ThirtyNine
ESSEX STREET

ISSUE 3 NOVEMBER 2010

Thirty Nine Essex Street Court of Protection Newsletter: November 2010

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Editors

Introduction

Welcome to our update for November 2010. In addition to our regular case-law commentary, we have two further items of news:[1]

1. a COP neutral citation now seems slowly to be creeping in to replace the mishmash of Family and Admin designations and Bailii have a case page dedicated to COP cases: http://www.bailii.org/ew/cases/EWHC/COP/

2. the Law Commission has an open consultation on unfitness to plead (http://www.lawcom.gov.uk/docs/cp197_web.pdf), which contains an interesting summary of the jurisprudence on litigation capacity and suggestions for the assimilation of the MCA into a revised test for unfitness to plead.

All cases discussed below can be found on www.mentalhealthlaw.co.uk if not otherwise available. They are set out in chronological order.

FA v Mr A & Ors [2010] EWCA Civ 1128

Summary

This case (unusually a reported decision of an application for permission to appeal to the Court of Appeal) merits a brief mention because of the trenchant comments by Munby LJ (the first in his formal capacity as a Court of Appeal judge) as to the problems posed by multiple judges having conduct of cases. The case had a particularly difficult and complex procedural history (having originally started out under the inherent jurisdiction), prompting Munby LJ to comment at paragraphs 31-2 as follows:

"*31. It is a striking feature that, when Eleanor King J directed on 17 December 2009 that this litigation should be transferred from the Family Division to the Court of Protection, she -- and, if I may say so, entirely appropriately -- directed that the proceedings "shall be allocated to a High Court judge nominated to sit in the Court of Protection". That was a direction that the case should be allocated to an identified judge. The direction has simply been ignored and, I regret to say, ignored by the court. The litigation since SA became an adult (I do not refer to the earlier wardship proceedings) was first before Macur J; it was then before Roderic Wood J; it was then before Eleanor King J; it was then before Roderic Wood J again; and, most recently, before Parker J. Unsurprisingly, with that complete lack of judicial continuity, the litigation has been allowed to drift in the most deplorable fashion.*

32. It is now, or will at the end of this long vacation be, seven years since the Family Division accepted, in the context of care proceedings relating to children, that the

[1] For which we are indebted to Helen Clift at the Official Solicitor's Office. All such contributions are very gratefully received and acknowledged.

previous delays in the system required as at least part of their solution a process of judicial continuity and judicial case management. Unhappily, and not for want concerns expressed by judges, no similar system of either judicial continuity or judicial case management yet seems to have been applied to the significant number of cases in the adult jurisdiction, whether in the Family Division or in the Court of Protection, which are of the scale and complexity which, as in the present case, requires the use of a judge of the High Court. And the consequence -- and the present case, I regret to say, is a classic if shocking example of the phenomenon -- is that all the vices which we were familiar with before 2003 in relation to the child jurisdiction are still too frequently to be found in the adult jurisdiction. The problem is systemic; the problem is fundamentally one for the court to grapple with, although, that said, there are many cases (and I do not speak with the present case in mind) where a more active stance adopted by the parties might facilitate the process."

It was against the background of this concern that Munby LJ took the perhaps unusual step of (effectively) converting a permission application into a directions hearing addressing matters going forward before the Court of Protection.

Comment

The authors anticipate that many of the readers of this newsletter will be all too familiar with cases coming on for direction before a series of different judges, and with the consequent problems that this can throw up. Unfortunately, anecdotal evidence suggests that, at present, the systemic problem identified by Munby LJ is only worsening.

D v R (Deputy of S) and S [2010] EWHC 2405 (COP)

Summary

In this case, Henderson J had to decide whether a Mr S had capacity to decide whether Chancery proceedings started in his name and on his behalf by his daughter and deputy, R, should be discontinued or compromised. By the proceedings, R sought declarations that gifts of money made by Mr S to a Mrs D (previously a legal secretary employed by his solicitors) in 2006 and 2007 totalling over £500,000 were procured by undue influence and should be set aside.

The facts of the case were relatively complex, but for present purposes the following matters were of importance to the decision:

1. it was common ground that Mr S had testamentary capacity as at April 2008;

2. there was an unbridgeable division of opinion between the (very eminent) experts instructed on both sides.

Henderson J adopted the analysis of and approach to the MCA set down by Lewison J in *Re P (Statutory Will)* [2010] Ch 33, but added a useful gloss on the terms of s.1(4) as follows:

"*39… the fact that the decision is an unwise one does not, of itself, justify a conclusion of lack of capacity: see section 1(4). Just as a testator has always had the freedom (subject now to the constraints of the Inheritance (Provision for Family and Dependants) Act 1975) to make testamentary dispositions which are unreasonable, foolish or contrary to generally accepted standards of morality, so too a person in his lifetime has the freedom to act in a manner which is (for example) unwise, capricious, or designed to spite his relations. The pages of English fiction and of the law reports alike bear ample testimony to the exercise of this basic human right, even if it is not one enshrined in so many words in the European Convention on Human Rights (although Articles 8, 9 and 10 are, of course, all relevant in this context).*

40. The significance of section 1(4) must not, however, be exaggerated. The fact that a decision is unwise or foolish may not, without more, be treated as conclusive, but it remains in my judgment a relevant consideration for the court to take into account in considering whether the criteria of inability to make a decision for oneself in section 3(1) are satisfied. This will particularly be the case where there is a marked contrast between the unwise nature of the

impugned decision and the person's former attitude to the conduct of his affairs at a time when his capacity was not in question."

He then turned to the question of the decision in issue, commenting as follows:

43. At a superficial level, the nature of the decision may be simply stated. As I have already said more than once, it is whether to discontinue, or to continue to prosecute, the Chancery proceedings. But that decision cannot be taken, it seems to me, without at least a basic understanding of the nature of the claim, of the legal issues involved, and of the circumstances which have given rise to the claim. It would be an over-simplification to say that the claim is just a claim to set aside or reverse the gifts which Mr S made to Mrs D, because in the ordinary way a gift is irrevocable once it has been made and perfected by delivery or transfer of the relevant assets. If a gift is to be set aside or recovered, some vitiating factor such as fraud, misrepresentation or undue influence has to be established; and if the donor is to decide whether or not to pursue a claim, he needs to understand, at least in general terms, the nature of the vitiating factor upon which he may be able to rely, and to weigh up the arguments for and against pursuing the claim. Provided that the donor is equipped with this information, and provided that he understands it and takes it into account in reaching his decision, it will not matter if his decision is an imprudent one, or one which would fail to satisfy the "best interests" test in section 4. But if the donor is unable to assimilate, retain and evaluate the relevant information, he lacks the capacity to make the decision, however clearly he may articulate it.

44. The need for an understanding of the nature of the claim is particularly pronounced, in my view, where the claim is founded on a rebuttable presumption of undue influence, and where the relationship which arguably gave rise to the claim is still in existence. One would naturally not expect a lay person to have the same understanding as a lawyer of the principles expounded by the Court of Appeal in Allcard v Skinner (1887) 36 Ch D 145 and by the House of Lords in Royal Bank of Scotland Plc v Etridge (No.2) [2001] UKHL 44, [2002] 2 AC 773. But if a donor is to decide whether or not to pursue such a claim, he must in my view understand (at least in the simple terms envisaged by section 3(2)):

(a) the nature and extent of the relationship of trust and confidence arguably reposed by him in the donee;

(b) the extent to which it may be said that the gifts cannot readily be accounted for by the ordinary motives of ordinary people in such a relationship; and

(c) the nature of the evidential burden resting on the donee to rebut any presumption of undue influence (traditionally described as proof that the gifts were made only after full, free and informed thought about their nature and consequences: see Hammond v Osborn [2002] EWCA Civ 885, [2002] WTLR 1125, at paragraphs [26] to [27] per Sir Martin Nourse).

45.It is only with the benefit of this minimum level of information that a donor in the position of Mr S can begin to reach a decision whether or not to pursue the claim, or (just as important) whether to attempt to settle it, and (if so) on what terms. Furthermore, where (as in the present case) the relationship with the donee which gave rise to the potential claim is apparently still subsisting, the court will in my judgment need to scrutinise with particular care whether the donor can stand back from the impugned transactions with sufficient detachment truly to understand the nature of the claim. By way of contrast, the necessary degree of understanding is likely to be far easier to establish where the donor was under an influence at the time of the gift (e.g. by a religious sect or guru) which has subsequently come to an end."

Henderson J then conducted a detailed analysis of the evidence of the various experts. These included a Court appointed visitor, the terms of whose appointment are of some note:

76. At a directions hearing on 20 October 2009 I ordered that a report should be prepared by a Special Visitor of the Court of Protection under section 49 of the 2005 Act, on the issues whether Mr S had capacity to decide whether

the Chancery proceedings should be continued and whether he had capacity to enter into a compromise of the claim (and, if so, on what terms). Among my concerns in making this order were, first, that Mr S should be examined by an expert who was independent of the parties, and, secondly, that when the examination took place Mr S should be free from immediate influence by either Mrs D or R. The order therefore contained provisions that for 14 clear days before the examination took place Mrs D should not contact Mr S in any form or manner, and that during the same period R should not speak to him about the Chancery proceedings or any of the issues relating to them.

Having conducted his analysis, he came to the clear conclusion that Mr S lacked the relevant capacity because he was unable to understand the information relevant to the decision, unable to retain it, and unable to use or weigh it as part of the process of making the decision. In the circumstances, and to his evident unhappiness (given the very clearly expressed wishes of Mr S that the proceedings not continue), he found himself compelled to a conclusion that R was entitled to continue to prosecute them.

Comment

This decision is, on one view, slightly odd, because it does not seem that any consideration was given by Henderson J as to whether continuing the proceedings was, in fact, in Mr S's best interests given his very clearly stated wishes that they not continue and that his gifts to Mrs D stand untroubled. It may well be that, because the nature of the claim was such that the presumption of undue influence had been raised, Henderson J considered that it was in Mr S's best interests for the proceedings to continue notwithstanding his views, but one would perhaps have expected an express statement of this in the judgment.

Henderson J's comments in respect of s.1(4) are of considerable interest, because there has been little judicial commentary on this section. It is, however, somewhat difficult to avoid the conclusion that the weight that can be placed upon the apparent lack of wisdom of the decision must be very little if the terms of s.1(4) are to be respected.

The decision is of note for one further reason, namely as a case study in the need for experts properly to be instructed. It is clear from the judgment that Mrs D's expert had been instructed in a very much less than satisfactory fashion, something which troubled the judge considerably (and was material in leading him to prefer the evidence of both R's expert and that of the Court of Protection Visitor). The paragraphs from his judgment in which he sets out his concerns are worth repeating in full as they identify a series of ultimately costly errors:

"*146. Before I leave the question of Mr S's understanding of the relevant information, I need to say a little more about Professor Howard's reports. In his second report, he addressed the question whether the Chancery proceedings should have been issued. As a preliminary comment, it should be noted that this is not quite the same as the question whether they should now be continued, although rather surprisingly Professor Howard seemed unable to appreciate the distinction between the two questions when it was put to him in cross-examination. In that report, he expressed the opinion that, although Mr S's memory was extremely poor, if prompted "he quickly recognises the facts and issues involved". Professor Howard went on to say that, with prompting, Mr S could recall the gifts and his reasons for making them, the fact that R was trying to recover the money, and the existence of the Chancery proceedings. However, it emerged from Mr Marshall's skilful cross-examination that this opinion was based on only a superficial acquaintance with the case on the part of Professor Howard, which he readily acknowledged. I have already referred to the relevant passages in his cross-examination, and I will not repeat them. It is, in my judgment, a fair criticism to say that Professor Howard should not have expressed a clear opinion in these terms without also making clear the limited nature of his own understanding of the facts and issues, and the precise steps which he had taken to remind or inform Mr S about them. A related, and equally valid, criticism is that he failed to comply with the mandatory requirement in the Practice Direction to Part 15 of the Court*

of Protection Rules 2005 to include in his report "a statement setting out the substance of all facts and instructions given to [him] which are material to the opinions expressed in the report or upon which those opinions are based". An acceptable alternative, as the Practice Direction makes clear, would have been to annex his instructions in so far as they were in writing. None of these elementary steps was taken, and the result (unintended I am sure, but nevertheless potentially very worrying) is that the report rests on a much flimsier foundation than a reading of it would naturally suggest. The rules are there for a good reason, and if they are not complied with a report, even from the most eminent of experts, is likely to lack the transparency and objectivity which the court rightly insists upon in expert evidence. I do not wish to be too critical, because the report appears to have been produced under some time pressure (although I must say it is not clear to me what the urgency was), and because Professor Howard and Hunters may have thought of it essentially as a supplement to the first report which he had produced in April 2008. Nevertheless, I have to say that there is substance in at least some of the severe criticisms of this report which Mr Marshall advanced in his closing submissions.

147.I am afraid that Professor Howard's third and fourth reports are also open to some criticisms of a similar nature. I have already referred to the unsatisfactory way in which they were produced, apparently on the basis of oral instructions given at conferences with counsel, and without prior authority from the court. As before, there is only a most perfunctory statement of the nature of those instructions in the body of the reports, and no proper statement of the materials upon which they were based. The overall result of these deficiencies is that I have had to treat Professor Howard's evidence with considerably more reserve than would normally be the case."

Re MB [2010] EWHC 2508 (COP)

Summary

Extensive guidance concerning implementation of DOLS has been given by Charles J in the case of Re MB [2010] EWHC 2508 (COP).

The facts of the case are interesting because they illustrate the problems faced by local authorities when a best interests assessor concludes that a deprivation of liberty is not in P's best interests, but where there appears to be no suitable alternative to P's placement, at least in the short term.

Mrs B had been admitted to a care home following concerns about physical assaults by her husband. An urgent authorisation was granted and then a standard authorisation lasting for one month. Prior to the expiry of the standard authorisation, a further standard authorisation was sought, but the best interests assessor concluded that the best interests requirement was no longer met. This was because Mrs B had displayed emotional and physical signs of distress at having been removed from her home. The local authority sought advice as to what they should do, and following some confusion due to difficulty in contacting the Court of Protection urgently, they issued a second urgent authorisation. Charles J found that this was not lawful. Once an urgent authorisation has been given, detention can only lawfully be extended by a standard authorisation or by court order.

Charles J went on to give useful guidance about the duties of managing and supervisory authorities. Where a problem arose such as had occurred with Mrs B, the best interests assessor should carefully consider whether even if the continued deprivation of liberty is not ideal, there are viable alternatives for P's short term residence. If not, it may be appropriate to continue a standard authorisation for a short period while changes to the arrangements are made, or in order to seek the court's assistance. Where the issue is that a further authorisation cannot be given under DOLS then it will not be correct to issue an application under s.21A MCA (challenge to an authorisation) as the relief that can be granted by the court will not be adequate. 'Standard' COP proceedings will be required. If necessary, pending application to the court, it may be possible to rely on s.4B MCA (defence

to a deprivation of liberty where it is necessary to perform a vital act or give life-sustaining treatment) but only if a decision is made with express reference to s.4 and recorded with full reasons in writing.

The court granted a declaration that Mrs B had been unlawfully deprived of her liberty from the expiry of the standard authorisation until the court declared the deprivation of liberty lawful at a subsequent hearing. This declaration was granted notwithstanding the fact that there was no criticism of the local authority or the best interests assessor, although the judge did say that he thought it was right that the Official Solicitor had not also sought damages for the breach of Article 5. It was also granted even though it appears that the judge considered the deprivation of liberty had been in Mrs B's best interests, as there was no suitable alternative accommodation that it would have been appropriate for her to move to at short notice that would have been a better option. While DOLS requires a deprivation to be in P's best interests to be lawful, the converse is not true: a deprivation of liberty which is in P's best interests is not thereby lawful, if there is no lawful authorisation or court order in place.

Comment

The judgment is essential reading for all best interests assessors and those involved in administering DOLS, and includes other pieces of advice, such as recording the time that authorisations start and end, in order that there is no risk of a gap or any confusion about the position.

G v E [2010] EWHC 2512(COP) (Fam)

There have been two recent judgments concerning the appointment of welfare deputies which expressed different views as to their appropriateness (*Re P* [2010] EWHC 1592 (Fam) and *Havering LBC v LD and KD* (unreported, 25 June 2010)) (both covered in previous updates).

The issue has been considered again by Baker J in the ongoing case of *G v E*. The judge agreed with the decision in *LBC v LD and KD* and found that the scheme of the MCA 2005 was such that decisions should ordinarily be taken by those looking after and responsible for incapacitated adults, with particularly grave decisions or issues which are the subject of dispute being resolved by the courts. The appointment of a deputy, which entailed giving one person a protected position regarding decision-making, was not appropriate except in limited circumstances, notably those identified in the MCA Code of Practice. These include cases where P is at risk of harm from family members or there is a long history of disputes, or where P has substantial financial assets which require regular management.

On the facts of the case, Baker J refused to appoint E's carers as either welfare deputy or property and financial affairs deputy. Routine decisions about E's care and treatment would be taken by his carer. If disagreement on significant issues arose, such as who should care for E in the event F was no longer able to, decisions would have to be taken collaboratively, or with the court's assistance if necessary:

On the facts of this case, Baker J found the application for the appointment of F and G as personal welfare deputies to be misconceived. The routine decisions concerning E's day-to-day care, including decisions about holidays and respite care could be taken by F as his carer. Decisions about his education should be taken collaboratively by F, G, his teacher, and other relevant professionals. Decisions about possible medical treatment should be taken by his treating clinicians, who will doubtless consult both F and G and others as appropriate. He found that, were there to be any disagreement about any of these matters, an application could be made to the Court of Protection. Decisions about who should look after E in the event that F is no longer able to do so should equally be considered (when the need arises) in a collaborative way and only referred to the court for endorsement if required or if there is any disagreement. Baker J concluded that that issue was for the very long term and it would be wholly inappropriate to appoint a deputy or deputies now to make that decision.

Comment

The upshot of this decision, and that in LBC v LD and KD is that the appointment of welfare deputies is likely to be very rare, and local authorities or family members who wish to seek such an appointment will have to consider their positions very carefully.

It is important, in the view of the authors, that one of the central reasons a welfare deputy was not required in *G v E* was that the judge considered that E's carers could make routine decisions about such matters as holidays and respite care. Often the motivation for an application to be welfare deputy, whether by a local authority or a family member, is the belief that the other is obstructive or is likely to make the wrong decision. It is only when the court clarifies the identity of the 'lead' decision maker, as Baker J did in this case, that such concerns can be dealt with. It seems to the authors that it can be drawn from the judgment of Baker J that where P is not at risk of harm from his family members, the assumption is that his family will take the lead in routine decision-making, albeit collaboratively with relevant professionals. Where there is a risk of harm because of the decisions made by P's carers or family, it may be that the local authority has to take the lead to protect P. In this case, the court's approval of particular decisions will be required and is likely to be preferred to the granting of a welfare deputyship.

The case also dealt with G's application to be made litigation friend for E in place of the Official Solicitor. The application was refused, since G's criticisms of the OS's conduct were without merit, G herself was not sufficiently objective, and the Official Solicitor was not litigation friend of last resort. It remains to be seen whether the Official Solicitor will agree with the last of those reasons.

A v DL, RL and ML [2010] EWHC 2675 (Fam)

Summary

The President has very recently given interesting and useful guidance for local authorities as to what steps might be appropriate where safeguarding concerns exist in relation to adults who have capacity but are thought to be subject to undue influence.

The case concerned an elderly couple who the local authority considered to be at risk of physical, emotional and financial abuse from their son, who lived with them. The local authority took the view that the couple did not lack capacity. The local authority had therefore rejected making an application under the MCA. It had also considered and rejected the possibility of an ASBO, or an order under s.153A of the Housing Act 1996. That left two possibilities for obtaining the court's assistance to protect the parents: an order under the inherent jurisdiction, or an order under s.222 Local Government Act 1972. The President concluded that an order was warranted and could be made under either.

The court's inherent jurisdiction was defined broadly in *Re SA (Vulnerable Adult with capacity: Marriage)* [2005] EWHC 2942) Fam [2006] 1 FLR 867 as extending to individuals with capacity who are prevented from making free choices due to undue influence, coercion or for some other reason. In the authors' experience, the Official Solicitor and the courts have not been keen to invoke the inherent jurisdiction in cases outside those of arranged marriage (as in SA). The President, however, was satisfied that on the evidence provided by the local authority, it was appropriate to make an order requiring the Official Solicitor to carry out an investigation to inform the court about the situation and whether the protective orders sought by the local authority were for the benefit of the parents, a procedure first created in *Harbin v Masterman* [1896] 1 Ch. 351. An order was also made at the without notice hearing preventing the son from acting unlawfully. No details of the order were given, but no doubt they related to his matters of concern identified by the local authority including attempting to transfer ownership of the house to the son, persuading his mother to enter a care home, and preventing carers from visiting.

Comment

The President noted that the case was 'highly

unusual', which in the view of the authors, a surprising comment. There are many safeguarding cases involving adults with capacity in which local authorities wish they had the power to take further steps to protect people, and confirmation that the decision in *SA* and the LGA 1972 can be relied on may well lead to further applications of this sought in the near future. The as yet unanswered interesting (and difficult) question is the extent and nature of the relief the court will grant in relation to a capacitated adult under the inherent jurisdiction once full details of the case are known and the son has been given the opportunity to present his case. It is suggested by the authors that the court is likely to tread very carefully in making orders that go beyond assisting the vulnerable adults to assert their capacity.

AVS v NHS Trust [2010] EWHC 2746 (COP)

Summary

This case very recently decided by the President is interesting as an example of the court's approach to limiting expert and lay evidence, and to the removal of a family member as a litigation friend.

The case concerned a dispute as to whether AVS, a patient with vCJD, should have a particular type of treatment re-started. The court held that AVS's brother, CS, who was a solicitor, had not demonstrated the necessary objectivity to act as a litigation friend in circumstances where CS's relationship with the NHS Trust had completely broken down.

As matters stood before the President, there was no medical evidence to support the particular course of action proposed by CS on his brother's behalf. All the medical evidence (advanced by the Trust) was the other way. There was a suggestion that a Dr P (from another NHS Trust) would come forward to take over AVS's case and would continue with the procedure advocated by CS: in which case, it would be likely that the proceedings would terminate. Catering for the possibility that the proceedings would continue, however, the President provided as follows:

"*22. In these circumstances, I must give directions on the basis that the case remains in court and that the lis potentially identified by Dr P remains. At the same time, it seems to me that both the court and the trust are entitled to know what Dr P's opinion is. I therefore came to the view that the proper course was to direct that the current proceedings should stand dismissed at the expiration of 14 days from the date on which this judgment is handed down unless within on that time CS files a report from Dr P in answer to the reports by Dr DH, Professor K and Dr. MR identifying a proper issue for the court's determination.*

23. I take this robust view of the case for one quite simple reason. On 14 October 2010 it was argued on CS's behalf that clinical opinion was not necessarily determinative of a "best interests" enquiry by the court. As a broad generalisation, I do not disagree with that proposition, and I certainly accept that the court's "best interests" analysis embraces all the circumstances of the case, of which clinical opinion is but one part.

24. At the same time, it strikes me as unlikely in the extreme that the court would order a clinician to undertake a medical intervention which he, the clinician, did not believe to be in the best interests of the patient. Absent a clinical opinion that the continued administration of PPS would be in the best interests of the patient, therefore, it seems to me that the current proceedings would be doomed to failure. In my judgment, therefore, these proceedings should stand dismissed unless Dr P provides a report properly identifying the lis upon which the court is being asked to adjudicate."

The President then set down a series of directions relating to disclosure and witnesses in the event that the proceedings were to continue. He made it clear that he had in mind in respect of both that he was "*dealing with matters of life and death, and that strong emotions have been aroused. I have a duty under ECHR Article 6 to legislate for a fair hearing, and in particular, whatever I decide, I do not want the unsuccessful party to leave the court feeling that he or it has not had a fair hearing. In addition, I must remember that I am dealing in large*

measure with professionals, who lead busy lives and have many calls on their time" (paragraph 29). In the circumstances, the President limited the medical evidence to 3 witnesses for each side.

Comment

The case provides a clear indication of the pragmatic and robust stance that the current President is taking towards those medical cases coming before him, not least by virtue of an unless order being made in respect of the filing of further medical opinion by CS. The only quibble that the authors would have with the approach taken in this case is that they find it impossible to imagine any circumstance under which the Court would order a clinician to carry out a procedure against his professional judgment as to the best interests of the patient, as this would be to go so directly against the professional codes applying to clinicians.

YA(F) v A Local Authority & Ors [2010] EWHC 2770 (Fam)

Summary

The question of whether the Court of Protection has jurisdiction to award damages for breaches of the ECHR rights of P (or a family member of P) has been considered in depth by Charles J in this important decision. It arose upon an application by two public authorities (ultimately supported by the Official Solicitor) for claims under the Human Rights Act 1998 ('HRA') brought by the mother of P and P himself to be struck out for want of jurisdiction.

Whilst the judgment itself is likely to the subject of considerable commentary in the weeks and months ahead, at this stage, we highlight the key paragraphs in the decision, namely:

"*17. I start with the common ground that the Court of Protection has jurisdiction to deal with the son's claim based on Convention rights, and that, in reliance on his Convention rights, the son can seek relief by way of a declaration in these proceedings. The route to that conclusion is found in sections 7(1)(b) and 8(1) of the Human Rights Act and section 15(1)(c) of the Mental Capacity Act. These sections identify what has become a well trodden path that is, for example, identified and explained by Munby J (as he then was) in Re L (Care Proceedings) Human Rights Claims [2003] 2 FLR 160. That path also reflects a number of commentaries and comments relating to the impact of the Human Rights Act, to the effect that individuals and others will be able to rely on, and seek relief in respect of, Convention rights in proceedings which are not confined to a claim to enforce or deal with Convention rights*.

18. I agree with that common ground. Should it be necessary to do so, the point that the Court of Protection has jurisdiction to deal with arguments and claims based on Convention rights is to my mind confirmed by paragraph 43 of Schedule 6 to the Mental Capacity Act because it makes express provision relating to declarations of incompatibility and reflects section 4 of the Human Rights Act.

19. It follows that the Court of Protection has jurisdiction (a) to deal with arguments raised on behalf of the son (and so, in general Court of Protection terms, P), which rely on breaches of Convention rights of which he (P) is a victim, and (b) to grant declaratory relief in respect of them.

20. But it is argued that that jurisdiction does not apply to the mother's claims because it is said that the jurisdiction and powers of the Court of Protection (a) do not enable it to grant her any remedy under section 8(1) of the Human Rights Act, and (b) do not enable the court to deal with, or the mother to rely on, her Convention rights as the victim of any breach thereof.

21. The core of this argument is that the purposes of the Mental Capacity Act are confined to, and directed to, considering only the best interests of somebody who is found to lack capacity, (i.e. P, in this case the son), and to make decisions, orders and declarations applying statutory tests in respect of either matters relating to P's welfare, (i.e. where he should live, medical treatment etcetera) or, and an important or, in respect of his property or affairs. So it is said that as the mother's claims do not relate to such matters they should be struck out. And I pause to confirm that no

incompatibility argument is properly before me in these proceedings.

22. The focus of this argument is on s. 15(1)(c) of the Mental Capacity Act which is set out above and provides that:

> *The court may make declarations as to the lawfulness or otherwise of any act done, or yet to be done, in relation to that person (i.e. the person who lacks capacity, P and thus here the son).*

It is argued that the declaratory relief sought by the mother (in contrast to that sought by the son), is not a declaration as to the lawfulness or otherwise of any act done or yet to be done in relation to "that person" namely the son (P). Rather, it is said that she complains of an act done to her or advances her claims as the victim of breaches of Convention rights.

23. The argument goes that s. 15(1)(c), in the context of the Act, should be interpreted as confining the act or acts done effectively, as I understand it, to ones of which P is the victim and therefore the court is only concerned with (and can only be concerned with) P as a victim. As a matter of ordinary English, it does not seem to me that the language needs to be or is so confined. I ask myself whether in this case the mother is seeking a declaration as to the lawfulness or otherwise of any act done in relation to her son. The answer to my mind is plainly yes, she is. The relevant acts were directed to the son. He was the person who was in hospital. He was the person who was placed elsewhere in circumstances that are complained of. I do not dispute the point made on behalf of the Defendants by reference to the relevant primary purpose, namely the creation of a new statutory court which is given jurisdiction to consider and deal with issues concerning the best interests of P. But, in taking both a literal and a purposive approach to legislation, secondary purposes can also be taken into account.

24. Standing back from the Mental Capacity Act, it seems to me that Parliament must have been well aware that people without capacity for whom decisions have to be made by the Court of Protection, if they cannot be made elsewhere, do not live in isolation. They often have families who are directly involved in decision making concerning, them and in their day to day care. There is no doubt that the mother is a necessary party to the best interests decisions that are made in respect of, and on behalf of, her son. Article 8 rights relate to and introduce a consideration of the impact of events on and between the members of a family and their relationships (see for example in the context of immigration Beuko Betts v SSHD [2008] UKHL 39, and cases in the Family courts often raise points in the context of Article 8 that relate to the interplay between the relevant rights and interests of the members of a family). Can it therefore be said that Parliament was intending that if a set of events occurs that impact the Article 8 rights of the members of the family of a person who lacks capacity, and those events are properly described as being an act or acts done in relation to the person who lacks capacity (P), the Court of Protection should not have jurisdiction to make declarations as to the lawfulness of such acts by reference to the Convention rights of, and on the application of, those members of the family? To my mind the answer to that question "No", and that consideration of this question indicates that an ability (and thus a jurisdiction) to deal with such issues is within a secondary purpose of the legislation.

25. I have reached that conclusion within the four walls of the Mental Capacity Act. But, in my view, it is fortified by section 3 of the Human Rights Act and by (a) the underlying purposes and impact of the Human Rights Act, as expressed in Re L (Care Proceedings) Human Rights Claims [2003] 2 FLR 160, in textbooks, and in statements by those who introduced the legislation, and (b) the point that I have already made that it seems to me that the intention of Parliament, in enacting section 7(1)(b) of the Human Rights Act, was to enable any proper party to proceedings before a court to raise for consideration by that court claims based on Convention rights. A similar approach can be found in the ability of parties to raise public law points in private law proceedings.

26. Other points were raised in the course of

argument which it seems to me on analysis take the matter little further....

30. That analysis and reasoning leads me to the conclusion as a matter of construction and application of the Mental Capacity Act, the Court of Protection has jurisdiction (a) to hear argument on behalf of the mother that acts done "in relation to that person (i.e. the son)" constitute breaches of her Convention rights, and (b) to make declarations as to the lawfulness of those acts on her application and in respect of breaches of her Convention rights as a result of such acts (i.e. acts done in relation to the son).

...

32. My analysis has now reached the stage that the Court of Protection has jurisdiction to deal with the claims of both the mother and the son in the sense of considering points they advance under section 7(1)(b) of the Human Rights Act and granting a remedy by way of a declaration. Can this court also grant damages under the Human Rights Act? The crucial sections here are sections 8(1) and (2) of the Human Rights Act. Section 8(1) limits the remedies and relief that can be granted to those within the powers of the relevant court. Section 8(2) also focuses on the relevant court and provides that damages may be awarded only by a court which itself (I stress itself) has power to award damages, or to order the payment of compensation in civil proceedings.

...

37. So one has to turn to the provisions relating to the relief that the Court of Protection can grant to determine whether or not it has the power to award damages and, so, whether or not the provisions of section 8(2) of the Human Rights Act are satisfied. The Court of Protection is a court created by statute and therefore its powers are limited by the statute. A feature, it seems to me, of section 8(2) of the Human Rights Act is that it is looking at the general powers of the relevant English court and, in the context of the Human Rights Act, it would be circular to argue that as a court has power under the Human Rights Act to award damages section 8(2) is satisfied.

38. Section 8(2) directs one to consider, for example, whether the High Court or a County Court, has a power to award damages. The powers of those courts flow from provisions of now the Senior Courts Act, the County Courts Act and, in the case of the High Court, the assimilation of earlier jurisdiction and indeed an inherent jurisdiction. In broad terms, it seems to me, that the jurisdiction and power to award damages in those courts derives from the subject matter of cases that the court has jurisdiction to deal with. Examples are contract, tort, trespass and there are many others, all of which are civil claims. So, in my view, when applying section 8(2) one is looking at the general ability of the court to award damages excluding the power to so conferred by the Human Rights Act itself.

39. I turn to the crucial section in the Mental Capacity Act; it is section 47(1). I have mentioned it earlier, it provides that:

> *The court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court.*

It is argued on behalf of the Defendants, and this was at the forefront of the argument put before me on behalf of the Official Solicitor on behalf of the son (P), that section 47(1) is an ancillary provision and/or a provision that facilitates the exercise of the jurisdiction of the Court of Protection.

40. It was then said that a power to award damages is not ancillary to the making of a declaration or facilitative of the making of a declaration. I would not quarrel with that, but first it seems to me that "the making of a declaration" is not an accurate description of the jurisdiction of the Court of Protection. The Court of Protection's relevant jurisdiction in this case is jurisdiction under the Human Rights Act. It seems do me that the natural reading of section 47(1) in that context is that in exercising its jurisdiction (under the Human Rights Act or indeed the Mental Capacity Act) the Court of

Protection has the same powers, rights, privileges and authority as the High Court would have when it is exercising its jurisdiction (under the Human Rights Act and generally) and, therefore, the Court of Protection has an ability to award damages under the Human Rights Act because the High Court can do so under s. 8(2) thereof because of its jurisdiction to award damages in civil claims.

41.In my view, that argument does not have the circularity of an argument that section 8(2) is satisfied because a court has jurisdiction under the Human Rights Act and thus the power under that Act to award damages. This is because the argument looks outside the Human Rights Act and asks the "what if" question set by s. 47 of the Mental Capacity Act namely what could the High Court do if it was exercising the jurisdiction conferred on the Court of Protection by the Mental Capacity Act and the Human Rights Act.

42. But if that argument is wrong, in my view, an alternative route to the same answer is to consider whether the Court of Protection, by section 47, is given a power to award damages in respect of something other than a breach of a Convention right. In my view it does. For example, to my mind, in reliance upon section 47, the Court of Protection could award damages pursuant to an undertaking in damages given to it when an injunction was granted. Also, by reason of section 50 of the Senior Courts Act, it would have a power which, probably, would never be exercised in the welfare jurisdiction, and which might only be exercised rarely in the property jurisdiction, to award damages in lieu of an injunction. That is one of the specific powers of the High Court that listed in the relevant provisions in the Senior Courts Act.

43. So this alternative analysis and reasoning for the result that section 8(2) of the Human Rights Act is satisfied looks to, and relies on, powers of the Court of Protection (in connection with its jurisdiction and by reference to the powers of the High Court) to award damages other than under the Human Rights Act.

...

45. It therefore seems to me, and I conclude, that both linguistically and purposively, albeit possibly against the instinct of a number of lawyers dealing with a welfare jurisdiction, the Court of Protection does have jurisdiction and thus power to award damages under the Human Rights Act."

Charles J therefore dismissed the application to strike out the HRA claims, although he directed that when the matter came back before him, he would treat both the claim of the mother and of the son as being proceedings in the Queen's Bench Division on the basis that, were the decision on jurisdiction to be successfully appealed, or in future in another case his conclusion was found to be wrong, any award made in the proceedings before him would have jurisdictional base.

Charles J then ordered the two public authorities to pay one half of the costs of the Claimant mother incurred and occasioned by the application to strike out the mother's Human Rights Act claim. The other half should be reserved; this recognises that the arguments raised jurisdictional issues. In coming to this decision, he was (un)impressed by the fact that the public authorities had taken a stance that this claim should be struck out on a preliminary basis without any apparent consideration whatsoever of what would then happen and how the relevant issues would be case managed if the applications succeeded.

Comment

This decision is of very considerable importance, because it had not been clear whether the jurisdiction of the Court of Protection extended as far as the grant of damages for breaches of the ECHR. It is clear that one of the primary reasons that Charles J expressed himself 'relieved' to have come to this decision (and, potentially, one of the reasons why he sought to reach the decision in the first place) was that the immediate consequence of a decision to the contrary would be that proceedings would then have to take place in the Queen's Bench Division in parallel with those in the Court of Protection, which would have the consequence of escalating costs. However, since the issue is

likely to be the subject of further judicial consideration, it may be that damages claims should continue to be issued in the Queen's Bench Division for the time being, as a protective measure.

Charles J expressed himself confident that the Court of Protection will be robust in its use of the grant or refusal of permission to ensure that the recourse to the damages jurisdiction of the Court does not lead either to the eyes of the parties and the Court being taken off the "welfare ball," or for family members to use welfare proceedings as a stick to beat public authorities with. It is very likely, however, that the stick is one that family members (and especially litigant in person family members) will seek to wave enthusiastically in light of this decision.

Our next update should be out in December 2010, 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.

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