ST JOHNS BUILDINGS

Joseph O’Brien

CASE UPDATE

SECTION 21A PROCEEDINGS: CAPACITY EVIDENCE: DISCLOSURE

MENTAL CAPACTY ACT 2005 SWITALSKIS
LECTURE SERIESFEBRUARY 2021

OVERVIEW

- Consider 3 cases:
- AMDC v AG [2020] EWCOP 58
- DP v Hillingdon [2020] EWCOP 45
- KK v Leeds City Council [2020] EWCOP 64

- Questions and Answers(?).

AMDC v AG [2020] EWCOP 58

- Poole J.

London Borough of Tower Hamlets v PB [2020] EWCOP 34 gave helpful guidance as to the general approach to be taken by the court when determining an issue of capacity:

"51.i. The obligation of this Court to protect P is not confined to physical, emotional or medical welfare, it extends in all cases and at all times to the protection of P's autonomy;

ii. The healthy and moral human instinct to protect vulnerable people from unwise, indeed, potentially catastrophic decisions must never be permitted to eclipse their fundamental right to take their own decisions where they have the capacity to do so. Misguided paternalism has no place in the Court of Protection;

AMDC

iii. Whatever factual similarities may arise in the case law, the Court will always be concerned to evaluate the particular decision faced by the individual (P) in every case. The framework of the Mental Capacity Act 2005 establishes a uniquely fact sensitive jurisdiction;

iv. The presumption of capacity is the paramount principle in the MCA. It can only be displaced by cogent and well-reasoned analysis;

v. The criteria for assessing capacity should be established on a realistic evaluation of what is required to understand the ambit of a particular decision by the individual in focus. The bar should never be set unnecessarily high. The criteria by which capacity is evaluated on any particular issue should not be confined within artificial or conceptual silos but applied in a way which is sensitive to the particular circumstances of the case and the individual involved.

AMDC

The professional instinct to achieve that which is objectively in P's best interests should never influence the formulation of the criteria on which capacity is assessed; vi. It follows from the above that the weight to be given to P's expressed wishes and feelings will inevitably vary from case to case.

"To set the bar too high could be unfair, unnecessary and discriminatory against the mentally disabled: *Sheffield City Council v E* [2004] EWHC 2808, para. 144 per Munby J, as applied by Baker J. in *PH v A Local Authority* [2011] EWHC 1704]. A linked principle is that the person must understand the salient information but not necessarily all the peripheral detail: *LBC v RYJ* [2010] EWHC 2665."[para 23]

AMDC

- Poole J identified some of the concerns § 24

- Paragraph 4.16 of the Code of Practice states, " It is important not to assess someone's understanding before they have been given relevant information about a decision. Every effort must be made to provide information in a way that is most appropriate to help the person understand".
- The expert's reports did not provide sufficient evidence either that AG had been given the relevant information in relation to each decision, or of the discussions the expert had had with P about the relevant information.

AMDC

- It is not a criticism of an expert that at different times they have reached different conclusions about a person's capacity. Capacity can change and new evidence may come to light. However, in this case significantly different conclusions had been reached at different times without clear explanations of why the conclusions had changed or how the evidence as a whole fitted together. Further, the change in opinion between the June report and the August letter had followed the receipt of a single further statement and without any further face to face assessment.
- The expert's final conclusion had been reached on a broad-brush basis rather than by reference to each decision under consideration.

AMDC

- A lack of information to show how AG had been assisted to engage when the expert had "hit a brick wall" in his attempts to have a discussion with her at his final interview. The lack of information left doubt as to whether AG was incapable of understanding the purpose of the interview, whether she had been given adequate support to engage, or whether she had simply chosen not to talk to the expert.
- A lack of a cogent explanation for why the presumption of capacity had been displaced in relation to the decisions under consideration. Conclusions were stated but not clearly explained.

AMDC

"When providing written reports to the court on P's capacity, it will benefit the court if the expert bears in mind the following":

a. An expert report on capacity is not a clinical assessment but should seek to assist the court to determine certain identified issues. The expert should therefore pay close regard to (i) the terms of the Mental Capacity Act and Code of Practice, and (ii) the letter of instruction.

b. The letter of instruction should, as it did in this case, identify the decisions under consideration, the relevant information for each decision, the need to consider the diagnostic and functional elements of capacity, and the causal relationship between any impairment and the inability to decide. It will assist the court if the expert structures their report accordingly.

AMDC

c. It is important that the parties and the court can see from their reports that the expert has understood and applied the presumption of capacity and the other fundamental principles set out at section 1 of the MCA 2005.

d. In cases where the expert assesses capacity in relation to more than one decision, i. broad-brush conclusions are unlikely to be as helpful as specific conclusions as to the capacity to make each decision; ii. experts should ensure that their opinions in relation to each decision are consistent and coherent

e. An expert report should not only state the expert's opinions, but also explain the basis of each opinion. The court is unlikely to give weight to an opinion unless it knows on what evidence it was based, and what reasoning led to it being formed.

OUTCOME

- A ”new” expert was instructed.
- **RE AG [2021] EWCOP 5**
- AG lacks capacity in relation to decisions about litigation, residence, care, financial affairs and property, and marriage, but does have capacity to make decisions about contact with others and engagement in sexual relations.

A VIEW

- Assessment and interview.
- Application of section 1, 2 and 3 MCA 2005
- Analysis.
- Brick wall cases and the presumption of capacity.
- Not limited to experts

"Some section 49 reports are written by psychiatrists who might, in other cases, provide an expert report under r.15. An assessment of capacity is no less important when carried out under s. 49 or by a social worker or Best Interests Assessor. What follows might be of assistance to all assessors, but it is specifically directed to r15 expert witnesses because that is the form of evidence under consideration in this case."

HILLINGDON

- Hayden J (VP)
- Section 21A appeal.
- Appeal was, in effect, that the court should, at the first hearing, have terminated the standard authorization.
- Important because of what the judgment states about section 21A applications and section 48 orders.

THE SECTION 21A PROCEDURE

"39. Ms Butler-Cole argues that, as a matter of general practice, the court should not make any interim orders in a Section 21A application, she reasons that the criteria are either met or not, either a detention is lawful or it is not. Alternatively, she submits, an interim order, to gather further information, should only be made if there is a sufficiently clear evidential basis to do so. I strongly prefer the alternative submission which, in my judgement, strikes the balance between protecting P's autonomy and promoting his welfare."

GIVING EVIDENCE?

"As I have indicated above, I consider this approach to be too rigid. It is the duty of the court to determine whether the mental capacity requirement is met. If, as here, the judge was uncertain, then the obligation on the court was to investigate it further and to do so "speedily", to adopt the word used in Article 5(4). Of course, in Section 21A applications the court will always and of necessity have a capacity assessment before it. It was open to the Deputy District Judge, for example, to permit questions to be put to Dr Longe and/or, if necessary, to arrange for him to give evidence or revisit his assessment. I doubt that it was necessary to instruct a further expert on what is, when properly identified, an essentially uncomplicated issue i.e. does DP have capacity to decide to change care homes to be nearer to his friend Bill and, if not, whether it is in his best interests to do so."

SECTIONS 21A /48 AND INTERIM DECLARATIONS

"All Counsel agree that an application made pursuant to Section 21A does not permit the making of an interim declaration pursuant to Section 48. Indeed, they submit that Section 48 itself does not permit the making of interim declarations, notwithstanding that this is almost universally the practice. As set out at para 29, above Section 48 provides for the making of an order or for the giving of directions. It does not provide for the making of a declaration. Thus, the Court's finding that there is reason to believe that P lacks capacity ought, strictly, not to be phrased in declaratory terms. Ms Butler-Cole also argues that, as the COPR 2017 describe an interim declaration as an "interim remedy", there can be no interim remedy in a Section 21A MCA application. As P is deprived, lawfully, of his liberty under a standard authorisation, the only remedy, it is argued, must be termination or variation of the standard authorisation."

SECTION 48

i) The words of the Statute in Section 48 require no gloss

ii) The question for the Court remains throughout: is there reason to believe P lacks capacity?

iii) That question stimulates an evidential enquiry in which the entire canvas of the available evidence requires to be scrutinised;

iv) Section 48 is a permissive provision in the context of an emergency jurisdiction which can only result in an order being made where it is identifiably in P's best interest

v) The presumption of capacity applies with equal force when considering an interim order pursuant to Section 48 as in a declaration pursuant to Section 15;

SECTION 48

vi) The exercise required by Section 48 is different from that set out in Section 15. The former requires a focus on whether the evidence establishes reasonable grounds to believe that P may lack capacity, the latter requires an evaluation as to whether P, in fact, lacks capacity;

vii) The court does not become responsible for authorising P's Deprivation of Liberty upon issuing of a Section 21A application. The court's function is to review the authorisation which is in force;

SECTION 48

viii) The objective of Section 48 is neither restrictive, in the sense that it requires a high level of proof, nor facilitative, in the sense that it is to be regarded as a perfunctory gateway to a protective regime, andix. There is a balancing exercise in which the Court is required to confront the tension between supporting autonomous adult decision making and to avoid imperilling the safety and well-being of those persons whom the Act and the judges are charged with protecting.

FALL OUT?

- The standard authorization is the legal vehicle for a person's deprivation of liberty. The court is reviewing the assessments.
- The quality of the all the assessments need to be carefully scrutinised. The statement of facts and grounds should identify with precision the failings in any assessments. The grounds should be bespoke.
- Utilise the guidance given in **AG** above.
- If there is a serious issue about capacity, consider whether at the first or second attended hearing the court should hear evidence from the assessor.

FALL OUT? ORDERS

- There is no need to utilise section 48 for an interim order on a persons capacity to make decisions on accommodation for the purposes of receiving care or treatment at the placement.
- There is no need to utilise section 48 for an interim order on best interests.
- But in relation to other capacity issues not covered in the schedule A1 assessments, the current approach is to draft a recital following the wording of section 48. *'The court has reason to believe'.*

FALL OUT?

- The court does not become responsible for authorising P's Deprivation of Liberty upon issuing of a Section 21A application. The court's function is to review the authorisation which is in force.
- But what if the court extends the SA?
- What if the court seeks further evidence having accepted that in order to determine the application further evidence is required because the evidence in the assessments is not satisfactory, as in the case of the capacity assessments, for example.

KK v LCC

- Cobb J
- Appeal from HH Judge Hayes QC.
- Application by KK to be joined as a party.
- Procedural issue arose.

“At the hearing before the Judge, the Local Authority and the Official Solicitor presented, and sought to rely upon, information which, although acknowledged to be relevant to the issue before the court, they wished to keep confidential from KK ("the confidential material"). The Judge received this documentary confidential material, and read it. Neither KK nor her lawyers were given access to this material. The Judge gave a separate shorter judgment (which I shall refer to as the 'supplementary judgment') in which he expressed his view about this confidential material, and its significance to the decision.”

KK v LCC: KK case on joinder

- KK occupied an important position in DK's life as her primary carer; KK disputed that she exerted any improper degree of influence over DK;
- KK wished to take any step necessary to assist in the determination of the facts by the Court of Protection. If the Local Authority were to advance a case which involves the determination of facts ultimately to determine welfare issues, then the only proper way to deal with this is/was by joining KK as a party, enabling her to see the evidence relied on and giving her the opportunity to present her case in response;

KK v LCC: KK case on joinder

- The court could exercise its case management powers to control what KK could or could not see as a party; this was (per Mr McCormack's submission, set out at §39 of the judgment) the way of striking, "the proper balance between the (claimed) need to protect DK by preventing KK from seeing particular aspects of the case, and the need for the court to hear from a close family member as to the issues at the heart of this case";
- KK should be able to participate "sitting in the theatre, not sitting in the wings";
- To ensure that the case is dealt with fairly and to ensure that the parties are on an equal footing, the court should join KK as a party to enable her to be involved in the process.

KK v LCC: Opposing arguments

- Cobb J said that HH Judge Hayes QC appropriately rehearsed the arguments advanced by counsel for the parties in this case who opposed the application, including the following (in summary):
- It was accepted that it would usually be the case that a parent of a young person who is the subject of proceedings in the Court of Protection would have party status; by analogy, in Family Proceedings, a person with parental responsibility would have automatic party status;
- However, the position is somewhat different when proceedings involve a vulnerable adult in the Court of Protection, particularly where it is not either a proposed or realistic option for P to reside with or be cared for by the applicant/prospective party;
- Any orders for disclosure to KK of the documents filed will impinge on DK's privacy;

i

KK v LCC: Opposing arguments

v) Where the *Article 6* and *Article 8 ECHR* rights of DK and KK are in play, it must be DK's interests which prevail;

v) At present, it was/is in DK's best interests for contact with her family to be supervised;

vi) KK is currently consulted in respect of best interests' decisions for DK, including placement options; this will continue and can be done without affording to KK party status in the proceedings.

KK v LCC: HH Judge Hayes QC

HH Judges Hayes QC stated that

"[43] Without revealing what that evidence is, I should state my key conclusions having considered and analysed what it says:

(a). I am satisfied that the reasons for not revealing the written evidence to KK are valid and that the necessity for redaction is rooted in DK's best interests.

(b). If I reveal to KK what that written evidence is, DK is likely to disengage from her engagement both with professionals and with these proceedings.

(c). Similarly, if I join KK to these proceedings, notwithstanding that written evidence, those same consequences will be likely to result.

KK v LCC

(d). I accept the case of LCC (… as supported by the Official Solicitor), that this will inhibit DK expressing her true wishes and feelings and undermine the process of ensuring her effective participation in these proceedings.

(e). Accordingly, the weight to be given to that evidence is significant as the effects of joinder, if allowed, would be to bring about consequences adverse to DK's welfare.

(f). This is not resolved by joining KK as a party and then exercising the Court's power to limit or redact disclosure. The effect of joinder, in itself, will bring about these adverse consequences for DK".

KK v LCC

Grounds of Appeal

- The procedure adopted by the court was one which led not simply to there being evidential material that was not disclosed to KK, but where submissions were accepted which were not made in her presence, and a 'closed' judgment handed down to which she has no access. KK may have been able to provide a counterpoint to the evidence filed. This offends the open justice principle, robbed the Judge of the potential to make proper determinations, and thus rendered the proceedings unfair;
- The judge erred in adopting such a procedure where there might have been alternative methods for dealing with the proceedings which would have nonetheless properly protected DK's interests. The lack of information provided to KK prevented her from contributing properly to the design of such alternative methods.

The test for party status

- *Rule 9.15(1)* of the *Court of Protection Rules 2017* ("*COP Rules 2017*") provides that "Any person with sufficient interest may apply to the court to be joined as a party to the proceedings".
- That rule only founds the right to apply. It does not automatically follow that the person who can show "sufficient interest" must be joined as a party.
- *Rule 9.15(1)* operates to screen out applications which cannot meet the "sufficient interest" test. If the court is not satisfied that the person who makes an application (or purports to do so) has "sufficient interest" then that is the end of the matter. To give an obvious example, someone unknown to P (or with only fleeting/trivial involvement in P's life) would not satisfy the "sufficient interest" test. They would have no right to make an application and would accordingly fall at that "first hurdle". [17]

The test for party status

- If a person overcomes this first hurdle of "sufficient interest", the application is properly made. But it does not follow that the applicant must be joined. The court then must apply a further test when deciding if to join that person as a party.
- That test is found in *rule 9.13(2)* of the *COP Rules 2017* which provides "The Court may order a person to be joined as a party if it considers that it is desirable to do so for the purpose of dealing with the application" (underlining added) (in original).
- The language used in *rule 9.13(2)* conveys that the court has a broad discretion when determining if a person should be joined to the proceedings.

Cobb on Hayes

“ I am wholly satisfied, indeed there has been no issue taken, that the Judge correctly identified and applied the relevant test on joinder and party status, as they are set out in *rules 9.13* and *9.15* of the *COPR 2017* (see [10] above wherein I quote the relevant extract from the judgment). I endorse his approach (reflected at §25 and §27 of the judgment: [14] above) that in considering the "desirability" test in *rule 9.13(2)*, the "sufficient interest" of the applicant for party status is likely to be relevant. The real dispute in this appeal focuses on the Judge's management and deployment of the confidential material and its impact on his decision.”

Cobb J

At the hearing of the application for party status should consider the following points:

i) The general obligation of *open justice* applies in the Court of Protection as in other jurisdictions;

ii) A judge faced with a request to withhold relevant but sensitive information/evidence from an aspirant for party status, must satisfy him/herself that the request is *validly* made;

iii) The *best interests* of P, alternatively the "interests and position" of P, should occupy a central place in any decision to provide or withhold sensitive information/evidence to an applicant (*section 4 MCA 2005* when read with *rule 1.1(3)(b) COPR 2017*); the greater the risk of harm or adverse consequences to P (and/or the legal process, and specifically P's participation in that process) by disclosure of the sensitive information, the stronger the imperative for withholding the same.

Cobb J

iv) The expectation of an "equal footing" (*rule 1.1(3)(d) COPR 2017*) for the parties should be considered as one of the factors.

v) While the principles of natural justice are always engaged, the obligation to give full disclosure of all information (including sensitive information) to someone who is *not a party* is unlikely to be as great as it would be to an existing party;

vi) Any decision to withhold information from an aspirant for party status can only be justified on the grounds of *necessity.*

Cobb J

vii) In such a situation the *Article 6* and *Article 8* rights of P and the aspirant for party status are engaged; where they conflict, the rights of P must prevail;

viii) The judge should always consider whether a step can be taken to acquaint the aspirant with the essence of sensitive/withheld material; by providing a 'gist' of the material, or disclosing it to the applicant's lawyers; I suggest that a closed material hearing would rarely be appropriate in these circumstances.

Cobb J:

"38. It seems to me that a judge may well find, indeed would be highly likely to find, that it is necessary to withhold sensitive evidence/information from a third party applicant for party status in Court of Protection proceedings where disclosure would be likely directly to harm P, or otherwise indirectly harm or adversely affect P, such as by inhibiting P in his/her active participation in proceedings. It must be remembered that the whole purpose of the welfare jurisdiction under the MCA 2005 is to protect and promote the best interests of P (see by analogy with the child, Re A at §18); the proceedings must not become an instrument of harm to P (again see Re A at §21). "

“The Judge's rationale for non-disclosure appears to have been firmly and appropriately rooted in his objective of protecting and promoting the best interests of DK. In my view, his approach is unimpeachable. What, after all, is the purpose of the proceedings if it is not to protect DK and enhance her welfare interests? Mr O'Brien made the compelling point that DK did not choose to bring these proceedings; this is all the more reason why she should not now be put in a position whereby her rights and her privacy are challenged/compromised by the process which is designed to protect her. The protection of DK and the advancement of her best interests rendered as a necessity the withholding of the confidential material from KK; had the Judge disclosed the material, and/or acceded to KK's application for joinder, he would have defeated the object of the exercise.”

A View

- Such applications for withholding information will be *very rare.*
- There will need to be clear evidence of the impact of joinder or disclosure of information on P. No assumptions should be made.
- The litigation friend is under a duty to competently and fairly conduct the litigation. A central role of the LF is seeking to obtain P's ascertainable wishes and feelings. Early identification of whether party status or disclosure to a prospective party is important. Sometimes this is not possible, but some cases from day one have the red flags.
- Disclosure to lawyers only? Not sure about that.

ST JOHNS BUILDINGS
BARRISTERS CHAMBERS

Manchester
0161 214 1500

Sheffield
0114 273 8951

Chester
01244 323070

Liverpool
0151 243 6000

@SJBNews

stjohnsbuildings.com