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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: April 2012

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Editors

Introduction

Welcome to the April 2012 issue, which includes the decisions of the Strasbourg Court in *Austin* and *DD* dealing with deprivation of liberty and Article 5, cases upon the removal of deputies and upon the proper construction and effect of ss.5-6 MCA 2005, as well as an exciting announcement about a new resource which will shortly be available on the Chambers website. In line with that announcement, from this issue onwards, our case notes will start with keywords.

As ever transcripts are to be found on www.mentalhealthlaw.co.uk if not otherwise available.

Austin v United Kingdom (Applications 39692/09, 40713/09 and 41008/09, Grand Chamber 15th March 2012)[1]

Article 5 ECHR – Deprivation of Liberty

Summary

This is the long-awaited decision of the Grand Chamber of the ECtHR in the case of the May Day protester and three innocent bystanders who were 'kettled' at Oxford Circus for around 7 hours in May 2001. The House of Lords held that they were not deprived of their liberty, and so Article 5 ECHR was not engaged, relying on a '*pragmatic approach which takes account of all the circumstances*' (per Lord Hope) and the balancing of the interests of the individuals against those of the community where there is a risk of violence and disorder. The claimants argued that such considerations were not relevant to the question of whether the objective element of a deprivation of liberty was satisfied. The purpose or aim of the restrictions could not be taken into account other than in determining whether a deprivation of liberty that fell within the categories provided for in Article 5(1) was proportionate.

The Government argued that the cordon was no more than a restriction on the claimants' freedom and that the court could look at the context in which the restrictions were imposed, which included the reason for their implementation and the fact that there were no other less restrictive alternatives.

The ECtHR summarised the applicable principles drawn from its caselaw, including the following:

a. Although the Convention is a living instrument, new exceptions or

[1] Summary and commentary by Tor (Neil being instructed – with Jenni Richards QC – in any appeal by the Official Solicitor in *Cheshire West* to the Supreme Court, and hence being unable to provide commentary upon this case at this stage.

justifications which are not expressly recognised in the Convention cannot be added by the court.

b. In other cases not involving Article 5, the court had taken into account the difficulties involved in policing modern societies, and the police were to be afforded a degree of discretion in taking operational decisions. Article 5 could not be interpreted in such a way as to make it impracticable for the police to fulfil their duties, provided the individual is protected from arbitrariness.

c. In determining whether someone has been deprived of his liberty, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is one of degree or intensity, and not of nature or substance.

The court stated that the purpose behind a measure and an underlying public interest motive has no bearing on whether the person is deprived of their liberty, although it may be relevant to whether a deprivation of liberty was justified. The same applies where the object is to protect, treat or care for a person who has not validly consented to a deprivation of liberty. However, in taking into account the 'type' and 'manner of implementation' of a restrictive measure, the court was able to 'have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell'. Further, "*The context in which action is taken is an important factor to be taken into account, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good*."

Thus, temporary restrictions on liberty which the public generally accept (such as travel by public transport or attendance at a football match) would not entail a deprivation of liberty provided they were 'rendered unavoidable as a result of circumstances beyond the control of the authorities and are necessary to avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose.' There could be a breach of Article 5 in a crowd control case, but all would depend on the specific context. On the facts of the particular case, there was no deprivation of liberty because the police had no alternative, the measures they adopted were the least intrusive and most effective, and there was no obvious point at which the restriction on movement became a deprivation of liberty. The measures were 'necessary' on the 'specific and exceptional facts' of the case.

Comment

The importance of this decision from the perspective of practitioners in the Court of Protection is of course whether it affects the decision of the Court of Appeal in *Cheshire West and Chester v* P [2011] EWCA Civ 1257. In the Court of Appeal case, it was held that although good intentions were not relevant to the question of whether there was an objective deprivation of liberty, the reason, purpose or aim of the placement was relevant. In reaching that conclusion, express reliance was placed on the House of Lords decision in Austin.

The ECtHR did not adopt the same language used by the House of Lords, and in particular, did not say that 'purpose' was a relevant factor. However, the ECtHR did say that context and circumstances are relevant, when considering the type and manner of implementation of restrictive measures. Is there any difference between these approaches, and does it matter if there is?

In the view of the author, there is a difference. 'Purpose' is much more closely elided to the impermissible consideration of subjective intention, and can too easily sweep up everything in its path. The purpose of providing 24 hour one-to-one support in a locked placement is to protect P from harm. Once that has been stated, what more is there to consider? 'Purpose' is generic, and diverts attention from the specific circumstances of the situation. If purpose had been the deciding factor for the

ECtHR, then it would surely not have concluded that there could be breaches of Article 5 in crowd control cases – if the police could say 'our purpose was to prevent violent disorder', that would stifle any further argument that a deprivation of liberty had arisen.

The ECtHR held instead that circumstances and context could be looked at, as part of the exercise of considering the type and manner of implementation of restrictive measure. How can the court's express rejection of purpose both in the kettling context and in the context of community care be reconciled with its taking into account of wider circumstances and its reliance on the measures adopted by the police being necessary and proportionate? The short answer is that it cannot, and that the dissenting judges were right when they said that allowing the context and the wider responsibilities of the police to be taken into account is "*dangerous in that it leaves the way open for carte blanche and sends out a bad message to police authorities*."

Be that as it may, the building blocks of the ECtHR's reasoning in Austin do not in any event apply to cases involving the care of incapacitated patients. There is no concern that by finding that P was deprived of his liberty in the Cheshire case, it would be impracticable for local authorities to fulfil their duties in providing community care, because, unlike in Austin, where the acts of the police did not fall within one of the exhaustive categories in Article 5 and therefore could not be justified if Article 5 was engaged, the deprivation of P's liberty could be warranted as being proportionate and in P's best interests. Even if the result of Austin is that it is proper to have regard to context and to the reason for restrictive measures being imposed in the community care context, the decision does not go so far as supporting the Court of Appeal's use of the comparator approach, or reliance on the fact that restrictive measures are said (often by the detaining authority) to be necessary to meet P's needs.

In practical terms, where does this leave best interests assessors and statutory bodies trying to decide whether a particular case involves a deprivation of liberty? Unfortunately, it remains the case that the more judgments that are published, the more confusing the guidance. In the author's experience, many social workers find the Cheshire West judgment difficult to understand and are concerned that it blurs the distinction between whether there is a deprivation of liberty, and whether that deprivation of liberty is in P's best interests. Unless and until the Supreme Court grants permission in the Cheshire West case and clarifies the approach to be taken, this unhelpful situation will continue. In the meantime, perhaps the most useful advice that can be given is to avoid thinking in terms of 'purpose', to look carefully at the restrictive measures in the particular case and to query whether they really are necessary and the least restrictive option, to remember that considerations of 'reason' are not determinative, and if in any doubt, to err on the side of caution and find that there is a deprivation of liberty, so as to protect the vulnerable adult while the uncertainty persists.

DD v Lithuania (Application no. 13469/06), ECtHR 14.2.12

Human rights; "Deprivation of liberty"; Guardianship

Summary

DD had suffered from mental disorder since the age of 16 when she discovered she was adopted. More than 20 hospital admissions had resulted in various diagnoses, the most recent being episodic paranoid schizophrenia. Her adoptive father was granted a declaration that DD was legally incapacitated and a legal guardian was appointed. Initially this was her psychiatrist and friend, DG; then her adoptive father; and ultimately a care home director.

Described as unable to care for herself, not understanding the value of money, and hungrily wandering the city streets, she was admitted to a psychiatric hospital for treatment. At the request of her father as guardian, she was then transferred to the Kėdainiai care home for those with learning disabilities. From there she battled with the State authorities on a number of fronts. She sought to reopen the guardianship

proceedings. A criminal inquiry was conducted into whether the circumstances surrounding the care home placement and the treatment she received there was unlawful. And she complained to various other authorities which led to further inquiries being undertaken.

With little progress made, DD's last stand was to apply with DG's assistance to the European Court of Human Rights ('ECtHR') alleging violations of Articles 2, 3, 5, 6, 8, 9, 10, and 13, claiming 300,000 Euros in compensation. In the end, the Court found violations of Articles 5(4) and 6(1) and ordered the State to pay 8000 Euros plus legal costs. Although the judgment deals with a broad range of issues, the following will focus on its discussion of Article 5.

1. Article 5(1) - "Deprivation of liberty"

DD contended that her involuntary admission to the social care home amounted to a "deprivation of liberty", which the Government denied. They argued that the care home was providing social services, not compulsory psychiatric treatment, and that the restrictions on DD were necessary due to the severity of her mental illness, were in her interests and were no more than the normal requirements associated with the responsibilities of a social care institution taking care of inhabitants suffering mental health problems.

The factual basis upon which this DOL issue had to be determined was in dispute but, perhaps reminiscent of HL v UK, the Court held:

"146… As concerns the circumstances of the present case, the Court considers that the key factor in determining whether Article 5 § 1 applies to the applicant's situation is that the Kėdainiai Home's management has exercised complete and effective control by medication and supervision over her assessment, treatment, care, residence and movement from 2 August 2004, when she was admitted to that institution, to this day (ibid., § 91). As transpires from the rules of the Kėdainiai Home, a patient therein is not free to leave the institution without the management's permission. In particular, … on at least one occasion the applicant left the institution without informing its management, only to be brought back by the police (see paragraph 29 above). Moreover, the director of the Kėdainiai Home has full control over whom the applicant may see and from whom she may receive telephone calls (see paragraph 81 above). Accordingly, the specific situation in the present case is that the applicant is under continuous supervision and control and is not free to leave (see Storck v. Germany, no. 61603/00, § 73, ECHR 2005-V). Any suggestion to the contrary would be stretching credulity to breaking point.

147. Considerable reliance was placed by the Government on the Court's judgment in H.M. (cited above), in which it was held that the placing of an elderly applicant in a foster home in order to ensure necessary medical care as well as satisfactory living conditions and hygiene did not amount to a deprivation of liberty within the meaning of Article 5 of the Convention. However, each case has to be decided on its own particular "range of factors" and, while there may be similarities between the present case and H.M., there are also distinguishing features. In particular, it was not established that H.M. was legally incapable of expressing a view on her position. She had often stated that she was willing to enter the nursing home and, within weeks of being there, she had agreed to stay, in plain contrast to the applicant in the instant case. Further, a number of safeguards – including judicial scrutiny – were in place in order to ensure that the placement in the nursing home was justified under domestic and international law. This led to the conclusion that the facts in H.M. were not of a "degree" or "intensity" sufficiently serious to justify a finding that H.M. was detained (see Guzzardi, cited above, § 93). By contrast, in the present case the applicant was admitted to the institution upon the request of her guardian without any involvement of the courts.

148. As to the facts in Nielsen, the other case relied on by the Government, the applicant in that case was a child, hospitalised for a strictly limited period of time of only five and a half months, on his mother's request and for therapeutic purposes. The applicant in the present case is a functional adult who has already spent more than seven years in the Kėdainiai Home, with negligible prospects of leaving it. Furthermore, in contrast to this case, the therapy in Nielsen consisted of regular talks and environmental therapy and did not involve

medication. Lastly, as the Court found in Nielsen, the assistance rendered by the authorities when deciding to hospitalise the applicant was "of a limited and subsidiary nature" (§ 63), whereas in the instant case the authorities contributed substantially to the applicant's admission to and continued residence in the Kėdainiai Home.
149. Assessing further, the Court draws attention to the incident of 25 January 2005, when the applicant was restrained by the Kėdainiai Home staff. Although the applicant was placed in a secure ward, given drugs and tied down for a period of only fifteen to thirty minutes, the Court notes the particularly serious nature of the measure of restraint and observes that where the facts indicate a deprivation of liberty within the meaning of Article 5 § 1, the relatively short duration of the detention does not affect this conclusion ...
150. The Court next turns to the "subjective" element … the applicant subjectively perceived her compulsory admission to the Kėdainiai Home as a deprivation of liberty. Contrary to what the Government suggested, she has never regarded her admission to the facility as consensual and has unequivocally objected to it throughout the entire duration of her stay in the institution. On a number of occasions the applicant requested her discharge … She even twice attempted to escape from the Kėdainiai facility … In sum, even though the applicant had been deprived of her legal capacity, she was still able to express an opinion on her situation, and in the present circumstances the Court finds that the applicant had never agreed to her continued residence at the Kėdainiai Home.
151. Lastly, the Court notes that although the applicant's admission was requested by the applicant's guardian, a private individual, it was implemented by a State-run institution – the Kėdainiai Home. Therefore, the responsibility of the authorities for the situation complained of was engaged …"

Accordingly the Court found that there was a deprivation of liberty.

2. Article 5(1)(e) - Justification

With Article 5(1) engaged, DD contended that the DOL was unlawful because the authorities had failed to consider whether less restrictive community-based arrangements would have been more suitable and because she had been excluded from the decision-making process. The Government, on the other hand, argued that her detention was lawful because her admission conformed to domestic law which enabled a person to be admitted at the request of their guardian, provided they suffered from mental disorder.

Significantly, the ECtHR applied the Winterwerp conditions to determine the legality of the placement:

"156. The Court also recalls that in Winterwerp … it set out three minimum conditions which have to be satisfied in order for there to be "the lawful detention of a person of unsound mind" within the meaning of Article 5 § 1 (e): except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder."

It found, at para 157, that DD satisfied these criteria, that no alternative measures were appropriate, and that accordingly it was lawful to confine her to the care home.

3. Article 5(4) – Review

The Court noted the following emerging principles at para 163:

(a) A person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention;
(b) Article 5 § 4 requires that the procedure followed have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether a proceeding provides adequate guarantees, regard must be

had to the particular nature of the circumstances in which such proceeding takes place;
(c) The judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. Special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves. (emphasis added)

The last principle was all the more true when, as here, the placement was carried out without any involvement on the part of the courts. The forms of judicial review may vary from one domain to another and may depend on the type of the deprivation liberty at issue but the Court held:

"165… It appears that, in situations such as the applicant's, Lithuanian law does not provide for automatic judicial review of the lawfulness of admitting a person to and keeping him in an institution like the Kėdainiai Home. In addition, a review cannot be initiated by the person concerned if that person has been deprived of his legal capacity. In sum, the applicant was prevented from independently pursuing any legal remedy of a judicial character to challenge her continued involuntary institutionalisation.
166. The Government claimed that the applicant could have initiated legal proceedings through her guardians. However, that remedy was not directly accessible to her: the applicant fully depended on her legal guardian, her adoptive father, who had requested her placement in the Kėdainiai Home in the first place. The Court also observes that the applicant's current legal guardian is the Kėdainiai Home – the same social care institution which is responsible for her treatment and, furthermore, the same institution which the applicant had complained against on many occasions, including in court proceedings. In this context the Court considers that where a person capable of expressing a view, despite having been deprived of legal capacity, is deprived of his liberty at the request of his guardian, he must be accorded an opportunity of contesting that confinement before a court, with separate legal representation…
167. In the light of the above, the Court … holds that there has also been a violation of Article 5 § 4 of the Convention." (emphasis added)

Comment

The facts of this particular case are clearly extreme but it is interesting to note that, in deciding that DD was deprived of her liberty, the key factor for the Court was the exercise of "complete and effective control by medication and supervision over her assessment, treatment, care, residence and movement" for over 7 years. Moreover, DD clearly felt the effects of the measures and unequivocally objected to them throughout her entire stay. One particular matter worth highlighting is the reference made at para 147 to the adequacy of safeguards, including judicial scrutiny, when determining whether restrictions are of a sufficient "degree" or "intensity" to engage Article 5(1). The implication being that the more safeguards that are in place – particularly the involvement of the court – the less intense will be the restrictions on the individual.

Unlike English law, which in ***RK v BCC*** [2011] EWCA Civ 1305, paras 14-15 confirms that a parent may not lawfully authorise the deprivation of their child's liberty, the ECtHR has yet to confine its decision in Nielsen v Denmark (1988) 11 EHRR 175 to history. Rather, at para 148, it continues to try to distinguish it on the basis that (a) Nielsen was a child and DD a 'functional' adult, (b) Nielsen was hospitalised for a limited period of time whereas DD had negligible prospects of ever leaving, (c) DD, but not Nielsen, was medicated, and (d) the State was far more involved in DD's placement. It remains to be seen whether such distinctions are capable of standing up to scrutiny in the context of the restriction/deprivation dilemma.

Reiterating its approach in ***Stanev v Bulgaria*** (Application no. 36760/06), the Court once again employed the Winterwerp threshold in a social care context to determine the legality of the person's detention. This calls into question

whether the Court of Appeal was right to reject such an approach as a "fallacy" in ***G v E and others*** [2010] EWCA Civ 822. Whether a person of unsound mind is detained in a psychiatric hospital or a community facility, Stanev and DD confirm that Winterwerp should be used. The crux of the matter, therefore, is whether depriving someone of their liberty because it is "best" for them (the English approach) provides more or less protection of their Article 5 rights than requiring their mental disorder to justify their detention (the Strasbourg approach).

DL v A Local Authority and others [2012] EWCA Civ 253

Inherent jurisdiction; Interface with MCA; Undue influence

Summary

The Court of Appeal had to decide whether a 'jurisdictional hinterland' existed outside the borders of the Mental Capacity Act 2005 ('MCA') to deal with 'vulnerable adults'. The assumed – but mainly disputed – facts were that, whilst living with his elderly parents, DL was physical and verbally aggressive to them. He was alleged to have controlled their contact with others, including health and social care professionals, and to have sought to coerce his father into transferring ownership of the house into his name, whilst placing considerable pressure on both parents to have his mother moved into a care home against her wishes.

At first instance, both parents were assumed to have capacity to make decisions regarding their residence and contact with others for the purposes of the MCA. However, the local authority had initiated proceedings under the High Court's inherent jurisdiction on the basis that DL's parents lacked capacity, not because their mind or brain was impaired or disturbed, but as a result of the undue influence and duress that he brought to bear upon them. An interim injunction restrained DL from misbehaving.

DL argued that the MCA provided a comprehensive statutory code for those lacking capacity and that to recognise a jurisdiction beyond it would undermine a person's right to autonomy. The fact that someone with capacity chose to live in a risky or exploitative situation did not give the court any right to intervene. The local authority, on the other hand, contended that such an approach would create a new "Bournewood gap" in respect of those who fell outside the protection of the MCA but whose capacity was overborne by non-MCA circumstances, such as undue influence.

The Court of Appeal retraced the pre-MCA case law and Parliament's response to the Law Commission's paper. One key issue was whether Parliament's silence on the matter meant that the prior jurisdiction was thereby ousted or respected. MacFarlane LJ held:

"61… In the absence of any express provision, the clear implication is that if there are matters outside the statutory scheme to which the inherent jurisdiction applies then that jurisdiction continues to be available to continue to act as the 'great safety net'…"

It was therefore unanimously held that the inherent jurisdiction survived and was "targeted solely at those adults whose ability to make decisions for themselves has been compromised by matters other than those covered by the MCA 2005" (para 53). A person's right to autonomy was in fact a strong argument in favour of retaining the jurisdiction which, endorsing Re SA (Vulnerable adult with capacity: marriage) [2005] EWHC 2941 (Fam):

"… is in part aimed at enhancing or liberating the autonomy of a vulnerable adult whose autonomy has been compromised by a reason other than mental incapacity because they are … (a) under constraint; or (b) subject to coercion or undue influence; or (c) for some other reason deprived of the capacity to make the relevant decision or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent". (para 54).

Public policy also justified its survival: "the will of a vulnerable adult of any age may, in certain circumstances, be overborne. Where the facts justify it, such individuals require and deserve

the protection of the authorities and the law so that they may regain the very autonomy that the appellant rightly prizes" (para 63). It was not easy to define and delineate the 'vulnerable adult', "nor is it wise or helpful to place a finite limit on those who may, or may not, attract the court's protection in this regard" (para 64). Instead, it was better for the law to develop and adapt on a case-by-case basis. However, Davis LJ issued a note of caution to local authorities:

"76… It is, of course, of the essence of humanity that adults are entitled to be eccentric, entitled to be unorthodox, entitled to be obstinate, entitled to be irrational. Many are. But the decided authorities show that there can be no power of public intervention simply because an adult proposes to make a decision, or to tolerate a state of affairs, which most would consider neither wise nor sensible. There has to be much more than simply that for any intervention to be justified: and any such intervention will indeed need to be justified as necessary and proportionate. I am sure local authorities, as much as the courts, appreciate that."

Having recognised the jurisdictional hinterland, what powers could it exercise? Only those orders that were "necessary and proportionate to the facts" were permitted (para 66). Most significantly, the Court expressly commended the approach taken in LBL v RYJ and VJ [2010] EWHC 2665 (COP) where Macur J. had rejected the contention that it could be used to impose a decision upon a capacitous adult as to whether or finance and instead focused on "the ability of the court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-making…" (emphasis added). MacFarlane LJ held:

"67. The facilitative, rather than dictatorial, approach of the court that is described there would seem to me to be entirely on all fours with the re-establishment of the individual's autonomy of decision-making in a manner which enhances, rather than breaches, their ECHR Article 8 rights."

However:

"68… I reject the idea that, if it exists, the exercise of the inherent jurisdiction in these cases is limited to providing interim relief designed to permit the vulnerable individual the 'space' to make decisions for themselves, removed from any alleged source of undue influence. Whilst such interim provision may be of benefit in any given case, it does not represent the totality of the High Court's inherent powers."

Comment

For an alleged abuser to argue that the law lacked the jurisdiction to protect the alleged abusee was always going to be a hard sell. Nonetheless, the Court of Appeal's affirmation of the inherent jurisdiction and its facilitative approach is hugely significant and no doubt controversial. It comes at a time when the Government is presently deciding the extent to which adult safeguarding processes should be put onto a statutory footing on the back of the recent work of the Law Commission. The 'great safety net' is but one of many tools available to safeguard vulnerable adults and its recognition is not much of a surprise. What is perhaps of more importance is the inherent jurisdiction's scope, approach and powers.

Whilst the Court's reluctance to exhaustively define the 'vulnerable adult' is entirely understandable, it does leave uncertain the boundaries of this jurisdictional hinterland. Numerous definitions exist in various judicial, legislative and policy guises. The term 'adult at risk' is currently preferred as it focuses less on the person's inherent vulnerability and more on their objective circumstances; what might be called 'situational' or 'circumstantial' vulnerability to which all of us may at some point succumb.

To illustrate the issues with a trivial example, imagine the following. The authors decide to dine at an authentic Japanese restaurant. Our decision may seem unwise to others as not one Japanese word can be uttered amongst us. The menu is in Japanese and the staff do not speak English. The specific decision we need to make is what to eat. Our inability to make that decision results, not from an impairment or disturbance affecting the functioning of the mind or brain, but from our inability to speak Japanese. We

therefore lack capacity for a non-MCA reason. We are situationally vulnerable.

With its 'theoretically limitless' powers, how should the inherent jurisdiction protect these vulnerable adults? The goal of the jurisdiction, as Kirsty Keywood suggests, "is to safeguard decision making, rather than to safeguard well-being per se" ((2011) 19(2) Medical Law Review 326). This is reflected in the Court of Appeal's insistence on taking a facilitative, rather than dictatorial, approach. A High Court judge would thereby facilitate our ability to make the culinary decision, perhaps by requiring an interpreter, rather than choosing the dish for us. Unlike the MCA, the inherent jurisdiction would not therefore permit proxy judicial decision-making. However, the distinction between the facilitative and dictatorial approaches is not always easy to draw where injunctive and declaratory powers are concerned.

Re Rodman [2012] EWHC 342 (Ch)[2]

Deputies – Financial and Property Affairs

Summary

This case concerned an application for removal of the a property and affairs deputy appointed in 2010 on behalf of a Mrs Rodman,[3] an elderly lady suffering from Alzheimer's disease.

Mrs Rodman had previously fallen under the aegis of the Court of Protection as she had been resident in the England and Wales, and had substantial assets here. A property and affairs deputy, a Mr Long, was appointed. By order of the Court of Protection, Mrs Rodman was then moved to the United States; those concerned understood at the time that it would be to New York. That order also recorded an undertaking by her four daughters that they would apply to be appointed as her welfare guardians and take appropriate steps to bring about the appointment of a financial guardian or conservator.

In circumstances that would appear to be unclear even to Newey J, Mrs Rodman either did not go to New York or was moved from New York to Nevada after her arrival.

The proposal that Mr Long be replaced was then made by the 'general guardian' of her estate, appointed as such under an order by the District Court of Clark County, Nevada. In May 2011, the guardian, Mr Shafer, issued an application in the Court of Protection seeking (inter alia) Mr Long, be replaced as Mrs Rodman's deputy. In July 2011, Mr Shafer proceedings in the Chancery Division for (a) Mr Long to be replaced as Mr Rodman's representative and (b) bills which Charles Russell had rendered to Mr Long for work in connection with the deputyship and Mr Rodman's estate to be assessed pursuant to s.71 Solicitors Act 1974.[4] By September 2011, Mr Shafer was also relying upon matters relating to the assessment of costs incurred by Charles Russell as justification for Mr Long's removal as deputy.

The application for removal was transferred from the Court of Protection to be heard before Newey J in the Chancery Division of the High Court.

In analysing the relevant legal framework, Newey J noted (at paragraph 17) that the relevant power was that contained in s.16(7) MCA 2005, and that the exercise of the power was a decision covered by s.1(5) MCA 2005. He further noted that, as such, he had to take into account the views of anyone engaged in caring for the person or interested in her welfare which, here, included her four daughters.

Newey J then went on to set out, at some length, why he was "entirely unpersuaded" that that it was in Mrs Rodman's best interests that Mr Long be removed as deputy. He noted, in particular: (1) Mr Long's greater expertise as regards the specifically British aspects of the case; (2) the fact that Mr Shafer's 'hostile' approach to date did not inspire confidence that

[2] In the interests of full disclosure, Alex acted on behalf of Mrs Rodman (by the Official Solicitor) in the earlier Court of Protection proceedings alluded to by Newey J.

[3] Who was also then, subsequently, appointed administrator of her late husband's estate.

[4] The latter proceedings remain to be determined, the Court being concerned here solely with the former issue.

he would be a suitable candidate; (3) that it could prove inconvenient and expensive to have different individuals handling her affairs and Mr Rodman's estate; (4) that, whilst it would be possible for Mr Long to be replaced as administrator of Mr Rodman's estate, this would, itself, cause its own problems and additional expense; (5) the costs incurred by Charles Russell were large, but not obviously excessive[5]; (6) whether or not it was correct that Mr Shafer upon being appointed deputy could require an assessment of costs pursuant to s.71 Solicitors Act 1974, Charles Russell had confirmed that they would take no point upon limitation, such that there was no risk that any right would be lost by the fact that Mr Long was not being replaced as deputy; (7) whilst the daughters had all signed a letter in August of 2011 to the effect that they had lost confidence in Mr Long and wished him to be replaced both as Mrs Rodman's deputy and personal representative, Newey J noted that the letter lacked any explanation as to why this should be so and that he had not heard evidence from them, such that he did not think that their views helped very much.

Comment

There is a paucity of case-law upon the test to be applied when considering whether to remove a deputy. Indeed, to the best of our knowledge, there have been no reported cases upon the exercise of s.16(7).[6] Whilst Newey J did not engage in a detailed analysis of s.16(7) (and did not refer at all to s.16(8)), it is perhaps of interest to note that he assumed that any decision taken under s.16(7) will be one that is taken for or on behalf of P. Whilst this is an assumption with which we would not quibble, we note that an alternative line of argument could be advanced by analogy to the case of *Re H* [2009] COPLR Con Vol 606, in which HHJ Marshall QC doubted whether the decision under s.19(9) as to the level of security that a deputy is required to post und was one to which s.1(5) applied.[7] Had this approach been adopted, we note, Newey J would not need to have to taken into account (even if to dismiss) the views of the daughters.

This case does raise an interesting question as to the power of the Court of Protection to control matters outside the borders of the United Kingdom. As noted by Newey J, the order endorsed by the Court in the earlier best interests proceedings specifically provided that it was in Mrs Rodman's best interests to be transferred from her current location to an identified location in New York; it would appear from the judgment of Newey J that she may, in fact, never have stepped foot in the door of that placement. It would have been interesting to note what, if any, steps the Court of Protection would have taken had this fact been identified to it in the immediate aftermath of the transfer.

ZH v Commissioner of the Police for the Metropolis [2012] EWHC 604 (Admin)

Restraint

Summary

This is an extremely important case, primarily because of its consideration of the scope (and construction) of ss.5 and 6 MCA 2005, and also for its further contribution to the debate as to the circumstances under which a person can be said to be deprived of their liberty.

ZH was a severely autistic, epileptic nineteen year old young man who suffered from learning disabilities and could not communicate by speech. In September 2008, he was taken by the specialist school he attended to a swimming pool for a familiarisation visit. Matters went very badly awry during the course of that visit, in

[5] Whilst Mr Long acted as a consultant to Charles Russell (where he was formerly a partner), the judge did not consider that his evidence that he had reviewed their costs and considered them reasonable at each stage was thereby deprived of all weight, especially as his remuneration was not linked to Charles Russell's profits.

[6] The – relatively recent – decision of HHJ Marshall QC in *Re J* [2011] COPLR Con Vol 716 related to the removal of an attorney under an LPA, the relevant factors identified under s.22(3)(b) MCA 2005 being very similar to those in s.16(8) MCA 2005. *Re J* was not cited in *Re Rodman*. We are aware that Senior Judge Lush determined an application for removal of a deputy in August 2011, an anonymised copy of his judgment is anticipated.

[7] Paragraph 51.

particular following the decision of the manager of the pool to ring the Police when difficulties were experienced in persuading ZH to move away from the side of the pool. The arrival of the police gave rise to an escalating series of events which culminated in ZH first jumping into the pool, being forcibly removed from it, being handcuffed, put in leg restraints and placed in a cage in the back of a police van for a period of around 40 minutes. As a result of this, ZH suffered consequential psychological trauma as and an exacerbation of his epileptic seizures.

ZH claimed (by his father as litigation friend) damages against the Commissioner of the Police for the Metropolis for damages, for assault and battery, false imprisonment, unlawful disability discrimination under the Disability Discrimination Act 1995 under the Human Rights Act 1998 alleging breaches of Articles 3, 5 and/or 8 of the ECHR and for declaratory relief.

The police contested the claim almost in its entirety. For our purposes, the most relevant aspects of the judgment are those dealing with claims for assault and battery, as well for false imprisonment/breach of Article 5 ECHR. Helpfully, Sir Robert Nelson analysed the legal framework in detail before then making findings of fact and considering questions of liability and quantum.

In considering the claims for assault and battery and false imprisonment, Sir Robert Nelson noted that it was accepted by the Commissioner that, once it was established that force was used upon ZH, or that he was imprisoned, the onus shifted to them to establish a lawful basis for the use of such force or imprisonment. Importantly, Sir Robert Nelson noted[8] that "[t]*o achieve this the Defendant has to demonstrate that his officers complied with the relevant provisions of the Mental Capacity Act.*" Relying upon *R(Sessay) v SLAM* [2011] EWHC 2617 (at paragraph 47)[9] Sir Robert Nelson held[10] that it was insufficient for the Commissioner to establish simply that an officer acted honestly and in good faith. Having set out the relevant provisions of the MCA 2005 (i.e. 1(5); 1(6), 4(2), 4(7), 5 and 6), which he considered to establish a number of pre-conditions which "if satisfied permit certain acts to be undertaken in respect of those lacking mental capacity, without legal liability being incurred,"[11] Sir Robert Nelson considered the position of the officers in question, four of whom it was clear were not aware of s.5 MCA 2005 at the time that they acted and did not have it in mind. These officers said that they relied upon the common law power of necessity.[12] Having considered rival submissions as to whether or not knowledge of the provisions of the MCA 2005 is an essential pre-requisite to the operation of the Act, Sir Robert Nelson held as follows:

> "*40. Whilst it is correct that the officers have to have the prescribed state of mind at the material time under sections 5 and 6, it is not necessary in my judgment, for them to have in mind the specific sections, or indeed even the Act, at the material time. What they must reasonably believe at the material time are the facts which determine the applicability of the Mental Capacity Act. Thus, at the material time they need to believe that the claimant lacked capacity to deal with and make decisions about his safety at the swimming pool, that when they carried out the acts that they did, they believed that the claimant so lacked capacity, and that they believed that it was in the claimant's best interests for them to act as they did. A belief that the situation created a need for them to act in order to protect the claimant's safety and prevent him from severely injuring himself would in my judgment be sufficient to satisfy the Act, provided of course that the belief was reasonable under sections 5 and 6 and a proportionate response under section 6 of the Act. It is also necessary for the*

[8] Paragraph 33.

[9] This paragraph, in which the Divisional Court cited the well-known authority of *R v Governor of Brockhill Prison Ex p Evans (No.2)* [2001] 2 AC 19, in fact only addressed the position in relation to a claim of false imprisonment.

[10] Paragraph 34.

[11] Paragraph 35.

[1212] Paragraph 37.

Police to have considered whether there might be a less restrictive way of dealing with the matter under section 1(6) and, if practicable and appropriate to consult the carers, to take into account their views. These are not only matters which they must have in mind when they carry out the acts of touching, grabbing or restraint but are matters which they must have had regard to before carrying out such acts."

Sir Robert Nelson therefore found[13] that it would therefore be theoretically possible for the police to have satisfied the conditions of ss.5-6 MCA 2005 even if some of their number were not aware of the terms of the Act itself. In light of his conclusion, he noted that he was not then bound to go on to consider whether or not the common law defence of necessity could apply in circumstances where the MCA 2005 applied. He chose to do so, however. Relying, in particular, on *Sessay*, ZH submitted that the defence of necessity had no place; the Commissioner submitted to the contrary.
Sir Robert Nelson held as follows in this regard:

"*44. For my part I am satisfied that where the provisions of the Mental Capacity Act apply, the common law defence of necessity has no application. The Mental Capacity Act requires not only the best interests test but also specific regard to whether there might be a less restrictive way of dealing with the matter before the act is done, and, an obligation, where practicable and appropriate to consult them, to take into account the views of the carers. It cannot have been the intention of Parliament that the defence of necessity could override the provisions of the Mental Capacity Act which is specifically designed to provide specific and express pre-conditions for those dealing with people who lack capacity*."

Having considered the law relating to the DDA 1995 and Article 3 ECHR, Sir Robert Nelson came on to consider Article 5. Perhaps unsurprisingly, in advancing the contention that ZH was not deprived of his liberty, the Commissioner placed heavy reliance upon the dicta from previous authorities[14] suggesting that it was appropriate to take into account the purpose (or reason) for the restriction in question being imposed. Sir Robert Nelson noted that the decision of the Strasbourg Court in *Austin* was awaited; his conclusions in this regard must therefore be read subject to the fact that the decision has now been handed down, but are of sufficient interest as to merit being reproduced in full:

63. It is right to say that there is no reference to 'purpose' in Article 5 save in relation to the specific exceptions (a) to (f). The cases however clearly establish that all relevant factors relating to the applicant have to be considered. If the applicant has a need for measures to be taken in order to protect his own safety, such a need should be taken into account otherwise the court is not considering the full circumstances relating to the applicant when the ambit of Article 5(1) is being considered. The court is not therefore considering the matter from the point of view of the person carrying out the measure, but from the point of view of the applicant who needs the measure to be carried out. This, it seems to me, is a similar approach to that adopted by Mrs Justice Parker [in MIG and MEG] *when taking into account the "reasons" for the applicants before her living where they did.*

64. There may be policy reasons why the ambit of Article 5 should only involve consideration of the actual effect upon the applicant, so that the scope of Article 5 is not unnecessarily diminished by "purpose" or "need". The matter was not argued in depth before me however, and

[13] Paragraph 41.

[14] *Secretary of State for the Home Department v JJ* [2008] 1 AC 385 Hale; *Surrey County Council v CA, LA MIG and MEG* [2010] EWHC 785 (Fam) and *Austin and another v Commission of Police for the Metropolis* [2009] 1 AC 564.

> *I am only able to express a tentative view on the basis of the material before me. On that material I conclude that the purpose of, or the need for a measure to be taken on the part of an applicant is one of the factors which should be taken into account in considering whether there has been an infringement of Article 5. It seems to me that if the consent of the applicant is relevant, which is not part of the concrete effect upon him, then need can also be said to be relevant.*"

On the facts, Sir Robert Nelson found that ZH had made out all aspects of his claim (and also that, even had been available, the defence of necessity to the common law claims would not have been applicable at any of the stages of the police's involvement). Interestingly, he found the police to have breached the DDA by failing to make a significant number of reasonable adjustments in their approach to him, such adjustments including consulting with his carers, allowing ZH opportunities to communicate with his carer during restraint and when in the van, giving ZH the opportunity to move away from the poolside at his own pace, recognising that force should have been the option of last resort, recognising that a calm, controlled and patient approach should have been taken at all times in their dealings with ZH, and considering any alternative strategies to that adopted. As Sir Robert Nelson noted at paragraph 139, "[t]*he need for a calm assessment of the situation and the acquisition of knowledge of how to deal with the autistic young man before taking any precipitate action, was essential*."

As regards Article 5, Sir Robert Nelson's conclusions were as follows:

> "*145. The nature and duration of the restraint lead me to the conclusion that there was a deprivation of liberty, not merely a restriction on movement on the facts of this case. Furthermore, even though I am of the view that the purpose and intention of the police (namely at least in part to protect ZH's safety) is relevant to the consideration of the application of Article 5, I am nevertheless satisfied that even when that is taken into account, a deprivation of liberty has occurred. The actions of the police were in general well intentioned but they involved the application of forcible restraint for a significant period of time of an autistic epileptic young man when such restraint was in the circumstances hasty, ill-informed and damaging to ZH. I have found that the restraint was neither lawful nor justified. Even though the period may have been shorter than that in Gillan v United Kingdom 2010 APP No 4158/05, it was in my judgment sufficient in the circumstances to amount to a deprivation of liberty under Article 5.*"

Sir Robert Nelson awarded the following damages to ZH (no award being made for aggravated or exemplary damages at common law or for the breaches of the ECHR):

- Post traumatic stress disorder: £10,000
- Exacerbation of epilepsy: £12,500
- Disability Discrimination Act damages: £5,000
- Trespass to the person: loss of liberty £500
- Trespass to the person: pain and distress from the assault £250
- Total: £28,250

Sir Robert Nelson also granted declaratory relief (the precise scope of which was not set out in the body of the judgment), concluding as follows:

> "*162. This case is another example of the difficult role the police are often called upon to play. None of them were fully aware of the features of autism, what problems it presented and how it should best be dealt with in a situation such as occurred at the Acton swimming baths. They were called to the scene by a misleading message about ZH's behaviour, and on arrival perceived the need to take control and be seen to be taking steps to deal with the situation. What was called for was for one officer to*

take charge and inform herself of the situation, as fully as the circumstances permitted so as to be able to decide on the best course of action to take. That did not happen: their responses were over-hasty and ill-informed, and after ZH had gone into the pool matters escalated to the point where a wholly inappropriate restraint of an epileptic autistic boy took place. They did not consult properly with the carer who was present when they arrived, even if he was not as proactive as he might have been in informing them of what was happening, what needed to be done and what needed to be avoided.

163. The opportunities to take stock, before ZH went into the pool and whilst he was in it, were not taken. All of those involved in this incident were acting as they genuinely thought best, whether pool staff, carers or police, and it is clear to me, having listened to their evidence, that all have been to some extent emotionally affected by the events of that day. Whilst I am clear in my conclusion that the case against the police is established, I am equally clear in concluding that no one involved was at any time acting in an ill intentioned way towards a disabled person.

164. The case highlights the need for there to be an awareness of the disability of autism within the public services. It is to be hoped that this sad case will help bring that about."

Comment

This case warranted setting out in some detail as (whilst not a COP case) it is the first in which ss.5-6 MCA 2005 have been subject to detailed judicial consideration. It is of particular significance that, whilst Sir Robert Nelson concluded that it is not necessary that a person have before them all relevant provisions of the Act (or, indeed, have knowledge of them), they must both reasonably believe the facts which determine the applicability of ss.5-6 and also – importantly – have considered all the relevant matters which the Act prescribes. It is respectfully suggested that this approach must be correct as it focuses upon the substantive protections afforded to P by the MCA 2005 so as to ensure that steps are taken in his best interests, whilst at the same time enabling those who are in fact taking those steps not to be affixed with legal liability on 'procedural' grounds.

Sir Robert Nelson's conclusions as to the vexed question of purpose/reason must now be read in light of the decision in *Austin*, but to the extent that they address themselves to the actual needs of P (rather than the views of the restrainer of those needs) they are consistent with that decision.

As the judge noted, the case is also an object lesson in how quickly situations can escalate if well-intentioned but uninformed (even if uniformed) individuals seek to intervene without taking the necessary steps to appraise themselves of the particular needs of the particular individual at the particular time. It also stands, we might note, as a rather interesting counterpoint to *Crawford & Anor v Suffolk Mental Health Partnership NHS Trust* [2012] EWCA Civ 138 (discussed in our March newsletter) and the (one might possibly think rather cavalier) approach taken there to the restraint of the challenging.

Denis Michael Seaton & Others v Anthony Seddon & Others [2012] EWHC 735 (Ch)

Mental Health Act 1983 – interface with MCA 2005, Mental Capacity – fluctuating capacity

Summary

In this matter Roth J had to consider a complex claim arising out of a dispute in relation to licencing rights over a song. The first four claimants, were members of a band, MY ("the MY claimants"). The fourth claimant, FW, is mentally ill and brought his action by his litigation friend, the corporate receiver of Birmingham City Council who had been appointed as his "receiver" by the Court of Protection.

In the 1980s, MY had a hit single, "Duchie". In

1984 the MY claimants entered in to a contract ("the Sparta Florida Agreement") which made provision for the licencing of rights to a song ("Kouchie") on which the contract asserted MY's hit single "Duchie" had been based. They were represented in the negotiations by the firm of Solicitors Woolf Seddon of which the First Defendant was a partner. The claim as framed before Roth J was not issued until 2010. It challenged the conduct of Woolf Seddon who had acted both for the MY claimants and for another party to the Sparta Florida Agreement (whose interests conflicted with those of the MY claimants). Woolf Seddon applied to the Court for summary judgment against the claimants by way of strike out on grounds that it amounted to an abuse of process. The claimants also applied for permission to amend their Particulars of Claim.

Rather than plead the claim in negligence or for breach of the solicitor's contract of retainer, the claim had been pleaded on the grounds that Woolf Seddon stood in a fiduciary position in respect of the MY claimants. Roth J noted that the obvious reason for this was that any claim in negligence would be long out of time. The central issue was whether there was any basis on which the effect of the Limitation Act 1980 could be avoided.

The claim as pleaded effectively included allegations of fraud but such allegations had not been fully pleaded. Roth J summarised the principles applicable to a pleading of fraud at paragraphs 39 to 41 of the Judgment. He rejected a submission made on behalf of the claimants that the CPR had introduced more stringent requirements in this regard. On the facts, Roth J considered the allegations of fraud had no realistic prospect of success.

Roth J then considered the claimants' claim that there had been a breach of fiduciary trust. Roth J set out a number of authorities on this issue including *Paragon Finance plc v Thakerar & Co* [1999] 1 All ER 400 *and Cia de Seguros Imperio v Heath (REBX) Ltd* [2001] 1 WLR 112 in which the Court had drawn a distinction between class 1 and class 2 types of constructive trust. On the facts, he considered that any trust that was in place fell in to the second category to which the exception provided for in the Limitation Act 1980 would not apply. Properly considered, the claims were claims in tort and subject to the application of s32 of the Limitation Act 1980 (which allows for the postponement of a limitation period) limitation would have expired after 6 years.

The Judge then turned to the issue of whether the particular circumstances of the fourth claimant could form a basis for prolonging or otherwise disapplying the limitation period. He noted that the relevant legislation had altered over the period in question and that s.28 of the Limitation Act had been amended to include a reference to the MCA 2005.

The fourth claimant was born on 23 May 1967. Accordingly, at the date of accrual of the causes of action he was under a disability by reason of his age ("the first disability"). He ceased to be under that disability on becoming 18 on 23 May 1985. Any disability arising as a result of the fourth claimant's capacity was a "secondary disability." The parties agreed that once time had started to run nothing could stop it: Purnell v Roche [1927] 2 Ch 142.

Two issues crystallised:

i) If the second disability commenced before the termination of the first disability, did that extend the limitation period? More specifically, if the fourth claimant came to lack mental capacity before his 18th birthday, would that stop time from running?

ii) Was the determination of whether or not the fourth claimant was of unsound mind or lacking in mental capacity to be made pursuant to the 1980 Act as it was at the time of the facts being considered or in its amended form? More specifically, was the relevant test whether the fourth claimant was incapable of managing and administering his property and affairs by reason of a mental disorder under the terms of the Mental Health Act 1983 ("the 1983 Act"), or whether he lacked capacity within the meaning of the 2005

Act to conduct legal proceedings?

Subsequent overlapping disability

For the fourth claimant, it was submitted that so long as a claimant is continually under "disability", time does not begin to run, even if the second, overlapping disability is of a different nature to the first disability. For Woolf Seddon, it was argued that time began to run on the fourth claimant attaining his majority regardless of whether he can establish that he was under the second disability as at that date.

The Judge preferred the fourth claimant's submission and accepted that there was scope for a second overlapping disability:

> "*The thrust of section 28(1) is that so long as a person is under a disability, the limitation period should not start to run so that he is not potentially compelled to commence proceedings. Since that applies to a child until he reaches the age of 18, if on his eighteenth birthday he is still under a disability, albeit a different disability from that which applied when the cause of action accrued, it would be inconsistent with the statutory purpose for the running of the limitation period to commence nonetheless. As I have already mentioned, the rule that a second disability which starts only after the cessation of the first disability will not cause an extension or suspension of the limitation period is capable of harshness. For a cause of action which accrues to a child, the limitation period will run from his eighteenth birthday even if he is involved in an accident the next day that causes brain damage such that he thereafter lacks mental capacity. But I see no reason to interpret section 28(1) so as to increase its potential harshness by imposing the same result if he developed a mental illness before – and possibly long before – his eighteenth birthday. The fact that mental incapacity can be long-lasting and that therefore time may not run for a long time is inherent in the existing statutory scheme and not the result of this construction. I note that the Law Commission's recommendation that there should be a long-stop limitation period, but also that if a claimant develops lack of capacity after a limitation period has commenced then the running of time should be suspended, has so far not been adopted: Limitation of Actions (Law Com no. 270, 2001), paras 3.126-3.133…*"

Applicable law

As to the second issue, Roth J concluded that the appropriate law to apply was that applicable at the time of the accrual of the cause of action (1984). He therefore proceeded to consider whether the fourth claimant was by reason of mental disorder within the meaning of the Mental Health Act 1983 "*incapable of managing or administering his property and affairs*": s.38(3).

The evidence before the Court was that, by 1987, the fourth claimant was suffering from acute schizophrenia. However, the Judge noted that this was a progressive illness and could provide evidence as to his mental state at the relevant time (some 2 years earlier). There was, however, additional evidence from the claimant's GP dating to 1985. The Judge was satisfied on this basis that the claimant was suffering from a relevant mental disorder at the material time. However, in line with the decision in *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, [2003] 1 WLR 1511, the question of capacity is issue specific. The claimant was required to show that he would not have been able to understand, with an appropriate explanation, that he may have a claim against MY's solicitors related to a failure to get the band publishing royalties for Kouchie, and to decide whether to make such a claim. The evidence fell short of establishing this. Further and in any event, the evidence was insufficient to show that the fourth claimant had been under a continuous disability until 2004.

Notwithstanding his finding that the relevant law to be applied was that applicable in 1984, Roth J went on to consider the alternative scenario where the applicable law was that in 2010 (at the

date of issue) and by which time the Limitation Act 1980 had been amended to refer to the MCA 2005. Roth J noted that under the MCA 2005 capacity is issue specific and that, in accordance with the statutory guidance, it is expressly recognised that capacity may fluctuate and it is to be assessed at the relevant time. Accordingly, for the purposes of preventing the limitation period from running, the fourth claimant would still have to show that his lack of capacity had been continuous from the 1980s until 2004. Roth J that the claimant could not establish this so as to avoid the application of the Limitation Act. He further held:

> "*In my judgment, it is not adequate for the fourth claimant to say that his mental capacity is a matter for expert evidence which he would wish to call at trial. Where he seeks to rely on his incapacity to rebut an obvious limitation defence and the case comes before the court on a summary judgment application, particularly where that application was issued on 8 October 2010 and, for various reasons, came on for full argument over a year later, it is incumbent upon the fourth claimant to place before the court sufficient evidence to support his claim of mental incapacity. This is obviously not an issue that will be affected by disclosure from the defendants. I consider that it would be wholly wrong to permit the fourth claimant's claim to go to trial on all the substantive issues that are otherwise statute barred, on the speculative basis that he might by then be in a better position to establish his own mental incapacity that would overcome the limitation defence.*"

The application for summary judgment succeeded. The claimants were refused permission to amend the Particulars of Claim as against Woolf Seddon.

Comment

This decision effectively establishes that for the purposes of preventing a limitation period from running, claimants will have to establish both that they lacked capacity at the time at which the cause of action should have accrued and that they suffered a continuous lack of relevant capacity throughout the period in which they contend limitation should not run.

For those who have fluctuating capacity, such as the fourth claimant in this case, this is potentially an extremely difficult burden to meet. In this specific context, the decision illustrates the harshness of the rule that once limitation has started to run, it cannot be stopped and raises the question as to whether section 28 of the Limitation Act 1980 offers individuals with fluctuating capacity adequate protection.

It is also interesting that Roth J concluded that both the MCA 2005 and the Mental Health Act 1983 would have yielded the same result. In effect, his decision was that because the claimant had failed to satisfy the evidential burden under the MHA 1983, he could not meet the evidential burden under the MCA 2005.

Practitioners will note the Judge's finding as to when the fourth claimant should have produced the expert evidence (at the summary judgment hearing). Admittedly, on the facts, there was more than a year between the application for summary judgment and the hearing. However, in other cases, time frames could be considerably more compressed. claimants who intend to rely on a lack of capacity to defeat a limitation point may wish to ensure that they have expert evidence available prior to or shortly after the issue of proceedings.

Coombs v Dorset NHS PCT and another [2012] EWHC 521 (QB)

Mental Health Act

Summary

Although this case relates to the Mental Health Act 1983 ('MHA'), it merits a mention, albeit briefly because permission to appeal has been given. It was common ground between the parties that an 'ordinary' patient was entitled to free hospital care but could choose to arrange and pay for their own. The issue was whether

the fact that they were detained under the MHA deprived them of this 'right'. In deciding that such a patient was not prevented from paying for his own care and treatment, HHJ Platts held:

"63. … Decisions as to where he is treated would remain with the managers of the hospital; decisions about treatment with the responsible clinician. All he is choosing to do is provide the money to facilitate placement or treatment, which is deemed appropriate by the detaining authority, and I see no difficulty with that.
64. I do not categorise this as charging for the provision. The detaining authority would always have to be in the position to provide suitable and appropriate care and treatment without the patient contributing. If the patient however chooses to pay for that, or for any other option, and the detaining authority agree, then why should he not be able to?"

It did not make a difference whether the patient had the mental capacity to make such a decision or whether, as here, they had a deputy appointed under the Mental Capacity Act 2005 to do so.

Comment

Whether this preliminary issue was correctly decided will be determined on appeal. The implications certainly at first blush seem significant, with wealthier detained patients being afforded greater access to treatment options and placements. But aside from the central issues, it is interesting to note that the Judge recognised the distinction between having 'capacity' and having 'insight', before stating at para 54: "This lack of insight and vulnerability will undoubtedly make any decision as to whether or not to offer to fund treatment very difficult for a patient."

CQC report on DOLS

The second annual report from CQC on DOLS has been published. The report refers to recent 'high profile investigations into failures in health and social care' which 'reinforce the need for and value of a system to safeguard the rights of people who lack capacity and are deprived of their liberty'. The report also unsurprisingly finds that further training and guidance is required, and that the complexity of the DOLS system continues to cause problems.

Listing Deprivation of Liberty Safeguarding cases

We are grateful to both James Batey at the Court of Protection and Beverley Taylor at the Official Solicitor for (independently) bringing the following significant announcement from the President and Charles J to our attention:

> "*The President and the Judge in Charge of the Court of Protection have determined that it is no longer necessary for all cases where the issue of Deprivation of Liberty Safeguarding is raised to be heard by a High Court Judge.*
>
> *The judges at the issuing court based in the Thomas More building of the Royal Courts of Justice will consider whether the issues raised in the case appear to require the consideration of a High Court Judge and allocate the case to the appropriate level of judge accordingly. The question of allocation may be reconsidered if and when further information relevant to the issue arises.*
>
> *If the judges at Thomas More, or their colleagues in any court on reconsideration of the appropriate level of judge to hear the case, are unclear on whether the case should be heard by a High Court judge, they should seek guidance from the Family Division Liaison Judge for the circuit which will be hearing the case.*
>
> *This change regarding the listing of Deprivation of Liberty Safeguarding cases has immediate effect.*
>
> *Date 15th March 2012*."

COP Cases Online

Conscious that our newsletters have now covered a significant body of case-law since we started them nearly two years ago, and that they are not easily searchable, one of our number, Neil, has burnt the midnight oil so as to wrestle their contents into a web-based database (snappily entitled COP Cases Online) which will be launched during the course of the next month and will be available initially at www.39essex.com. The database will include the case summaries and comments from newsletters published to date (and will be updated monthly), and will be easily searchable and browsable. In the meantime, and as a taster, we are very pleased to be able to give you a complete version of our newsletters to date in one document, which Neil has laboured hard on to make easily navigable.

MCA training DVD

We have put the finishing touches to our MCA training DVD aimed at lawyers, social workers, best interests assessors, IMCAs and other practitioners, and the final product is being delivered imminently. Please email beth.williams@39essex.com to purchase a copy.

Our next update should be out at the start of May 2012, 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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