ThirtyNine
ESSEX STREET

ISSUE 30 FEBRUARY 2013

Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: February 2013

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Introduction

Welcome to the February 2013 newsletter. We cover in this issue an important decision which may help unlock the current difficulties with the Official Solicitor's ability to accept invitations to act as P's litigation friend, an equally important decision of Senior Judge Lush upon the duties imposed upon attorneys in the management of the donor's monies (with guest commentary by Caroline Bielanska), as well as a significant decision of the Court of Appeal upon disclosure of social work records, and of the ECtHR on capacity assessment and (in case you were feeling bereft) deprivation of liberty.

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

As a final bonus, and in response to positive feedback from the last time we did so, we include with this issue a compendium of all our previous case comments.

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

WCC v AB and SB (unreported, 26 October 2012)

Practice and procedure – other

Summary

This decision of HHJ Cardinal is of some importance as providing a judicial imprimatur of a potential way out of (at least some) of the difficulties in which parties find themselves now as a result of the well-known strains upon the Official Solicitor's office at the moment.

A relatively standard application was brought for declarations/decisions in respect of the capacity and welfare of a young man. At an interim hearing, HHJ Cardinal had to decide whether the young man's aunt could be appointed as his litigation friend in the circumstances where the Official Solicitor had twice been asked to consider representation of AB following initial orders made by the Court but without response. Upon inquiry by the Court on the day of the hearing, the relevant caseworker at Official Solicitor office indicated that she would not be able to consider appointment of the Official Solicitor until CB's application to be appointed as her nephew's litigation friend had been disposed of, thereby meaning that it would take another ten weeks from the date of the interim hearing before the Official Solicitor could act as his litigation friend. The local authority expressed

concerns as to the appointment of the aunt, in particular that she would not be independent or objective.

HHJ Cardinal took a clear view that AB needed representation immediately, and that he needed also to move to order reports from an independent consultant psychiatrist and independent social worker. He therefore examined CB's application to be appointed AB's litigation friend to see whether there were any factors which disqualified her. He did so in a robust fashion, and concluded that he would – in essence – give her the benefit of the doubt that she could fairly and competently conduct proceedings on behalf of her nephew, albeit that he would keep a watching brief on matters and would – if he started to have doubts about her role – very quickly entertain an application from the local authority to remove her.

In reaching his conclusion, and in light of the fact that the Official Solicitor was not in a position to act as litigation friend save as a last resort (and, even then, only after a delay of many weeks), HHJ Cardinal noted that the commentary to Rule 140 of the Court of Protection Rules in Jordan's Court of Protection Practice 2012 was "perhaps a little excessive" in stating that a relative or concerned person would be likely to have a conflict of interest in acting as P's litigation friend.

Comment

The demands upon the Official Solicitor at present are well known (his note upon acceptance of instructions is to be found here). Mostyn J in *AB v LCC (A Local Authority*) [2011] EWHC 3151 (COP) gave guidance as to the circumstances under which an RPR can act as a litigation friend; we have also found that IMCAs are being appointed. The judgment of HHJ Cardinal serves as an endorsement of the appointment of a suitable family member even where, prima facie, such an appointment would be likely to bring them into conflict with other family members concerned as to P's welfare. The robust approach adopted HHJ Cardinal in this case is to be welcomed, and we would hope that it is to be followed elsewhere as a way of seeking to ensure that the system is kept moving in a way which allows for suitably speedy determination of applications.

Re Buckley (unreported, 22 January 2013)

Lasting Powers of Attorney - revocation

Summary

This important decision concerns the duties of attorneys as regards the management of P's monies. It arose upon an application by the Public Guardian to revoke an LPA and direct him to cancel its registration in light of his concerns as to the conduct of the sole attorney, the niece of P. His investigations had revealed that (inter alia) a very substantial sum (nearly £90,000) of P's monies had been put by the niece into a reptile breeding venture and she had taken nearly £45,000 of P's capital for her own personal benefit.

The niece did not oppose the application; she did not attend the hearing. The application was granted, and in so doing SJ Lush took the opportunity in the judgment to set out the responsibilities of attorney acting under a LPA when investing the donor's funds. At the outset, he noted (at paragraph 20) that there were "*two common misconceptions when it comes to investments. The first is that attorneys acting under an LPA can do whatever they like with the donors' funds. And the second is that attorneys can do whatever the donors could - or would - have done personally, if they had the capacity to manage their property and financial affairs*."

Neither of these propositions are correct, however, both because of the fiduciary relationship between attorney and donor and because of the obligation of the attorney to act in the best interests of donor upon the donor's incapacity.

Senior Judge Lush noted that, before the MCA 2005 came into force on 1 October 2007, both the Court of Protection and the antecedents of the Office of the Public Guardian were actively involved in the investment of patients' funds. There was a discrete Investments Branch, which issued in-house guidance for staff, *Investing for Patients*. That guidance included a range of

investment codes suitable for both short-term and long-term investments.

Senior Judge Lush took the opportunity in this judgment in essence to update that guidance to reflect current circumstances, limiting himself solely to short-term investment codes (P in this case being aged 81 ½ and short-term investment codes being generally more appropriate where an individual has a life expectancy of five years or less).

In particular, he noted (paragraph 36) that "[g]enerally speaking, attorneys acting under an LPA should ensure that any investment products or services they acquire on a donor's behalf are provided by individuals or firms who are regulated by the Financial Services Authority. One of the advantages of this course of action is that the donor's investments will be covered by the Financial Services Compensation Scheme ('FSCS'), in which eligible deposits are protected up to a maximum of £85,000."

Senior Judge Lush then set out his proposal for a rewritten version of the short-term investment codes recommended in *Investing for Patients* (technical reasons prevent its reproduction here).

He continued:

> "*38. Investing for Patients suggested a few other factors that may need to be considered, such as:*
>
> *(a) whether any major items of expenditure are anticipated or should be planned for;*
>
> *(b) whether any gifts or payments to dependants are likely to be made. This will usually involve an application to the Court of Protection for authorisation to make gifts in excess of the limits imposed by section 12 of the Mental Capacity Act in order to reduce the impact of Inheritance Tax;*
>
> *(c) the type of return required. For example, whether a high income is needed from the investments, or whether the capital can be left to grow, or whether a mixture of the two would be more appropriate;*
>
> *(d) risk: whether absolute safety is required for the investment or whether some risk is acceptable in exchange for the possibility of getting a better return; and*
>
> *(e) whether there is an existing portfolio and, if so, the tax and cost considerations that may affect decisions about whether to change it and how quickly.*
>
> *39. The guidance also considered the interests of beneficiaries under the patient's will or intestacy, which included asking the following questions:*
>
> *(a) whether it is likely that the investments will be sold when the patient dies, or whether the beneficiaries of the patient's estate are likely to want the investments as they then stand; and*
>
> *(b) whether there are any provisions in the patient's will which affect the composition of the investments, such as a specific bequest of an investment or the creation of a trust in which income and capital go to different beneficiaries.*
>
> *40. In this respect, Investing for Patients concluded that, 'it will probably only be worthwhile to consider in depth the interests of those who will benefit on death if the following conditions all apply:*

(a) *the capital available for investment is over £100,000;*

(b) *there is no reason to believe that the patient's state of health is life-threatening; and*

(c) *the capital, when invested, will adequately satisfy the patient's current and future income and capital requirements.'*

41. *Until such time as the Office of the Public Guardian issues its own guidance to attorneys and deputies on the investment of funds, I would suggest that, as they have fiduciary obligations that are similar to those of trustees, attorneys should comply with the provisions of the Trustee Act as regards the standard investment criteria and the requirement to obtain and consider proper advice. I would also recommend that attorneys and their financial advisers have regard to the criteria that were historically approved by the court and the antecedents of the OPG in Investing for Patients, albeit with some allowance for updating, as suggested in paragraph 37 above*."

Senior Judge Lush concluded his analysis of the general obligations imposed upon attorneys in this regard with three further points:

a. attorneys should keep the donor's money and property separate from their own or anyone else's: Mental Capacity Act Code of Practice, paragraph 7.68. This applies to investments and, wherever possible, all investments should be made in the donor's name. If, for any reason, it is not possible to register the investment in the donor's name, the attorney should execute a declaration of trust or some other formal record acknowledging the donor's beneficial interest in the asset;

b. subject to a sensible *de minimis* exception, where the potential infringement is so minor that it would be disproportionate to make a formal application to the court, an application must be made to the court for an order under s. 23 of the Mental Capacity Act 2005 in any of the following cases: (a) gifts that exceed the limited scope of the authority conferred on attorneys by s.12 of the Mental Capacity Act; (b) loans to the attorney or to members of the attorney's family; (c) any investment in the attorney's own business; (d) sales or purchases at an undervalue; and (e) any other transactions in which there is a conflict between the interests of the donor and the interests of the attorney;

c. attorneys should be aware of the law regarding their role and responsibilities. Ignorance is no excuse. At paragraph 44, Senior Judge Lush noted that he was "*not suggesting that attorneys should be able to pass an examination on the provisions of the Mental Capacity Act 2005, but they should at least be familiar with the 'information you must read' on the LPA itself and the provisions of the Mental Capacity Act 2005 Code of Practice. Section 42(4)(a) of the Act expressly stipulates that it is the duty of an attorney acting under an LPA to have regard to the code*." He noted in this regard the explicit nature of the declaration at Part C of the LPA form to be signed by the attorney, setting out the nature of the understanding of the role and responsibilities to be undertaken by the attorney.

On the facts of the case, Senior Judge Lush had little difficulty in finding that the niece had contravened her authority and acted in a way that was not in P's best interests. He therefore revoked the LPA and directed the cancellation of its registration.

Guest comment by Caroline Bielanska

A power of attorney operates not only on the basis that the appointed attorney is a person to be trusted but that they possess the necessary skills and knowledge to undertake what can be an arduous role. It is more likely that an attorney exceeds his authority or mismanages the

donor's affairs because he does not understand how he is to go about making decisions or does not possess the skills, than those attorneys with a clear intention to abuse their position for their own advantage.

The donor of any power should be informed of the risk of abuse by the attorney. Research undertaken by Professor Hilary Brown of the Salomons Institute (which is part of Canterbury Christ Church University) on behalf of the former Public Guardianship Office identified risk factors for financial mismanagement of powers of attorney. It found for example, women over 80 years of age are at higher risk of financial abuse where they appoint a more distant relative, such as nephews and nieces where that relative does not live close by. Consideration should be given to the level of risk of the chosen attorney.

Senior Judge Lush made a salient point; managing your own money is one thing. Managing someone else's money is an entirely different matter. It is not the case that an attorney will simply step into the donor's shoes and make decisions in exactly the same way as the donor. The MCA 2005 requires a different approach. The attorney must follow the core Principles, make decisions in the donor's best interests and follow the Code of Practice. In addition, the attorney must be aware of the limits and extent of his authority, such as not making gifts that exceed those allowed under s.12 (customary occasions subject to the reasonableness test).

It is good practice to ask the donor to consider his chosen attorney's skills and situation. Do they have experience of managing a significant amount of money and home ownership and have they a known history of good personal financial management? Are they in good health? Do they have other commitments which would limit their time to be able to make decisions? Answers to these questions may flag up any shortcomings in the attorney's ability to carry out their role and the donor may prefer to choose an alternative attorney.

Legal advice is often focused on the drafting of the power, and getting it through the OPG registration process with less attention on the future operation of the power. It is a misconception that it is good practice to avoid including any restrictions or conditions in the power, in case the terms are rejected by the OPG which delay registration pending an application by the Public Guardian for severance of the offending term.

It may be appropriate to include a supervisory condition in the power, for example some financial oversight by someone independent, such as production of accounts to the named person, accountant, tax adviser or solicitor and specific requirement for the attorney to seek independent financial advice.

Relying on the attorney reading (and not necessarily understanding) the prescribed information in the LPA is not sufficient to inform attorneys as to how they should make decisions. The attorney is the donor's agent. Those acting for the donor in the setting up of the power should consider what information the attorney needs to be able to carry out his tasks. To act in the best interests of the donor, one must advise the attorney as to what he can and cannot do.

The research undertaken by Professor Brown highlighted that many attorneys do not see what they are doing is abusive as they will often rationalise the decision as something the donor would have wanted had they had mental capacity. Even if that were true, the attorney needs to understand his role as a fiduciary and the risk to his position if he were to act in conflict with those duties. This may be enough to prevent more common mismanagement situations.

One has to wonder if Mrs Buckley's solicitor should have provided better advice, as it may be she would have chosen a different attorney, included supervisory conditions, ensured her niece was made aware of her responsibilities and perhaps established an ongoing relationship to prevent things going wrong.

A Local Health Board v J [2012] All ER (D) 146 (Nov)

Medical treatment – treatment withdrawal

Summary and comment

Following a cardiac arrest, J was in a permanent vegetative state ('PVS'). A therapy assistant's student recorded in a diary that during treatment J had verbalised that she wanted to die and then repeated 'die' ten times; whereas the assistant's account was that J made and repeated a *sound like* 'die'. In an ex tempore judgement, Roderic Wood J. distinguished between 'verbalisation', which did not occur when a patient was in a PVS, and 'vocalisation', a moan or groan often repeated and seen in PVS and other conditions. It was improbable that J was capable of forming a sentence, however simple and her vocalisation had been innocently misinterpreted. It did not indicate a level of awareness consistent with a minimally conscious state ('MCS') and declarations and orders were granted for artificial hydration and nutrition to be lawfully withdrawn.

We mention this case because clearly the verbal/vocal distinction will be an important factor in the PVS/MCS distinction.

The NHS Trust v AW [2013] EWHC 78 (COP)

Medical treatment – treatment withdrawal

We note this case in passing for completeness sake: the granting of an application for a declaration that it was lawful and in the best interests for AW, in a permanent vegetative state, for active medical treatment to be withdrawn. It represents the application of the now well-established principles to the individual facts of AW's case.

Durham County Council v Dunn [2012] EWCA Civ 1654

Practice and procedure – other

Summary

Between 1980 and 1984, the Claimant was a resident at Aycliffe Young People's Centre in Newton Aycliffe which fell within the responsibility of Durham County Council. In December 2007, the Claimant's solicitors wrote to the Council intimating a claim for damages in respect of assaults alleged to have been committed by staff at the Centre when he was there in the early 1980s and requesting disclosure of certain documents. That request referred explicitly to the Data Protection Act 1998. Some documents were disclosed in redacted form. Others, including the Claimant's social care records were not disclosed at all.

Proceedings were issued, the claim was allocated to the multi-track and standard disclosure was ordered. The Claimant sought the disclosure of un-redacted copies of various documents, some of which he had already been provided with in redacted form. The dispute over the extent of the Council's duty to disclose the documents came before District Judge Fairclough in the context of a case management conference. District Judge Fairclough concluded that the Defendant was entitled to disclose redacted copies. In reaching this decision, the District Judge focused on the DPA 1998. HHJ Armitage QC then considered the application on appeal. In allowing the appeal, he referred to the tension between the DPA 1998 and the Civil Procedure rules, and concluded that the proper approach is:

"*(i) to concentrate on the application of the Civil Procedure Rules, which are specific to the task in hand, and which require disclosure of relevant documents. In the present case there is no doubt/issue that the documents are relevant and thus disclosable and liable to be inspected.*

(ii) to consider whether the applying party needs the redacted data for a section

35 (2a) and/or (b) purpose. In the present case the claim is supported by adequate evidence without the redacted material, but that material may lead to further evidence supporting and/or undermining either sides case and thus aid fair disposal of the claim.

(iii) where the documents contain information which, by references to third parties, give rise to a relevant train of enquiry supporting the receiving party's case or undermining the possessor's case, to take into account that third party's rights under the [DPA] are or may be engaged (depending on the precise data held in relation to the third party and the form of it – the latter for the purpose of deciding whether the [DPA] applies to it at all) and the legislature's preference for protecting third party data.

(iv) to take into account also that even if rights under the [DPA] are not engaged, the revelation of the information to the Claimant and possibly to a wider audience may well be against the third party's wishes and interests and have the potential to cause harm.

(v) balance the prejudice to the applying party of being deprived of information against the prejudice to the third party as a result of the disclosure."

Permission for a second appeal before the Court of Appeal was granted. The Court of Appeal expressly acknowledged that legal practitioners and District Judges do not all approach the issues relating to disclosure in a consistent way and, in particular, confusion can arise as to whether the duty of disclosure is primarily one that arises under the Data Protection Act 1998 (DPA) or one arising pursuant to the Civil Procedure Rules (CPR).

In giving judgment, Lord Justice Maurice Kay noted that it was unfortunate that the original letter from the Claimant's solicitor had referred to the DPA 1998. The witness statements in the application before District Judge Fairclough also referred to the DPA rather than to Part 31 of the CPR. However, the Vice President found that the District Judge had erred in treating the DPA as the governing regime. Whilst the District Judge had proceeded to analyse the issue by reference to CPR Part 31, he had referred to a duty to protect data as if it were a category of exemption from disclosure or inspection under CPR 31.3 (b) and this was misleading.

Maurice Kay VP concluded that:

"21… The true position is that CPR31, read as a whole, enables and requires the court to excuse disclosure or inspection on public interest grounds. In a case such as the present one, it may be misleading to describe the issue as one of public interest immunity (a point to which I shall return). The requisite balancing exercise is between, on the one hand, a party's right to a fair trial at common law and pursuant to Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and, on the other hand, the rights of his opponent or a non-party to privacy or confidentiality which may most conveniently be protected through the lens of Article 8. It is a distraction to start with the DPA, as the Act itself acknowledges. Section 35 exempts a data controller from the non-disclosure provisions where disclosure is required in the context of litigation. In effect, it leaves it to the court to determine the issue by the application of the appropriate balancing exercise under the umbrella of the CPR, whereupon the court's decision impacts upon the operation of disclosure under the DPA.

22. When I refer to 'the appropriate balancing exercise', I mean appropriate in the context of the particular litigation. This brings me back to public interest immunity. It will

clearly arise in some contexts, the clearest example being civil litigation with national security implications: Al-Rawi v Security Service [2012] 1 AC 531; [2011] UKSC 34. However it is wrong to treat all cases in which a public authority seeks exemption from a disclosure or inspection obligation on public interest grounds as being cases of public interest immunity in the strict sense. Thus in care proceedings, the law has moved on from the approach taken in the later decades of the twentieth century to the point where, in Re R (Case: Disclosure: Nature of Proceedings) [2002] 1 FLR 775, Charles J was able to say (at page 777):

> *'… general statements that one sees in textbooks and hears that social work records are covered by public interest immunity, which is a widely stated class claim, should now be consigned to history.'*

I do not propose to dwell on this history. It is discussed in the following judgment of Munby LJ which I have read in draft and with which I agree. The disputed documents in the present case are not social work records in the strict sense but they are not dissimilar in nature and, in my view, they should attract the same approach.

23. *What does that approach require? First, obligations in relation to disclosure and inspection arise only when the relevance test is satisfied. Relevance can include "train of inquiry" points which are not merely fishing expeditions. This is a matter of fact, degree and proportionality. Secondly, if the relevance test is satisfied, it is for the party or person in possession of the document or who would be adversely affected by its disclosure or inspection to assert exemption from disclosure or inspection. Thirdly, any ensuing dispute falls to be determined ultimately by a balancing exercise, having regard to the fair trial rights of the party seeking disclosure or inspection and the privacy or confidentiality rights of the other party and any person whose rights may require protection. It will generally involve a consideration of competing ECHR rights. Fourthly, the denial of disclosure or inspection is limited to circumstances where such denial is strictly necessary. Fifthly, in some cases the balance may need to be struck by a limited or restricted order which respects a protected interest by such things as redaction, confidentiality rings, anonymity in the proceedings or other such order. Again, the limitation or restriction must satisfy the test of strict necessity.*"

Munby LJ, concurring, set out the evolution of the history of disclosure within public law children's proceedings. Whilst he noted that the question of how exactly PII applied within such proceedings was an interesting and important one to which the answer was not immediately apparent, he agreed with the proposition advanced by Charles J in *Re R (Care: Disclosure: Nature of Proceedings)* and set out by Maurice Kay VP that "*general statements that one sees in textbooks and hears that social work records are covered by public interest immunity, which is a widely stated class claim, should now be consigned to history*," continuing that:

> *"45. The reality now in the Family Division is that disputes about the ambit of disclosure, whether in relation to social work records or other types of document, are framed in terms of the need to identify, evaluate and weigh the various Convention rights that are in play in the particular case: typically Article 6 and Article 8 but also on occasions Articles 2, 3 and 10. Examples can be found both in Re L (Care: Assessment: Fair Trial) [2002] EWHC 1379 (Fam), [2002] 2 FLR 730, and in Re B (Disclosure to Other Parties) [2001] 2 FLR 1017, to which Ms Connolly also took us. Recent examples of the same approach can*

be found in the decisions of the Court of Appeal in A Local Authority v A [2009] EWCA Civ 1057, [2010] 2 FLR 1757, where Articles 2 and 3 were engaged as well as Articles 6 and 8, and Re J (A Child: Disclosure) [2012] EWCA Civ 1204, another case where Article 3 was engaged.

46. *Re B (Disclosure to Other Parties) [2001] 2 FLR 1017 was a care case where there was a dispute as to whether one of the fathers involved in the proceedings should have access to certain documents, including psychiatric reports, relating to the mother, her husband and the children. I held that he should not. However, I emphasised (para 89) that:*

> *'Although, as I have acknowledged, the class of cases in which it may be appropriate to restrict a litigant's access to documents is somewhat wider than has hitherto been recognised, it remains the fact, in my judgment, that such cases will remain very much the exception and not the rule. It remains the fact that all such cases require the most anxious, rigorous and vigilant scrutiny. It is for those who seek to restrain the disclosure of papers to a litigant to make good their claim and to demonstrate with precision exactly which documents or classes of documents require to be withheld. The burden on them is a heavy one. Only if the case for non-disclosure is convincingly and compellingly demonstrated will an order be made. No such order should be made unless the situation imperatively demands it. No such order should extend any further than is necessary. The test, at the end of the day, is one of strict necessity. In most cases the needs of a fair trial will demand that there be no restrictions on disclosure. Even if a case for restrictions is made out, the restrictions must go no further than is strictly necessary.'*

So far as I am aware, this approach has never been challenged and has often been followed. Indeed, the passage I have just quoted has twice been approved by the Court of Appeal: Re B, R and C (Children) [2002] EWCA Civ 1825, para 29, and Re J (A Child: Disclosure) [2012] EWCA Civ 1204, paras 49, 50.

47. *I might add that although there has been recent discussion in Family Division case law about the applicability of public interest immunity to police child protection records, I cannot recall any occasion during my nine years in the Division when any question of public interest immunity was ever raised before me in relation to local authority or other social work records.*

48. *In these circumstances I would respectfully suggest that the treatment of this important topic in the White Book is so succinct as to be inadvertently misleading.*

49. *I add two points. The first is that, in determining whether or not documents that are otherwise relevant should be withheld from disclosure in family proceedings, precisely the same principles seemingly operate and precisely the same Convention approach is applied in cases involving a claim to public interest immunity as in cases where disclosure is sought to be withheld on some other ground: see Re J (A Child: Disclosure) [2012] EWCA Civ 1204, paras 46-60. So it is not immediately obvious what advantage there is in first determining whether or not public interest immunity applies.*

50. *The second point is that, particularly in*

> *the light of the Convention jurisprudence, disclosure is never a simply binary question: yes or no. There may be circumstances, and it might be thought that the present is just such a case, where a proper evaluation and weighing of the various interests will lead to the conclusion that (i) there should be disclosure but (ii) the disclosure needs to be subject to safeguards. For example, safeguards limiting the use that may be made of the documents and, in particular, safeguards designed to ensure that the release into the public domain of intensely personal information about third parties is strictly limited and permitted only if it has first been anonymised. Disclosure of third party personal data is permissible only if there are what the Strasbourg court in Z v Finland (1998) 25 EHRR 373, paragraph 103, referred to as "effective and adequate safeguards against abuse." An example of an order imposing such safeguards can be found in A Health Authority v X (Discovery: Medical Conduct) [2001] 2 FLR 673, 699 (appeal dismissed A Health Authority v X [2001] EWCA Civ 2014, [2002] 1 FLR 1045). I agree, therefore, with what the Vice President has suggested in paragraph 25 above* [i.e. a provision that the identities of non-parties be not disclosed beyond the parties and their legal advisors and that the information to be disclosed be used solely for the purpose of those proceedings until further order of the County Court]

On the facts, the Council's appeal was rejected.

Comment

As the Court itself noted in this decision, there are an increasing number of civil claims brought in respect of historic allegations of abuse. This decision is a welcome clarification that when considering disclosure in such cases, the central issue is always whether the criteria under CPR Part 31 are met, even in circumstances where the DPA 1998 may also apply or indeed have been relied upon at a pre-action stage.

The relevance of this decision goes wider than this, however. The rules upon disclosure in the Court of Protection Rules Part 16 were discussed by McFarlane J (as he then was) in *Enfield LBC v SA, FA and KA* [2010] EWHC 196 (Admin) [2010] COPLR Con Vol 362. In that decision, whilst McFarlane noted that there was no direct equivalent to the duty of full and frank disclosure applicable in proceedings relating to children and that the Part 16 rules were modelled upon those contained in CPR Part 31, he held (at paragraph 58) that there could "*be no justification for there being a difference of this degree between the family court and the Court of Protection in fact-finding cases of this type where really the process and the issues are essentially identical whether the vulnerable complainant is a young child or an incapacitated adult. For the future in such cases in the Court of Protection it would seem justified for the court to make an order for 'specific disclosure' under COPR 2007, r 133(3) requiring all parties to give 'full and frank disclosure' of all relevant material*."

Taking the *Enfield* case together with the *Dunn* case and the recent Supreme Court decision in *In the matter of A (a child)* [2012] UKSC 60, it is absolutely clear that when proceeding in the Court of Protection, providing that the requirement of relevance is met, disclosure should only properly be resisted where strictly necessary. The approach of the Courts would suggest that the threshold for establishing such necessity has been set relatively high and recourse to blanket arguments as to the class of documentation will not be met with approval. Conversely, it is also clear that the Courts will be very alive to the possible consequences of such disclosure, and to the possibility that safeguards will be required to ensure that the use of any information disclosed is carefully controlled.

Lashin v Russia [2013] ECHR 63 (Application No 33117/02)

Mental capacity – assessing capacity

Summary

In these proceedings, the European Court of Human Rights considered a challenge by Mr Lashin, who suffered from schizophrenia, against the decision of the Omsk Regional Court in August 2000 upholding a finding that he lacked capacity. Following that decision, Mr Lashin had sought on more than one occasion and with the support of his father who had been appointed as his guardian, to have his capacity restored. However, this was repeatedly declined.

In 2002, the applicant was admitted to hospital. His father was subsequently stripped of his status as legal guardian, partly as he had unsuccessfully tried to confer that appointment by way of power of attorney on a third party, but also on the basis that the applicant had not received appropriate medical treatment and his condition had worsened. The applicant nonetheless again challenged his hospitalisation and demanded a re-examination by independent experts. However, in December 2002, the hospital was appointed as Mr Lashin's guardian and, acting in this capacity revoked its request for authorisation to confine the applicant. The Court closed the proceedings without a hearing on the grounds that the applicant was thereafter treated as a voluntary patient and his only legal guardian was no longer presenting a dispute.

The applicant submitted that his inability to have his legal capacity reviewed breached his rights under Article 8 of the Convention. He further challenged the manner in which the decisions that he lacked capacity had been taken up until December 2002, namely in his absence and without an examination by an independent panel of experts as the applicant had himself requested.

The government accepted that, in principle, the decision that a person lacks capacity can amount to an interference with their rights under Article 8 ECHR. However, given Mr Lashin's schizophrenia, it maintained the decision was necessary and proportionate in the circumstances.

As regards the complaints arising from the decisions that he lacked capacity up until December 2002, the Court held the following:

a. a decision that a person lacks capacity can infringe their rights under Article 8 ECHR, applying *Matter v. Slovakia*, no. 31534/96, § 68, 5 July 1999, and *Shtukaturov v. Russia*, no. 44009/05, § 83, ECHR 2008;

b. depriving someone of his legal capacity and maintaining that status may pursue a number of legitimate aims, such as to protect the interests of the person affected by the measure. In deciding whether legal capacity may be restored, and to what extent, the national authorities have a certain margin of appreciation. It is in the first place for the national courts to evaluate the evidence before them; the Court's task is to review under the Convention the decisions of those authorities, *Winterwerp v. the Netherlands,* 24 October 1979, § 40, Series A no. 33*; Luberti v. Italy*, 23 February 1984, Series A no. 75, § 27; and *Shtukaturov v. Russia*, § 67);

c. the extent of the State's margin of appreciation in this context depends on two major factors. First, where the measure under examination has such a drastic effect on the applicant's personal autonomy (as in the case of Mr Lashin) the Court is prepared to subject the reasoning of the domestic authorities to a somewhat stricter scrutiny. Second, the Court will pay special attention to the quality of the domestic procedure. Whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8 (see *Görgülü v. Germany*, no. 74969/01, § 52, 26 February 2004).

On the facts, the ECtHR found that the decision not to restore Mr Lashin's capacity was taken

without seeing him or hearing from him. Whilst the Court accepted that there were possible exceptions from the "*rule*" of personal presence, it noted (at paragraph 82) that a departure from this rule is possible only where the domestic court carefully examined this issue. This was not the case on the facts before it, and the Court noted (ibid) that "*a simple assumption that a person suffering from schizophrenia must be excluded from the proceedings is not sufficient*."

A second aspect of concern was the failure to commission a fresh psychiatric assessment. More than a year and a half had elapsed since the original assessment and the applicant had requested that his mental condition be re-evaluated. Where the opinion of an expert is likely to play a decisive role in the proceedings, as in the case at hand, the Court found (at paragraph 87) that expert's neutrality becomes an important requirement which should be given due consideration. Lack of neutrality may result in a violation of the equality of arms guarantee under Article 6 of the Convention. An expert's neutrality is equally important in the context of incapacitation proceedings, where the person's most basic rights under Article 8 are at stake.

The Court concluded that the confirmation of the applicant's incapacity status in 2002 based on the report of 2000 breached his rights under Article 8.

In relation to the applicant's alleged inability to have his mental capacity reviewed, the Court reiterated the need for periodic reassessment given that "*it is recognised that in the vast majority of cases where the ability of a person to reason and to act rationally is affected by a mental illness, his situation is subject to change*" (paragraph 97).

The Court cited its decision in *Stanev*, in which the Court had observed that "*there is now a trend at European level towards granting legally incapacitated persons direct access to the courts to seek restoration of their capacity*" (§ 243), and noted that in Russia at the time the law neither provided for an automatic review nor for a direct access to the court for an incapacitated person. In those circumstances, the applicant was fully dependant on his guardian in this respect. Where, as in the present case, the guardian opposed the review of the status of his ward, the latter had no effective legal remedy to challenge the status. Having regard to what was at stake for the applicant, the Court concluded that his inability for a considerable period of time to assert his rights under Article 8 was incompatible with the requirements of that provision of the Convention. Consequently, there was a violation of Article 8 of the Convention.

Comment

The facts giving rise to this claim were extreme and the procedural history indicates that the applicant had tried to avail himself of many different avenues to challenge the finding as to his lack of capacity. Moreover, and reiterating a point that we have addressed previously, caution must be exercised before reading across too directly dicta from decisions reached in the context of legal systems where capacity is a matter of status.

However, too much can be made of the difference between 'status' based systems and that enshrined in the MCA 2005. After all, a decision that P lacks capacity in one or more respects gives the Court of Protection a wide-ranging jurisdiction to take decisions in P's best interests as regards those matters. Alternatively, in the case of (for instance) sexual relations, a decision by the Court of Protection that P lacks the capacity to consent to such relations, represents a significant – if no doubt justified – legal circumscription of P's autonomy.

In the circumstances, this decision is of relevance to English practitioners because the Court chose to examine the issue of the steps taken by the Courts regarding the applicant's capacity by reference to Article 8 as opposed to Article 6 (as in *X and Y v Croatia* (Application No. 5193/90, decision of 3.11.11)). The approach taken was, however, essentially identical to that adopted in *X and Y* and indicates the concern that the Court is manifesting to ensure that decisions relating to the capacity of adults are reached after due consideration - and following a 'rule' of personal presence to be departed from only after the domestic Court has made a specific

investigation of whether so to depart.

The emphasis upon Article 8 is of importance because of the relationship identified by the Court between an individual's capacity and their ability to enjoy their private life. It chimes also with the emphasis placed by the Court upon Article 8 in the context of those deprived of their liberty in psychiatric institutions: see *Munjaz v United Kingdom* (Application No. 2913/06, decision of 17.7.12)

It is also of note that the Court highlighted the imperative of updated neutral expert evidence based on an examination of the patient when conducting a review of that patient's mental condition. This is potentially relevant to any case where the patient has an unstable mental condition or where his capacity may fluctuate.

Mihailovs v Latvia [2013] ECHR 65 (Application no. 35939/10)

Article 5 ECHR – deprivation of liberty

Summary

M challenged his confinement at a centre for people with mental disorders in Latvia on the grounds that it violated Articles 5 and 8 ECHR. A psychiatric examination in 2000 concluded that M was suffering from epilepsy with psychotic syndromes and symptoms but was not suffering from a mental illness. In 2002 he was admitted to the centre following an application made by his guardian. He had remained at the centre since that time, first in Īle and then in Lielbērze after it was relocated in 2010. M claimed he was detained against his will and numerous applications for his release were refused.

Centre in Īle

There was a factual dispute between M and the government as to whether the centre in Īle was "open" or "closed" in nature. The Court emphasised that this question was not determinative of the issue and reiterated that the key factor was whether the management of the centre exercised "complete and effective control over his treatment, care, residence and movement" (at paragraph 131). The Court concluded the objective limb of the test was met as M was under constant supervision and was not free to leave the institution without permission whenever he wished (at paragraph 132).

In relation to the subjective element of the test, the Court reiterated (paragraph 134) the statement first made in *Shtukaturov* (Application No. 44009/05, decision of 27.3.08) that the fact that a person lacks *de jure* legal capacity to decide matters for himself does not necessarily mean that are *de facto* unable to understand their situation. It found that M was a person whose true wishes and feelings it was possible to ascertain. The Court recorded that the documents presented to the court showed that M "*subjectively perceived his compulsory admission to the Īle Centre as a deprivation of liberty*" (at paragraph 134), having never regarded his admission as consensual and having objected to it during his stay there. The Court accordingly found that M was deprived of his liberty at the centre in Īle.

The government failed to satisfy the Court that the conditions in Article 5(1)(e) were met as it had not proved the existence of "objective medical opinion" that M was suffering from a "true" mental disorder at the time he was placed in the centre (at paragraphs 147-148). The Court observed that the other requirements of Article 5(1)(e) were not met as it was not clear that M posed any danger to himself or others or would not submit to treatment voluntarily and insufficient consideration given to other less restrictive means of social assistance and care (at paragraph 149).

The Court went on to find that Article 5(4) was breached during M's time in Īle as the regulatory framework for placing individuals in social care centres did not provide the necessary safeguards and he was prevented from pursuing any legal remedy of a judicial character to challenge his continued "involuntary institutionalisation" (at paragraphs 151 and 156).

Centre in Lielbērze

However, the Court declined to find that M was deprived of his liberty from 2010 onwards, after

the centre relocated to Lielbērze. It rejected this aspect of his claim (addressing both the objective and subjective elements together), on the basis that M had acknowledged the centre at Lielbērze was an "open institution;" had refused to move to another branch of the centre (saying that he was satisfied with his stay at the centre in Lielbērze); was able to leave the centre on several occasions and did not approach any domestic authority with a view to obtaining his release or complaining about any breaches of his rights (which he had done whilst at the centre in Īle). The Court concluded (at paragraph 139):

"*These factors, in contrast to those* [pertaining at the centre in Īle] *are sufficient for the Court to consider that the Government have shown that the applicant had tacitly agreed to stay in the Īle Centre in Lielbērze. The Court would add, in this respect, that it is not without importance that the applicant's representative conceded that the applicant's complaints related to the events in the past, thereby implicitly confirming that he did not have any objections to the current state of affairs in the Īle Centre in Lielbērze.*"

No separate issues were found to arise under Article 8.

Comment

This case is perhaps noteworthy, in the first instance, not so much for the conclusion that M was deprived of his liberty at the centre in Īle, as this was largely for the reasons given in *Stanev v Bulgaria*, Grand Chamber (Application No. 36760/06), but for the conclusion that M was not deprived of his liberty at the Centre in Lielbērze. It is not entirely clear upon what basis this conclusion was reached because of the way in which the Court approached the objective and subjective elements compendiously; it appears, though, that the Court's primary reason for finding there to have been no deprivation of liberty was that the subjective element was not made out.

Whilst M had perhaps been less vociferous in his objections to remaining at the centre in Lielbērze, and may have found it preferable to being moved to another branch of the centre, there may be some room for doubt as to whether he in fact wished to stay there. The Court's finding that M had tacitly accepted his placement is, in this respect, difficult to square with efforts that had been made (though possibly not fully pursued) by his newly-appointed guardian for M to be allowed to leave the centre (see for example paragraphs 50 and 51). Considering the weight that the Court attached to M's representative agreeing that his complaints related to events in the past, there is perhaps a lesson here for all lawyers not to concede any potentially material point lightly!

More broadly, perhaps, the decision raises the question of precisely how the European Court of Human Rights is currently interpreting the subjective element of the Article 5 trinity, namely that the person has not validly consented to the confinement in question (*Storck v Germany* (2006) 43 EHRR 6). The Court has consistently referred back to the *HL v UK* judgment in its recent jurisprudence, describing it – accurately – as a case where "*the applicant was an adult legally incapable of giving his consent to admission to a psychiatric hospital, which, nonetheless, he had never attempted to leave*" (paragraph 129 of M's case). The Court in *HL* was not impressed with arguments based upon Mr L's compliance – and indeed, it was precisely because it found that the arrangements for the treatment of the compliant incapacitated were not in compliance with Article 5 that it was necessary for the DOLS regime to be enacted. The Court has also emphasised (in *Stanev* at paragraph 119), and relying on *HL* that it has "*held that the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action.*"

In the circumstances, therefore, it seems at first sight curious that the Court now appears to be examining whether or not individuals who are considered by their own legal systems to lack the requisite capacity to decide upon their living arrangements are or are not content with those arrangements.

The answer, we would suggest, is that in all the recent cases in which the Court has undertaken this exercise, the Court has been concerned with a status-based system, where the person can be wholly or partially divested of legal capacity by an appropriate body (often, it would appear, in circumstances which have caused considerable concern to the Court). In such instances, the Court has therefore been at pains to secure as effective as possible a respect for the autonomy of the individual in question by allowing the possibility that, notwithstanding the fact that they have been formally divested of their capacity, they may still be in a position to understand their position and to act upon that understanding. This requires the Court – in essence – to undertake a rudimentary capacity assessment of its own in relation to the specific question of whether the person has capacity to consent to the confinement in question (or, to use the Court's words, express their "true wishes and preferences"). Depending on the result of that assessment, the Court can then decide whether or not the person has 'validly consented' to their confinement.

Conversely, in the English system, where capacity is issue specific, we would suggest that the question of whether or not the subjective element is satisfied can be equated directly with the question of whether the person has capacity to decide whether to be accommodated in the place in question (and there to be subject to the restrictions which, objectively, amount to a deprivation of their liberty). In other words, for purposes of Schedule A1, a person who meets the mental capacity requirement set down in paragraph 15 is by definition a person who cannot validly consent to the confinement in question, even if they are compliant.

OPG Consultation Response

The Ministry of Justice has now published its response to the consultation upon *Transforming the Services of the Office of the Public Guardian***.** The consultation response can be found here.

In summary, and following broad approval for the proposals, the MOJ intends to implement the following by April 2013:

1. introduce an online tool for making a Lasting Power of Attorney (LPA) to make the process simpler, clearer and faster and reduce errors in the LPAs that reach the OPG requiring correction;

2. reduce the statutory waiting period for registering an LPA from six to four weeks in order to make the process quicker, whilst still retaining adequate safeguards; and

3. amend the regulations to allow deputies to change bond provider without the need to apply to the Court of Protection, with the original bond being automatically discharged after two years.

By April 2014, the MOJ has committed itself to:

1. developing simpler versions of the current Health and Welfare and Property and Affairs forms that align with the new digital LPA process;

2. amending the current LPA 002 'application to register' form, and considering whether it can be merged with the LPA forms themselves, to remove duplicate information and reduce the amount of form-filling that is required;

3. introducing the ability to search OPG registers online as part of the programme of work to replace the OPG's current IT systems;

4. completing the fundamental review of the current approach to the way the Public Guardian exercises his statutory supervisory function and have implemented the results of that review wherever possible;

5. implementing an online payment facility for the payment of both LPA and deputyship fees; and

6. introducing digital channels to support deputies in fulfilling their duties under the MCA 2005, which will also be in line with the outcomes of the fundamental review of supervision.

As regards areas requiring further development (and/or primary legislation), the MOJ will (without any specific time-frame):

1. consider in more detail the role of the certificate provider, the benefits provided by the certification process and the difficulties sometimes faced trying to identify suitable people to fulfil this role before bringing forward any further proposals in this area;

2. consider in more detail the role of named persons and the value they add to the process of making and registering an LPA. The MOJ has indicated that it does not intend to make any changes to the maximum number of named persons at this time;

3. consider whether the current process of notification operates effectively and whether there may be scope for further work in this area; and

4. consider revising the notification process so that the OPG notifies named people, rather than the person making the application to register the LPA.

CQC Report: Monitoring the Mental Health Act in 2011/2

The CQC published on 29.1.13 its third annual report upon the operation of the MHA 1983. It contains discussion and/or recommendations relating to matters MCA 2005 related, including:

1. an expectation that change will be seen in certain areas of recurring concern in the care and treatment of people subject to the MHA 1983, including that:

> "*Clinical staff must be appropriately trained in assessing and recording whether the patient has mental capacity to make decisions and whether they consent to treatment. Ongoing dialogue with the patient is essential. This conversation or dialogue should consider what treatment a person prefers and also how a person would like to be treated in the future (advance planning).*"

2. a – disturbing – section in the chapter upon the use of 'Coercion in practice' relating to de facto detention (pp.34-35), highlighting both the scale of de facto detention of notionally voluntary patients and (allied to this) staff confusion about their legal status, an example being where:

> "*One member of staff described the patient as being 'on' a section 5 of the Mental Capacity Act. When the Commissioner explained that no-one can be 'on' a section 5 of the Mental Capacity Act, and that the powers of that act cannot, in any case, authorise deprivation of liberty or detention, the member of staff said that the patient was 'sort of detained'. This demonstrates how potential confusion about the powers of the Mental Capacity Act can be increased through imprecise use of language to describe patients' legal status*."

3. discussion (p.57) of the case of *Sessay v (1) South London & Maudsley NHS (2) Met Police)* [2011] EWHC 2617 (QB) [2012] 2 WLR 1071 and of confirmation therein that MCA powers cannot be used by the police as authority to transport patients to hospital-based places of safety where this amounts of a deprivation of liberty;

4. a detailed discussion of the complex issues which arise around ascertaining a patient's capacity to consent to treatment (pp. 69-71), including the following significant passage:

> "*The* [MHA 1983] *Code of Practice requires clinicians to assess patients' capacity to consent to or refuse treatment at the points where such consent is discussed, and record these assessments in the patients' notes. Some clinicians have questioned whether this conflicts with*

the first principle of the Mental Capacity Act, which states that people should be assumed to have capacity. In CQC's view, where a person is in the situation of requiring specialist inpatient mental health care under the powers of the Act, the assumption of capacity should be backed up by an evidenced record. The Mental Capacity Act Code of Practice also states that professionals should never express an opinion about a person's capacity to make a decision without carrying out a proper examination and assessment.

An incorrect assumption that a patient subject to powers of the Mental Health Act has capacity to agree to treatment may deprive that patient of the statutory safeguard of a second opinion. In CQC's examination of over 2,500 records in 2011/12, 42% did not indicate that a capacity assessment had taken place on admission, and 36% had no record of a capacity assessment at the end of the three-month period or at the last administration of medication

The levels of non-compliance with the Code of Practice consent to treatment guidelines have been an ongoing problem in mental health services from the introduction of the safeguards in the Mental Health Act, and have been featured in every report to Parliament by the monitoring bodies for that Act. In particular, many previous reports have noted poor practice in operating the safeguards and questioned the reality of consent apparently given by patients.

CQC continues to have concerns that not all services give sufficient regard to patients' wishes, or attention to their capacity to make decisions."

Our next update will be out in March 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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