanted to have a baby. The evidence also suggested that until April 2013, she had conscientiously attended scans and had showed every sign of wanting to keep the baby. She had then ceased taking her prescribed medication. She started to exhibit behaviours which led members of her family including her husband and mother to believe that she had become unwell. On 17 April 2013, P attended a clinic seeking to have an abortion. For various reasons, although appointments were made on two separate occasions for the procedure to be carried out, she did not in fact have the termination. At the beginning of May 2013 she was compulsorily detained under s.2 Mental Health Act 1983. Despite that, she had

maintained her wish to terminate the pregnancy and therefore not only consented to the abortion but was herself "very strongly" requesting it.

The hospital where she was detained believed that she did not have capacity in the relevant regard and issued proceedings in the COP seeking a determination by the Court and associated declarations as to whether (1) she lacked capacity to make decisions about the desired termination of her pregnancy; and (2) if she lacked capacity, whether it was in her best interests to undergo an abortion procedure.

In an ex tempore judgment, Holman J began by setting out a number of principles defining the parameters of his decision. In particular, he noted that the decision was being taken within the framework of the existing law and in accordance with the provisions of the Abortion Act 1967.

In considering the question of capacity, Holman J reiterated the cardinal principles that a person is presumed to have capacity in the relevant regard unless it is established that they do not and further that if they have capacity then they also have autonomy to make a decision which may be unwise or which others do not agree with.

Holman J noted that the evidence of P's treating consultant psychiatrist was very clear that P lacked capacity in the relevant respects. That view was shared by the independently instructed Psychiatrist, Dr Smith. Dr Smith's evidence was that P perfectly understood the procedure and what would be involved as she had previously had a termination. She understood the finality of the decision. However, Dr Smith considered that P lacked capacity as the basis of her decision was flawed evidence and paranoid beliefs, particularly but not exclusively in relation to the future support she believed her husband would provide. In reaching her conclusion, Dr Smith relied on the temporal relationship between P stopping her medication, developing paranoid ideas about her husband and mother and deciding to opt for a termination of pregnancy.

Holman J emphasised that, once the issue was before a court, the overall assessment of capacity is a matter for the judgment of the court. Whilst acknowledging that in most cases the evidence of two psychiatrists would be determinative, he reached a different overall conclusion as to P's capacity in this case.

Where Holman J disagreed with the experts was as to the "level of the bar as to capacity", the relevant question under s.2 MCA 2005 being whether P is "unable" to make a decision. The judge considered that the evidence was that P had reached a decision some weeks previously and had maintained her position and so "*there is no doubt that she has capacity to 'make' a decision*." The more complex question was whether P was unable to use or weigh the information, as s. 2 had to be read in light of s. 3, and the psychiatric evidence was that she could not.

However, Holman J considered it of significance that, even if it was correct that certain of P's beliefs in relation to her husband and mother were paranoid, she had cited a number of discrete rational reasons as to why she did not wish to carry the child to term. These included the fact of her current situation (as a person detained), her ability to care for the child in the future and that the fact that carrying the child made her feel suicidal. Holman J concluded that P was a person who had made and maintained for an appreciable period of time a decision. He concluded that it would be:

> *"…a total affront to the autonomy of this patient to conclude that she lacks capacity to the level required to make this decision. It is of course a profound and grave decision but it does not necessarily involve complex issues. It is a decision that she has made and maintains; and she has defended and justified her decision against challenge. It is a decision which she has the capacity to reach. "*

The proceedings were dismissed.

Comment

Aware, undoubtedly, that this decision was a one in a highly charged area, Holman J explicitly

stated that this was a case which "could not be more fact specific." It is however, a striking reminder that the bar for establishing capacity should not be set too high, and that having capacity is not synonymous with making decisions which the court, or other persons, necessarily agree with. In the careful distinction between suffering from a mental illness and suffering from a functional lack of capacity to take momentous decisions, it has some resonances with the pre-MCA 2005 case of Re *C (Adult: Refusal of Treatment)* [1994] 1 WLR 290, in which a patient suffering from severe mental disorder was nonetheless held to have the capacity to refuse to undergo an amputation of his leg to rid him of the gangrenous infection endangering his life.

It is also an example of a case in which the Court has granted an application by the Official Solicitor that his appointment as litigation friend should be brought to an end, that application being made on the basis of expert evidence suggesting that P had the capacity to conduct litigation.

RC v CC and X Local Authority [2013] EWHC 1424 (COP)

Contact – practice and procedure – other

Summary

A birth mother ('RC') sought the reintroduction of indirect contact with her adopted 20 year-old daughter ('CC') whom she had not seen for over 18 years. The adoptive mother had ceased sending letters, drawing, photographs and cards after separating from the adoptive father, with whom the daughter now resided. Ordinarily the decision whether to resume contact with one's birth parents is that of the adopted individual, not of the birth family. But she lacked the mental capacity to make it.

At issue was whether an unredacted psychological report and social worker statements should be disclosed to the birth mother. A redacted version of the report detailed CC's intellectual abilities, psychometric results, and conclusions about CC's wishes and feelings as to contact. The unredacted version would reveal her whereabouts and the psychological services with which she was engaging. The social work evidence was unredactable and spoke of CC's personal and family circumstances and the social work that had been carried out with her.

The Court of Protection Rules 2007 132-139 relate to disclosure but do not contain any test or threshold for denying disclosure, rule 138 merely providing:

(1) A party who wishes to claim that he has a right or duty to withhold inspection of a document, or part of a document, must state in writing:

(a) that he has such a right or duty; and

(b) the grounds on which he claims that right or duty.

HHJ Cardinal accepted that "*in principle cases should proceed on the basis of disclosure but any presumption in favour of such disclosure must be tempered by the court's paramount duty to address the best interests of CC and the need to weigh up the Article 6 and 8 rights engaged in answering the question as to what must be disclosed*" (paragraph 22). Rejecting the 'real harm' test *(Re E (Mental Health Patients)* [1985] 1 WLR 245), HHJ Cardinal adopted the approach taken in *Durham County Council v Dunn* [2012] EWCA Civ 1654; namely whether disclosure denial was 'strictly necessary.' He held that the Court should approach the matter as follows:

(i) The Rules and the decided cases clearly point to a presumption that there should be disclosure of all documents unless good reason to the contrary are shown - is the withholding of disclosure strictly necessary?

(ii) Applying the test of strict necessity involves the Judge who is to decide the case reading the unredacted documents and deciding for himself whether or not the documents can be withheld.

(iii) In deciding whether or not documents should be so withheld the Judge should bear in mind the best interests of P.

(iv) In determining best interests the Judge should conduct a balancing act, weighing up the competing rights of the parties under Articles 6 and 8 of the European Convention.

(v) Having done so the Court will direct accordingly but should as in public interest immunity cases keep the matter under constant review and invite further submissions if it deems it necessary.

(vi) ...

(vii) If the Judge determines that some documents can be disclosed to the advocate and not the party bringing the application he should direct/injunct counsel accordingly.

HHJ Cardinal accepted that RC's Article 6 rights were engaged as she had the right to a fair trial of her application for contact,

> "*33… But she is not entitled to examine the private life of this vulnerable young woman; I am satisfied that it would be disturbing for CC for her rights to be invaded - her family is under strain. I do not consider it right for her to have to be told that private information had been divulged to a party whom in reality she does not know. It is right for the Official Solicitor in my judgment to seek to avoid any distress the knowledge of disclosure might cause CC*."

On the facts, HHJ Cardinal decided that the birth mother could see the redacted psychological report but not the social work evidence; this would be disclosed only to her counsel who was injuncted from revealing it to her. Although there was "no evidence that RC would act improperly in abusing such information" (paragraph 33), withholding it was held to be strictly necessary and would not breach her Convention rights.

Comment

The approach taken by HHJ Cardinal in this case to the question of disclosure is an important amplification of an area in which the Rules are silent. In its approach to the threshold to be adopted, we would respectfully suggest, the correct one, as regards the adoption of the "strictly necessary" test propounded in the *Durham* case (as to which, see our earlier comment).

One aspect of the decision, however, does perhaps give pause for particular thought, namely the decision to limit disclosure of the social work evidence to the birth mother's Counsel alone. This appears to have been ordered by HHJ Cardinal without reference to authority or argument, and we are aware that other judges in the Court of Protection have taken similar steps in unreported proceedings.

However, prohibiting Counsel (or Counsel and solicitors) from disclosing or discussing evidence with their client puts them in a difficult and potentially invidious position. Further, such a limited confidentiality ring is inherently uncomfortable because (quite possibly) everyone else in the courtroom will know what the legal adviser's client does not.

In proceedings before the Mental Health Tribunal, proceedings with which many advocates, and some judges, in the CoP are familiar, such limited disclosure is not unknown, but – unlike in the CoP – there is a statutory basis for this (rule 14(5) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008/269).

That raises the question of whether such rings can properly be ordered in the CoP. in the absence of such a statutory basis. A case decided in the judicial review context at the end of last year (not referred to by HHJ Cardinal) would appear to confirm that 'confidentality rings' limited to Counsel are acceptable subject to certain conditions. In his judgment in *R(Mohamed) v SSD* [2012] EWHC 3454 (Admin), Moses LJ gave his reasons for ordering that some information in respect of which public interest immunity had been claimed could in

principle be provided to the Claimant's lawyers alone (and considered in camera). He asked himself (at paragraph 6) whether there was "*some principle which precludes the court from ordering disclosure to those nominated within the confidentiality ring? I must recall that these are proceedings in which the claimant moves by way of judicial review but I shall assume that there is no distinction between the principles which apply in this type of litigation and in a civil claim*." Having reviewed the authorities, Moses LJ held that there was no principle which prevented disclosure to those nominated within the confidentiality ring. However, he noted that:

> *28 The free and unencumbered ability to give and receive instructions is an important facet of open and fair trials. That ability is hampered if in some respects the lawyer is unable to disclose all the relevant evidence and material and, in that respect, the client is deprived of the opportunity to give informed instructions. But the degree to which that is of importance will vary from case to case. No lawyers should consent to such a ring unless they are satisfied they can do so without harming their client's case. But provided the legal advisers are satisfied they can safely continue to act under a restriction, the inability to communicate fully with the client will not in such circumstances undermine the fundamental principles on which a fair application for judicial review depends.*

It would seem to us that:

(i) the principle set down here is of equal relevance in proceedings before the Court of Protection; such that

(ii) it must be doubtful whether limited disclosure can be ordered in the absence of clear and express consent on the part of the affected party's legal representatives; and that

(iii) under no circumstances would the appointment of a Special Advocate be appropriate: see the decision of the Supreme Court in *Re A (A Child) (Disclosure of Third Party Information)* [2012] UKSC 60; [2012] 3 WLR 1484.

Another interesting feature of this case relates to Article 8. HHJ Cardinal held that the birth mother could not rely upon her right to respect for "family life" because the legal relationship with her daughter had been severed by the adoption and "[t]*he fact of the correspondence cannot be said to have reintroduced some sort of family life for the purposes of Article 8*" (paragraph 37). It is not clear whether the point was taken but, of course, even in the absence of "family life," Article 8 protects the right to respect for correspondence.

Futter & Ors v HMRC; Pitt & Ors v HMRC [2013] UKSC 26

Gifts

Summary

Chancery practitioners will be busy for years assessing the impact of the Supreme Court's conjoined decisions in the appeals of *Futter* and *Pitt*, and, in particular, considering the impact of its re-assessment of the so-called rule in *Hastings-Bass*, concerned with trustees who make decisions without having given proper consideration to relevant matters which they ought to have taken into account. For our purposes, the decision is of significance insofar as it provides a salutary tale regarding the need for caution in assessing all the implications prior to taking a prima facie final step regarding the disposition of P's assets.

In the second of the two appeals before the Supreme Court, that of Pitt, the difficulty had arisen thus. In 1990, Mr Derek Pitt suffered very serious head injuries in a road traffic accident. His claim for damages for his injuries was compromised by a court-approved settlement in the sum of £1.2m. Mr Pitt's solicitors sought advice from Frankel Topping, a firm of financial advisers. They advised that the damages should be settled in a discretionary settlement, a Special Needs Trust ('SNT'). Frenkel Topping gave their advice in a written report to Mrs Pitt (as receiver) which was made available to the

Official Solicitor, who represented her husband in the application to the Court of Protection. The report referred to various advantages which the SNT was expected to secure, and it mentioned income tax and capital gains tax in its illustrative forecasts. But the report made no reference whatsoever to inheritance tax. The SNT could have been established without any immediate inheritance tax liability if (i) it had been an interest in possession trust or (ii) it had been a discretionary trust complying with s. 89 Inheritance Tax Act 1984. In order to comply with s.89 its terms should have provided that at least half of the settled property applied during Mr Pitt's lifetime was applied for his benefit. But the SNT as drafted and executed contained no such restriction. The consequence was an immediate liability to inheritance tax of the order of £100,000, with the prospect of a further tax charge on the tenth anniversary in 2004. At first instance, the deputy judge (Mr Robert Englehart QC) observed that by 2010 the total tax, together with interest and penalties (if exacted) must have amounted to between £200,000 and £300,000.

Mrs Pitt and her advisers became aware of the inheritance tax liabilities in 2003. In 2006 Mr Pitt (by a litigation friend) and the trustees of the SNT commenced proceedings against Frenkel Topping claiming damages for professional negligence. That claim was settled. As Lord Neuberger (giving the sole speech on behalf of the Supreme Court) observed at para. 90: "[h]*ad it gone to trial the claim, even if successful in establishing duty and breach, might have faced difficulties over causation, since Mrs Pitt executed the SNT under the authority of an order of the Court of Protection, which had considered its terms. That court's apparent lack of awareness of the importance of section 89 of the Inheritance Act 1984 is one of the most remarkable features of the whole sorry story.*"

Mr Pitt died in 2007. After taking further advice his personal representatives (who were also two of the trustees of the SNT) commenced proceedings seeking to have the SNT set aside either under the *Hastings-Bass* rule, or on the ground of mistake. The first defendant was the remaining trustee of the SNT (who took no part in the proceedings) and the second defendant was the Revenue (which actively opposed the application). Evidence was given in writing and there was no cross-examination.

At first instance, the SNT was set aside on the basis of the rule in *Hastings-Bass*. However, in so doing, the first instance judge indicated that, even if there had been a mistake of any sort, it was only a mistake as to the consequences of the transaction, rather than its effect, and so he would not have granted rescission of the SNT.

HMRC appealed, successfully, against both the decisions in *Futter* and *Pitt*, which were heard together. The appeals against the decision of the Court of Appeal were, similarly, heard together by the Supreme Court.

The Supreme Court dismissed the appeals against the decision of the Court of Appeal both appeals insofar as they turned upon the rule in *Hasting-Bass*, in essence because it concluded that the rule required that the inadequate deliberation on the part of the trustees must be sufficiently serious as to amount to a breach of fiduciary duty, and that this was not established in either case. As Lord Neuberger noted at para. 97:

> "*As her husband's receiver under the Mental Health Act 1983 Mrs Pitt was in a fiduciary position but there is no suggestion that she had any professional qualifications. She devoted herself, alternating with a carer, to looking after her disabled husband. As anyone in that position would, she took professional advice from solicitors and specialist consultants. After hearing from her legal advisers and the Official Solicitor the Court of Protection made an order on 1 September 1994 authorising (not directing) her to execute the SNT and she acted on that authority on 1 November 1994… She had taken supposedly expert advice and followed it. There is no reason to hold that she personally failed in the exercise of her fiduciary duty. Unfortunately the advice was unsound*."

Mrs Pitt's appeal was, however, allowed on the

basis of mistake. As a matter of law, Lord Neuberger held, the true requirement for rescission on the ground of mistake is simply for there to be a causative mistake of sufficient gravity. The mistake in her case, viewed objectively with the intense focus required, was a serious one. Mrs Pitt had an incorrect conscious belief, or made an incorrect tacit assumption, that the proposed SNT had no adverse tax effects. It was also relevant that the SNT could have complied with statutory requirements without any artificiality or abuse of statutory relief and indeed it was precisely the sort of trust to which Parliament intended to grant relief.

Summary

As noted above, this case stands as something of a cautionary tale – experienced financial advisers, solicitors, the Official Solicitor and (it would appear) the Court of Protection (in its previous incarnation) all failed to appreciate a vital provision of the Inheritance Act 1984 and therefore led Mr and Mrs Pitt up a very expensive garden path. That the garden path led, eventually, to the setting aside of the SNT was far from a given. It is perhaps to be expected that s.89 is now seared on the collective memory of those advising as to the establishment of trusts for disabled persons, but the case is a reminder that Donald Rumsfeld was correct in his identification of the dangers posed by unknown unknowns.

Coles v Perfect (unreported, 13.5.13)

Mental capacity – Litigation

Summary

This case, a full transcript of the judgment of which is not available, bears brief mention as it adds another piece to the puzzle relating to the provisions in CPR Part 21 relating to the settlement of proceedings where the Claimant lacks litigation capacity. It is therefore to be read alongside the judgments in *Dunhill v Burgin* (the most recent being [2012] EWHC 3163 (QB)), on its way to the Supreme Court. In summary, Ms Coles (by her father as litigation friend) applied for the Court's approval of a personal injury settlement reached with the defendant. In light of the *Dunhill v Burgin* decisions, in which retrospective doubt had arisen as to the claimant's capacity to enter into a binding agreement, she sought the approval of the court. As at the point of seeking such approval, there was no determination by the court that she was a protected party for purposes of CPR Part 21, and the question therefore arose whether the court had jurisdiction to approve the settlement. The Claimant submitted that the court could approve the settlement in the exercise of its inherent jurisdiction. The Defendant did not dispute that proposition, but submitted that on a proper construction of CPR r.21.10, a court's approval of a settlement agreement could only be valid and effective if it had made a prior determination that the claimant was a protected party. It would appear from the Lawtel summary that neither party in fact alleged that the claimant lacked the capacity to enter into the agreement.

Teare J held that the court could approve the settlement in the exercise of its inherent jurisdiction (and would do so for reasons which need not concern us). He was further reluctant to order that there should be a determination of incapacity where capacity was not in issue, since such a trial would be disproportionate and immensely costly. He found that the concern expressed by the Defendant's insurers as to the effectiveness of seeking court approval of a settlement agreement where a Claimant had not been declared to lack capacity was unfounded: on a proper construction of CPR r.21.10, the rule simply required that there had to be court approval in order that a settlement of a claim by a protected party be valid. If the court approved a settlement and it were later determined that the Claimant lacked capacity, the effect of r.21.10 would not be that the settlement would be invalid, but rather that it was in fact valid as it had been court-approved.

Comment

This case is of some significance to those involved in personal injury proceedings involving claimants who (potentially) lack litigation capacity and, specifically, capacity to enter into a settlement. Whilst we await the ruling of the

Supreme Court upon the components of such capacity and the precise retrospective effect of CPR r.21.10, this judgment provides a pragmatic solution in positions of potential doubt, by confirming that approval of a settlement will serve to protect the Claimant (and indeed the Defendant) in the event of a later question as to the Claimant's capacity, and that it is not necessary for the potentially expensive and time-consuming exercise of determining that capacity be undertaken prior to such approval.

North Dorset NHS PCT & Anr v Coombs [2013] EWCA Civ 471

Mental Health Act 1983 – interface with MCA

Summary

We note this decision because we had previously noted the first instance decision ([2012] EWHC 521 (QB), concerning the question of whether a patient detained under the MHA 1983 is entitled to pay for their own costs and treatment. Mr Coombs did not have the capacity to make the decision whether to do so, and had the benefit of a Deputy; HHJ Platts at first instance found (1) Mr Coombs was entitled to pay for his own care and treatment if the detaining authority were in agreement with the option that they wished to choose; and (2) it made no difference that the decision whether to make such payment was made by the Deputy.

The Court of Appeal dismissed the appeal brought by the PCT. There was no consideration in the judgment of Lord Justice Rix (with whom Aikens and Black LJJ agreed) to questions of Mr Coombs' capacity, but he held thus in concluding that there was no reason in public policy or otherwise to prevent payment:

> "*33. These authorities* [including, for instance, *Rabone v. Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72]*, variously relied on by both parties, are of only indirect assistance. However, in my judgment they do at least demonstrate the following. First, analogies may be made for many purposes. When it comes to assessing the vulnerabilities of detained patients and thus the state's responsibilities for them, it is relevant to refer to their lack of control over their own lives. In such a context it is understandable that the analogy of prisoners is apposite. Even in that context, however, Rabone shows that informal patients may suffer similar vulnerabilities and that the state owes similar responsibilities to them. Secondly, despite the apposite analogy with prisoners, nevertheless for many purposes it remains equally important to remember that detained patients are in hospital because of mental disorder and in order to treat them therapeutically, not for the purposes of punishment. Thus, within the necessary restraints, it may be appropriate to recall that the hospital is their home. Thirdly, when it comes, however, to concentrate on the state's responsibility to detained patients with respect to their treatment and care, the cases underline the similarity of such patients with all others who are entitled to look for help from the NHS: they are entitled to the same duty as all who may suffer physical or mental illness. Fourthly, private mental hospitals exist which may contain detained patients, that is to say patients detained under the provisions of the MHA 1983, who may be either private patients or patients for whom the state has NHS duties of care which it meets by buying in private services.*
>
> *34. In these circumstances, it seems to me that there is nothing inherent in the structure or wording of the MHA 1983 or the 2006 Act, and nothing by way of public policy, to exclude absolutely the possibilities of detained patients (or their family or others holding responsibility for looking after their assets) paying for or contributing in part to the cost of their treatment or care. Presumably,*

private patients detained in a private hospital do exactly that. Detained patients who are being looked after by an NHS authority will have most, if not all, of their costs funded by the state: but even in their case, it may be possible, as in the case of any patient within the NHS system, to purchase private accommodation or other top-up care facilities available within the applicable Guidance. Of course, it will not be possible to provide for care or treatment which is in conflict with the recommendations of the responsible clinician. Nor may it always or perhaps even often be possible within the NHS system to purchase additional care or treatment facilities without running into the principle of free provision and the limitations upon the exceptions to that principle. However, the cases cited above show that responsible clinicians may recommend treatment or care which the NHS is not under a duty to provide, because it goes beyond its statutory duty. There seems to me no reason in statute or public policy why there should be an absolute bar on the provision of facilities, recommended by or consistent with the recommendations of the responsible clinician, which may be available at a price, within or without the NHS system.

35. *Ms Richards submits, as she did below, that private payment may create difficulties of a practical nature, as where private funding previously available breaks down. However, as the judge said, such difficulties of funding may always raise their head, and do not create public policy bars of their own.*

36. *It seems likely that the same answer is applicable whether the detained patient has a claim against a tortfeasor or whether it is simply a matter of a personal choice to pay. Similarly, it seems also quite possible that even detained patients under Part III have to be assimilated for these, as for other purposes, with detained patients under Part II. However, it is not necessary in this case to determine those matters*."

Comment

The result of this appeal is perhaps not altogether surprising, but the extracts cited above are of some interest both for their clear emphasis upon the therapeutic role of detention under the MHA 1983 and for the refusal to exclude that a patient who has the financial ability to maximise the benefits available to him during such detention from so doing.

R (T) v Legal Aid Agency [2013] EWHC 960 (Admin)

COP jurisdiction and powers - experts

Summary

In this case there was a successful challenge to the refusal of the Legal Aid Agency ("LAA") to authorise the cost of obtaining expert evidence in care proceedings. The court granted the four parties in the family law proceedings permission jointly to instruct a well-known service ("the MFS") to carry out a multi-disciplinary assessment of the parents and children. The directions given by the district judge in relation to the expert evidence complied with the guidance given by Sir Nicholas Wall, P in *A Local Authority v S and others* [2012] EWHC 1442 (Fam); [2012] 1 WLR 3098 and included the following:

"(b) the proposed assessment and report are necessary to the resolution of this case for the following reasons: a multi-disciplinary assessment is necessary for the court to determine whether the parents are able to meet the children's needs.

(c) this case is exceptional on the facts because there are allegations of neglect in respect of six children

under 10 years

(d) the costs to be incurred in the preparation of such report shall be paid by the parties in equal shares and are wholly necessary, reasonable and proportionate disbursement on the funding certificates of the publicly funded parties in this case.

(e) the court considers the hourly rate of £90 to be reasonable in the context of their qualifications, experience and expertise.

(f) the field in which this expert practises and the particular expertise which they bring to bear on this case is highly specialised. There is no realistic prospect of finding an alternative expert with the necessary expertise at a lower fee.

(g) the issues in this case are not appropriately addressed within the evidence before the Court."

MFS estimated that the cost of its multi-disciplinary assessment would be between £23,550 and £31,650. The district judge directed that she considered the total amount of £31,650 to be reasonable in the context of the experts' qualifications, expertise and experience. The order went on to record that the particular expertise of MFS was highly specialised and there was no realistic prospect of finding an alternative expert with the necessary expertise at a lower fee. However, the LSC decided that it would only give prior authorisation for one quarter of a maximum amount of £19,170 (over £4,000 less than the minimum amount calculated by MFS). As a result of this, MFS refused to carry out the multi-disciplinary assessment.

An application to judicially review the decision of the LSC was made on behalf of the six children. In the course of his judgment Collins J referred to the detailed guidance given by Sir Nicholas Wall, P in *A Local Authority v S and others*, cited above. The key aspects of this guidance may be summarised as follows:

(iv) Where the party or parties who seek to instruct an expert are publicly funded there is no doubt that the LSC (now the LAA) has the power to refuse to fund the instruction or fund the instruction in part only. Such a decision can be challenged by way of judicial review.

(v) Advocates should explain to the judge why a particular expert is required, noting that the current pressure of work means that the judge may not have time to master the details of the documents in the case but that where possible the court should read the relevant papers and record this on the face of the order.

(vi) Where the court takes the view that the expert's report is necessary for the resolution of the case, it should say so and should give reasons. The reasons need not be lengthy or elaborate. They must, however, explain to anyone reading them why the decision maker has reached the conclusion he or she has, particularly if the expert's rates exceed the maximum rates ordinarily allowable. This can be done by way of preamble to the order, or by a short judgment, delivered at dictation speed or inserted by the parties with the judge's approval.

(vii) There is a need for the LSC (now the LAA) to deal with applications promptly and, particularly if the application is being refused, or only granted to a limited extent, to give its (at least concise) reasons for its decision. Whilst the solicitor seeking prior authority can go ahead regardless, and instruct the expert at the rate the expert demands, such a suggestion, in reality, is unreal.

Collins J also set out the guidance from *A Local Authority v S and others* concerning the need for the LSC to give reasons for its funding decisions. He echoed and endorsed that guidance and went on to say (at paras 14-16):

"While there is no statutory requirement for reasons to be given by the defendant, the law has developed to require reasons where fairness so dictates. Cases such as these where children may be removed from parental care involve Article 8 of the ECHR and the welfare of the child which is paramount. There is an obvious requirement that all proper steps are taken to enable a judge to reach an informed decision when dealing with those rights. The parties and the court are in my view clearly entitled to understand why a refusal to allow what the court has considered necessary has been made so that it can, if appropriate, be challenged speedily.

The letter [from the LSC] *gives no reasons to explain why the full sum put forward is not approved. Since the defendant appeared through its representative, Mr Michael Rimer, at the hearing of S it was clearly aware of the President's guidance. Guidance in this field from so authoritative source as the President, in a reserved judgment after hearing submissions from, amongst others the LSC, gives rise to a public law duty upon the LSC, capable of being enforced, as the President said, by judicial review. Ms Hewson has sought to rely on the real difficulties faced by the defendant in dealing with the increasing number of applications for prior approval. In the S case it had been shown that following the new funding order in October 2011 introduced as part of the legal aid reform programme designed to save costs applications for prior approval of experts increased from 216 in November 2011 to 1855 in April 2012. That increase has, I was told, continued. Ms Hewson said that 4 employees in an office in Wales now had to deal with some 100 applications each week. That I suspect was something of an exaggeration but the point she was seeking to make was that the burden on those responsible for making the decision was such that they did not have the time to enter into any discussion nor to give any substantial reasons. Attempts to save costs in one way can have an effect which increases costs in another. If as a result of the new rules introduced in October 2011 greater pressure is imposed resources must be provided to meet that pressure. In R(H) v Ashworth Hospital Authority [2003] 1 WLR 127 at paragraph 76 Dyson LJ said this:-*

> '*I absolutely reject the submission that reasons which would be inadequate if sufficient resources were available may be treated as adequate simply because sufficient resources are not available. Either the reasons are adequate or they are not and the sufficiency of resources is irrelevant to that question*.'

These observations apply a fortiori where there is an absence of reasons when reasons are required.

It is also important for the expert to explain why the work which will be charged for is needed, particularly if, as here, the overall figure is large. Those instructed to do work in publicly funded cases must recognise that they will be asked for such explanations and so should spell out in sufficient detail, which need not be extensive, why the work regarded by them as necessary will be needed. It may be obvious in some cases and no more than an indicator of the anticipated hours within a bracket for a particular piece of work may be needed."

Critically, Collins J went on to hold that the LSC would need very good reasons to refuse prior approval where a judge had decided, and given reasons why, such expert evidence was necessary (at para.17):

"Now that the instruction of experts can

> *only follow if a judge so orders because he or she is satisfied and gives reasons for being satisfied that it is necessary it seems to me that the [LAA] should only refuse to give prior approval if it has very good reasons so to do. While the judge's decision is not binding, it must carry very considerable weight. If there is good reason to reject it in whole or in part the [LAA] should engage with the court. This can I suspect be dealt with in many cases in writing. If the judge, having considered the [LAA]'s representations, maintains his or her decision it is difficult to see how a continued refusal to give effect to it could be other than unreasonable. In some cases oral representations may be considered necessary. If the defendant is prepared to engage in this way extra costs will be avoided and it seems to me to be an entirely reasonable way of dealing with the problem. Where, as here there is a bracket, it is difficult to justify approval of a lesser sum than the maximum (assuming the proposed work seems overall to be needed) since, if less than the maximum is carried out, payment cannot be sought for more than is one."* (Emphasis added)

On the facts of the present case, Collins J found that no reasons were given by the LAA. He said (at para.20):

> *"This might not have led to any relief beyond a declaration if I were persuaded that the only result could be that the decision was confirmed. Not only am I not so persuaded but I find it difficult to see that it would be reasonable, at least without engaging with the judge whether in writing or orally, to fail to comply with what she has decided is necessary."*

The decision of the LSC was quashed accordingly.

Comment

By analogy, this case provides a timely indication of the way in which the Administrative Court is likely to approach challenges to the LAA's refusal to authorise expenditure on expert reports in Court of Protection. However, it should be remembered that the test for expert evidence in family law proceedings is now one of necessity, whereas the Court of Protection Rules (for the time being) continu to set a lower test and provide that expert evidence must be "reasonably required to resolve the proceedings."

The case demonstrates the real difficulties and delays that can arise as a consequence of disputes over funding for expert reports. The frustration on the part of the MDF is clear from a letter written to the Claimant's solicitors: "*I have already explained that we are running at a loss, having to charge half of our original fees, and that our NHS Trust will not tolerate further reductions, or acceptance of protracted complications caused by the changes within the LSC and the inconsistencies in how each case appears to be managed*." Collins J appeared to share this frustration and was also critical of the LSC for failing to attend court when directed to do so by the district judge. The policy of the LSC not to attend hearings, but to offer instead to speak to the judge by telephone, appears to remain in place, despite having been described by the President in *A Local Authority v S and others* as "manifestly unsatisfactory".

In light of this decision, it is advisable for parties seeking permission for expert evidence to observe the requirements of rule 123(2) of the COP Rules (which, in the experience of the editors, are sometimes overlooked). Where there is reason to believe there may be a dispute over funding, it is advisable to invite the court to expressly recite in the preamble to the order:

(i) what relevant papers it has read;

(ii) the reasons why it considers that the expert evidence is necessary or reasonably required to resolve proceedings, which should include the reasons why the evidence would not otherwise be available to it as part of the proceedings;

(iii) the reasons why the volume of work is

required, if it is a particularly complex report;

(iv) the reasons for why there is any need to exceed the maximum rates usually allowable by the LAA; and

(v) the reasons why there is any departure from:

i. the principle that the costs of a single joint expert will be shared equally between the instructing parties, particularly if this has the effect of placing a disproportionately high cost burden on the party or parties in receipt of legal aid (this should include a robust scrutiny of the means of any party claiming to be unable to afford the cost of the instruction); or

ii. the principle that the instructing parties are to be jointly and severally liable for the costs of single joint expert.

The refusal of the LAA to authorise funding for expert reports may also have consequences for the other instructing parties. Where there is a single joint instruction, unless the court orders otherwise and subject to any final costs order that may be made, the instructing parties are jointly and severally liable for the payment of the expert's fees and expenses.

Finally in this regard, we should note that the MOJ has an open consultation at the moment as to introducing minimum standards for expert witnesses giving evidence in proceedings relating to children (the deadline for responses being 18 July 2013), and we would envisage that a similar approach is likely to be adopted in the CoP arena in due course. The proposed standards cover areas including: (1) the expert's area of competence and its relevance to the particular case; (2) maintaining expertise through Continuing Professional Development activities; (3) statutory registration or membership of an appropriate professional body; (4) applying the standards to overseas experts; (5) compliance with the Family Procedure Rules and Practice Directions; (6) seeking feedback from solicitors and the courts; and (7) good practice in relation to fees in publicly funded cases.

Response to consultation upon power of entry

The Government has now responded to the consultation exercise carried out in the summer as to whether the new Care Bill should include within it a power of entry to allow social workers to visit and speak to vulnerable adults feared to be at risk of undue influence from third parties. The consultation response is available here, but in summary its conclusions are these:

"*31. The consultation showed that, as we expected, this was a very sensitive and complex issue which divided opinion.*

32. We particularly noted the strength of feeling from members of the public who were against such a power, and the risk of unintended consequences highlighted by some respondents. There is also no conclusive proof that \this power would not cause more harm than good overall, even though in a very few individual cases it may be beneficial.

33. Based on the views expressed, and the qualitative evidence provided by respondents, we have concluded that the responses to the consultation did not provide a compelling case to legislate for a new power of entry. Therefore we will not be adding a safeguarding power of entry to the Care and Support Bill."

This conclusion has been welcomed with dismay by Action on Elder Abuse and the College of Social Work. We find it surprising that in its conclusions the Government did not take into account either the fact that such a power (alongside a suite of other tools) was enacted in the Adult Support and Protection (Scotland) Act 2007), and the Welsh Ministers propose to introduce such a power in Wales. Absent the

introduction of such a power by amendment during the course of the Care Bill through Parliament, it would appear therefore that the High Court will continue to be called up on to arm social workers with such a power on a case by case basis by the exercise of its inherent jurisdiction, a very much less satisfactory position.[2]

Review of COP3

In a story which resonates with those of us regularly asked why it appears that social workers are not considered appropriate individuals to complete a COP3 when they are regularly involved in complex capacity assessments and their evidence has been said to be of very considerable weight in court proceedings,[3] an interesting story in Community Care suggests that the new forms (anticipated to be out in August 2013 at the latest) will include a COP3 which makes clear that a social worker is properly able to complete one.

A spokesperson for HM Courts and Tribunals Service (HMCTS) quoted in the article said: "*The COP3 form must be completed by someone who is professionally qualified and able to give expert evidence in this form…. This could include a medical practitioner, a registered social worker or nurse with the relevant experience. The decision whether to accept the evidence is at the discretion of the judge. The Court of Protection is reviewing the form to include guidance for social care professionals completing the form*."

2 For some suggestions as to how the inherent jurisdiction might be crafted so as to reflect the Scottish experience, the interested reader is referred to the paper delivered by Alex at Action on Elder Abuse's National Conference in March 2013, available here.

3 See, for instance, the dicta of Baker J in *PH v A Local Authority and Z Limited and another* [2011] EWHC 1704 at paragraph 24 "…*In assessing the question of capacity, the court must consider all the relevant evidence. Clearly, the opinion of an independently-instructed expert will be likely to be of very considerable importance, but in many cases the evidence of other clinicians and professionals who have experience of treating and working with P will be just as important and in some cases more important*."

House of Lords Select Committee on the Mental Capacity Act 2005

Following the recommendation in the report of the Lords' Liaison committee that an ad hoc post-legislative scrutiny committee be appointed to consider the MCA 2005, the House of Lords approved on 14.5.13, the appointment of a committee to "consider and report on" the Act. The proposed members are:

- Lord Hardie (Chairman)
- Lord Alderdice
- Baroness Andrews
- Baroness Barker
- Baroness Browning
- Lord Faulks
- Baroness Hollins
- Baroness McIntosh of Hudnall
- Lord Patel of Bradford
- Baroness Shephard of Northwold
- Lord Swinfen
- Lord Turnberg

As Lucy Series notes, there are grounds for cautious optimism in the selection of the membership, Lord Patel, for instance, having been until recently the chair of the MHA Commission, and Baroness Browning having identified during the passage of what became Schedule A1 some of the difficulties that might arise if a deprivation of liberty was not given a definition.

The Committee has powers to appoint special advisors, to send for persons, papers and records, to 'adjourn from place to place' within the UK and take and publish evidence. It will report by 28.2.14.

MIND call for evidence

MIND has issued a call for evidence about the operation of DOLS safeguards which it intends to adduce in the Cheshire West appeals before the Supreme Court, in the form of a survey which MIND hopes will be completed by those who have experienced the DOLS system. The deadline for completion is 6 June.

Our next update will be out in July unless any major decisions are handed down before

then which merit urgent dissemination.

Please email us with any judgments and/or other items which you would like to be included: credit is always given.

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Michelle's broad range of experience in the Court of Protection encompasses deprivation of liberty, residence and contact, forced marriage, serious medical treatment, capacity to consent to marriage and capacity to consent to sexual relations as well as applications for financial deputyship. She is recommended as "responsive and approachable" and a "formidable presence" in the Court of Protection in Chambers and Partners 2013.

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