MENTAL CAPACITY REPORT: PROPERTY AND AFFAIRS

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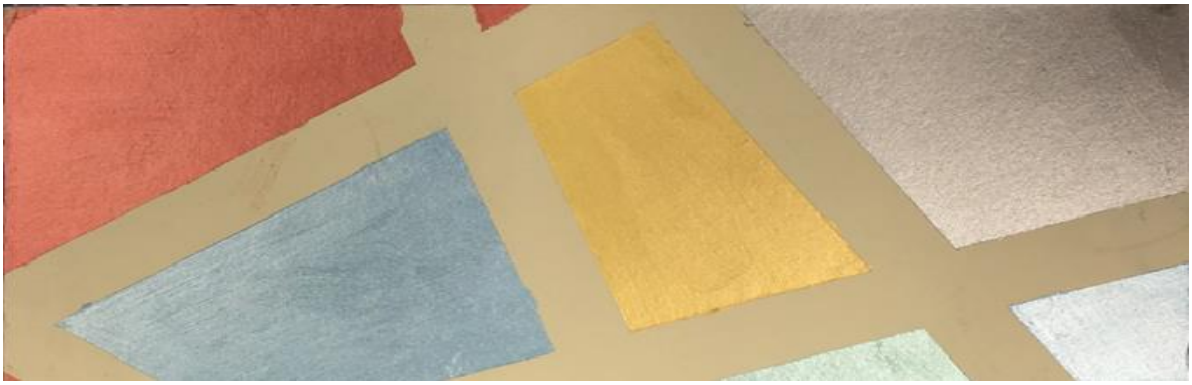

Welcome to the November 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Appeal considers parental consent to confinement, CANH withdrawal and the courts, and the latest DOLS figures;

(2) In the Property and Affairs Report: personal injury payouts and s.117 MHA 1983, calling in bonds and court approval of compromises through a human rights lens;

(2) In the Practice and Procedure Report: the Court of Protection Rules 2017 and what we can learn from the new Family Procedure Rules and PD concerning vulnerable witnesses;

(3) In the Wider Context Report: re-framing *Gillick* competence through MCA eyes, MHA changes coming into force, and CRPD developments and resources;

(4) In the Scotland Report: critical comments on practice rules, counter-proposals for guardians and parental consent to confinement from a Scottish perspective;

You can find all our past issues, our case summaries, and more on our dedicated sub-site here, and our one-pagers of key cases on the SCIE website. On our website, you can also find updated versions of our capacity and best interests guide, and new guide to without notice applications before the Court of Protection.

His fellow editors also take this opportunity to congratulate Neil on his very well-deserved nomination for the Bar Pro Bono award 2017.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

Personal injury payouts and s.117 MHA – the Court of Appeal pronounces

Tinsley v Manchester City Council & Ors [2017] EWCA Civ 1704 (Court of Appeal (Court of Appeal (The Master of the Rolls, Longmore and Irwin LJJ))

Deputies – financial and property affairs

Summary

We reported on this case at first instance, the facts being found here. The Court of Appeal defined the question before them as "*whether a person who has been compulsorily detained in a hospital for mental disorder under section 3 of the Mental Health Act 1983 and has then been released from detention but still requires "after-care services" is entitled to require his local authority to provide such services at any time before he has exhausted sums reflecting the costs of care awarded to him in a judgment in his favour against a negligent tortfeasor.*"

Mr Tinsley submitted that Manchester's refusal to provide after-care services unless it was satisfied that Mr Tinsley's damages awarded had run out, was unlawful in the light of the decision of the House of Lords (as it then was) in *Stennett* [2002] 2 AC 1127 (where it was decided that the relevant authorities providing s.117 after-care could not charge for those services).

The local authority argued that (1) that on the true construction of s.117 of the 1983 Act, Manchester was not obliged to provide after-care services if the claimant had been awarded damages for future care and (2) that to allow such a claim would offend against the principle against double recovery which has been established in the decided cases in the personal injury field, most notably by the *Court of Appeal in Crofton v NHSLA* [2007] 1 WLR 923 and *Peters v East Midlands Strategic Health Authority* [2010] QB 48.

Perhaps unsurprisingly [1] the Court of Appeal rejected the local authority's arguments and upheld the first instance judge's decision in a short and unanimous decision.

Lord Justice Longmore, who delivered the leading judgment described the argument that there was no duty to provide, arrange or provide after-care services if a claimant has funds for that purpose provided by a tortfeasor, as an "*impossible*" one on the basis that "*a refusal to pay*

[1] Although we understand Manchester are seeking permission to appeal.

for such services is effectively the same as providing such services but charging for them."

The Court of Appeal also had no trouble in disposing of the arguments about double recovery, finding that:

- There is nothing wrong or immoral about a claimant who has received damages for future care from a tortfeasor then applying to the state for care.
- Thus, unless there was some specific inhibition on deputies appointed by the Court of Protection arising from the risk of double recovery, there was no reason why Mr Tinsley should not now claim the benefit to which he may be entitled under s.117 of the 1983 Act.
- A court, when assessing a damages claim for a claimant, will of course seek to avoid double recovery by testing whether the claimant really intends to pay for private care, or to rely on state care.
- The local authority's concerns about claimants who have been awarded damages for future care in tortious claims then claiming local authority care while still having the funds for private care, might be overstated. "*Few claimants who have been awarded the costs of private care will voluntarily seek local authority care while the funds for private care still exist*."

Comment

Perhaps the most interesting point about this case is what the Court of Appeal had to say about the fundamental problem with the *Peters* decision. The Deputy in that case made an undertaking to the Court at the damages hearing that she would seek from the Court of Protection (a) a limit on her authority as the claimant's Deputy whereby no application for public funding of the claimant's care under section 21 of the 1948 Act could be made without further order, direction or authority from the Court of Protection and (b) provision for the defendants to be notified of any application to obtain authority to apply for public funding of the claimant's care under section 21 of the 1948 Act and be given the opportunity to make representations in relation thereto.

The idea behind this approach was that if the Deputy wished at some later date to claim state provision for the claimant, she would have to (i) put the defendant on notice and (ii) seek permission from the Court of Protection. There are two reasons why this as a scheme does not achieve the result that was intended. The first is because following the case of *Re SK* [2012] EWHC 1990 (COP) it is doubtful that a defendant tortfeasor would be able to bring him/herself within the definition of a person who can be joined to Court of Protection proceedings. The second reason is that, even if the defendant tortfeasor could be joined, the question for the Court of Protection would be whether it would be in P's best interests to make an application for state funded care. In making this decision, the court would not of course consider the position of the tortfeasors. It is almost inconceivable therefore that the court would conclude that it was not in P's best interests to be able to make such an application.

Bonds, liabilities and the Court of Protection

Re M [2017] EWCOP 24 (HHJ Purle QC)

Deputies – financial and property affairs

Summary

In this rather odd case, HHJ Purle QC had to consider whether he should order part of a bond held by E (the mother and deputy of M, the subject of the proceedings) to be called in in circumstances where it was said that she had failed to act in accordance with her deputyship duties by failing to pay a means tested contribution which the local authority assessed as due from M in respect of accommodation costs. Judicial review proceedings had previously been brought in M's name by his father in respect of the local authority's failure to fund M's education at a suitable establishment outside the local authority's area. The judicial review proceedings were ultimately compromised in an agreement between the relevant parties, including the local authority and the Learning and Skills Council, which provided (inter alia) for the LSC paying for M's educational provisions and the local authority paying both for the accommodation aspect, ancillary to the educational provision, and travel costs.

The local authority, following the agreed compromise, met the accommodation and transport costs, but sought to recoup some of the accommodation costs (but not any part of the transport costs) following means testing of M, whose means appear to consisted entirely of state benefits. E as M's Deputy refused to pay any part of the means tested costs. It is this refusal which was said by the local authority to amount to a failure to carry out her deputyship duties, and (inferentially) to have caused M's estate loss. The local authority therefore brought an application in on-running welfare proceedings involving M and her parents for part of the deputyship bond to be called in to enable it to recoup the costs it had incurred.

HHJ Purle QC rejected the application, construing the compromise agreement in the judicial review proceedings as both one which provided for unconditional funding on the part of the local authority, and one that was within the powers of the local authority to enter into. There was therefore no basis for the claim that the local authority sought to advance, and the application to call in the bond was rejected. In addition:

> *26.* […] *I am bound to say that I am puzzled as to the propriety of the procedure that has been adopted in calling in the bond in a summary way by an application made within the Court of Protection proceedings by the local authority. As Ms Bretherton QC demonstrated in relation to another claim, to which I shall come, the powers of the Court of Protection are limited. Leaving aside powers to grant focussed, declaratory best interest orders, none of which is relevant to the present case, the power is to take decisions for a person ("P") which P by virtue of incapacity is unable to take.*
>
> *27. The calling in of the bond requires the prior determination of whether or not E as Deputy is liable for loss caused to M by virtue of her failure properly to carry out her duties. The guarantor is only liable if E is liable. Thus it must first be*

established (a) that E failed properly to carry out her duties; (b) that this failure occasioned loss to M's estate.

28. There was at one stage, to my mind, an ambiguity in the way in which the local authority were approaching the matter, as it appeared to focus at least in part upon the impropriety of other expenditure incurred by E, and not the failure to pay the sums due to the local authority. However, Ms Bretherton QC confirmed in her submissions that this was not the legal basis of the claim to call in the bond. The sole complaint was that E, whilst Deputy, had not in fact paid - which she did not - any of the means tested contributions that the local authority required from M. That, however, did not give the local authority any cause of action against E, nor did it cause M's estate any loss. E, as Deputy, was answerable to M (not the local authority), the Public Guardian and the Court of Protection (acting in M's interests) in respect of any mismanagement of M's assets, but not to the local authority.

29. In my judgment where there is a disputed case of mismanagement, it is not appropriate for that dispute to be adjudicated upon in a relatively informal application, made to the Court of Protection, for the calling in of the bond. Once of course liability is admitted or established, the calling in of the bond is a routine matter. But first the liability of the person who is ultimately liable to the guarantor once the bond is called in must be established, and that can ordinarily only be established in proceedings brought by, or on behalf of, P - in this case M - against the officeholder in question, which in this case was E. M, of course, is not in a position to bring proceedings because he lacks capacity to do so. The local authority are not his representative. J is and J has not sought to make any complaint against E in this connection, nor do I see how she could do so. The Public Guardian might initiate the calling in of the bond but still the underlying liability of the Deputy must first be established because until such liability is established the guarantor is not liable under the bond. In a case therefore where the liability of the Deputy (and therefore of the guarantor) is disputed, that liability must first be established by proceedings brought by someone with standing to do so.

30. As far as the local authority is concerned they are a third party creditor of M, assuming for present purposes (contrary to what I have already held) that they are entitled to a means tested contribution from M. They have no cause of action against E, any more than any other creditor would be entitled to bring proceedings to enforce obligations owed not to the creditor but to that creditor's debtor. A creditor dealing with someone of full capacity may enforce payment of a debt, which may result in bankruptcy resulting in the appointment of a trustee in bankruptcy, who can then enforce the obligations owed to the bankrupt. But what is not legitimate is to short circuit all that by enabling creditors to bring proceedings in their own name for obligations owed not to them but to someone else, even when that someone else owes the creditor money. That is simply not the way in which the law of obligations works.

31. Accordingly it seems to me that the local authority's application was misconceived because (a) there must first be established a liability under the Bond, which is dependent on E being

> *liable for loss occasioned by her breaches of duty; (b) no proceedings have been brought to establish that liability; (c) only M, or his Deputy on his behalf with the approval of the Court of Protection, or possibly the Public Guardian, could bring such proceedings.*
>
> *32. In addition, the mere failure to make the means tested payments did not cause M any loss falling within the bond. Even if the means tested amounts were due, his estate was not diminished by the failure to pay them, so that there was no recoverable loss. As mentioned earlier, there was some ambiguity in the case as originally advanced because it appeared to be suggested that there was improper expenditure in other respects. The extent and precise amount of the supposed improper expenditure was not examined in detail, however, and, as recorded earlier, Ms Bretherton QC confirmed that the sole legal basis of the claim for calling in the bond was not by reference to what E spent on other things, but on her failure to make the means tested payments to the local authority. On that basis, M's estate has suffered no loss.*

It is clear that HHJ Purle QC was then asked to provide further reasoning in this regard, and did so:

> *35.* [Counsel for the local authority] *said rightly that the local authority is not seeking to recover the monies for itself but is merely seeking the calling in of the bond, which is properly a Court of Protection matter, and will result in the monies being paid into M's estate. I agree that once liability is established, or admitted under the bond, the calling in of the bond is a matter which the Court of Protection, or the Public Guardian, can effect. This is not however a case where liability is admitted, so it has to be established by appropriate action. I have sought to explain why, given that prior requirement, liability can only be established at the suit of M or those representing him (not the local authority) as M's estate has on this hypothesis suffered a loss, not the local authority. Further, it seems to me vital, in a case of disputed liability, that there should be a determination of that dispute with pleadings and the procedural safeguards that proper case management provides. Further, for the Court of Protection to determine such a dispute (which is a necessary pre-requisite of the calling in of the bond) would be beyond its narrow function and power of making best interest decisions for M. The Court of Protection can decide that proceedings to enforce the disputed liability be taken for the benefit of M, as he is in no position to take that decision himself. What it should not in my judgment do is try that dispute.*

HHJ Purle QC also rejected claims by M's parents that they had been caused loss by the acts of the local authority on the basis that the local authority (once it had taken over as deputy) had withheld monies due to M, leading his parents to spend monies of their own in looking after M and in providing for his necessities. The judge made clear not only was this not a matter that could be considered by the Court of Protection, but also that – substantively – it was one for economic loss, "*which presupposes that the local authority owes a duty to E and A directly. This is one of the most difficult areas of the law to make good and I have heard nothing which has persuaded me that E and A might even arguably get over that hurdle*."

Comment

This application was – to put it mildly – a surprising one for the local authority to make, both substantively and procedurally. It is perhaps unfortunate that HHJ Purle QC did not have drawn to his attention the decision of HHJ Hodge QC in *Re Meek* [2014] EWCOP1, in which HHJ Hodge QC had had cause to consider in some detail when the court will call in a bond. The two judgments are not inconsistent, but the earlier judgment provides useful context for the operation of the bond scheme. As HHJ Hodge QC had noted (at para 38):

> *Effectively, the bond scheme offers an alternative to a deputy bringing an action against a previous defaulting deputy to recover lost or stolen funds. It provides an immediate, and straightforward, mechanism by which the court can ensure that an incapacitous person is compensated for losses that have been incurred through the default of his deputy. It avoids the delay and expense which the incapacitous person would otherwise face in bringing proceedings against a defaulting deputy, who may be of questionable solvency, and enforcing any judgment obtained within those proceedings. The defaulting deputy does not get off scot-free, but he is instead likely to face proceedings brought by the bond provider.*

In the earlier case HHJ Hodge QC had held both that the decision whether to call one is is one to be taken for or on behalf of P (therefore on a "best interests" basis) and that (at para 93) that "*the appropriate course the Court of Protection should take in cases of default by a deputy is to call in the security bond almost as a matter of course*."

In *Re Meek*, the default was clear. In the instant case, the default was not clear, and it is therefore hardly surprising that the court was troubled at the idea of using the summary procedure for calling in a bond.

Protected parties, compromises and human rights

Penn v Revill [2017] EWHC 2630 (QB) (High Court (Dingemans J))

Other proceedings – civil proceedings

Summary

In this case, Dingemans J was asked to consider whether the provisions of CPR 21.10 are incompatible with the rights protected by article 14 of the European Convention on Human Rights when read with either article 6 or article 1 of the first protocol of the ECHR. CPR 21.10 requires that a compromise in civil proceedings with a protected party (i.e. a person lacking the capacity to conduct the proceedings) is not binding unless and until it is approved by the Court. This means that either the protected party or the other party to the compromise may withdraw from the compromise at any time before its approval.

The issue arose in the context of a situation in which the Defendant to a personal injury claim sought to resile from a compromise agreement reached with a protected party Claimant before it had been approved by the court (because of the impact of the reduction in the change in discount rate). It was common ground that, absent the impact of the ECHR, the Defendant would be entitled to do so. The question was whether the ECHR dictated a different approach.

The Claimant contended that the proper approach dictated by the ECHR and, indeed, the CRPD, was that set down in the family law proceedings:

> *46. Mr Weitzman* [for the Claimant] *referred to the approach which had been taken in Family law proceedings to compromises in Smallman v Smallman [1972] Fam 25. In that case the words "subject to the approval of the Court" did not prevent a binding agreement being made or entitle one party to resile from its terms before the court had been asked to approve it. The clause simply suspended carrying out the terms of the agreement until it had been approved. In Sharland v Sharland [2015] UKSC 60; [2016] AC 871 at paragraphs 27 and 28, Baroness Hale commented on differences between compromises in family proceedings and civil proceedings. Mr Weitzman's essential point was that the CPR could have adopted the approach to "the approval of the Court" in family law proceedings. Mr Weitzman submitted that such an approach would have been consistent with the United Nations Convention on the Rights of Persons with Disabilities, would have involved less interference with Mr Revill's ECHR rights, and would have been a proportionate approach to the issue of protected parties. Such an approach would have meant that Mr Damiani could not have withdrawn from the compromise unless the Court did not approve the compromise. Mr Grime* [for the Defendant] *submitted that the approach taken by the rule making committee to this provision of the CPR was a proper approach, well within the discretionary area of judgment for the rule-making committee.*

Dingemans J held that:

> *49.* [...] *the approach taken by CPR 21.10 to compromises and court approval was a proportionate means of achieving the legitimate aim of ensuring the protection of protected parties from: other parties; from themselves; and from legal representatives. This is because, as was common ground, the objects set out in paragraph 21 above required the implementation of a scheme which required court approval of a compromise made by a protected party before that compromise would bind the protected party. This was because the protected party required protection from inadequate compromises, other parties required a means of obtaining a valid compromise, and consequential matters of distribution of the damages and costs needed to be resolved. This means that, as was common ground, CPR 21.10 pursued a legitimate aim.*
>
> *50. Although it is right that the CPR could have been rewritten so that the approach in family law cases was adopted, in my judgment the approach taken by the CPR was proportionate. This was for two main reasons. First the decision whether to continue with the "civil cases" approach set out in CPR21.10 or the "family proceedings" approach was within the discretionary area of judgment for the rule-making committee. There are factors in favour of the family proceedings approach. In this case it would have meant that Mr Damiani would have been held to the compromise, assuming that the court approved the compromise. However there are factors in favour of the approach taken by CPR 21.10. These include the facts that: (1) the compromise rule now set out in CPR 21.10 is long established so that all*

practitioners know where they stand, meaning that everyone can enter into negotiations to attempt to compromise the action knowing the legal position; and (2) permitting all parties, including the protected party, to withdraw from a compromise before it had been approved maintained a fair balance between protected parties and the other party who might want to withdraw. The family proceedings approach requires permission from the court to withdraw from a compromise, and such permission might not be provided. This could create uncertainty with all the attendant worry and cost. It might also be undesirable, for example legal representatives acting in a case where a protected party had developed groundless fears about the effect of a compromise (which compromise would affect the rest of that protected party's life) and which groundless fears would never have been sufficient to justify a court refusing to approve the compromise, might withdraw from the compromise. This would enable the protected party to be reassured, providing as much autonomy as possible to the protected party consistent with the UN Convention, before a further compromise was made. That further compromise would either meet the protected party's concern or at least provide as much comfort as possible to the protected party. It was for the rule making committee to decide which approach between the civil damages and family proceedings approach to pursue. The approach taken by CPR 21.10 was well within the discretionary area of judgment accorded to the rule making body to make the relevant procedural arrangements to secure the good administration of justice and to protect the relevant rights engaged.

51. Secondly CPR 21.10 formed part of a series of rules which, among other matters, included the duty on the court to provide active case management. […]. *The powers of active case management permit the court to ensure that cases involving protected and unprotected parties are managed in a proportionate and efficient manner, thereby securing the good administration of justice and protecting the relevant rights.*

Comment

Although the attempt by the Claimant to maintain the benefit of the compromise agreement in this case was ingenious, it is hardly surprising that Dingemans J saw fit to maintain the conventional approach to CPR 21.10, as to do otherwise would have to have been to wreak havoc in such cases. A really rigorous approach to interpreting Article 13 CRPD (the right of access to justice, making one of its very rare outings in the English courts) would have involved a far more root and branch challenge to the very concept of 'protected party' (see further in this regard the article by Alex, Neil and Peter Bartlett here).

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Conferences

Conferences at which editors/contributors are speaking

Deprivation of Liberty in the Community

Alex is delivering a day's training in London on 1 December for Edge Training on judicial authorisation of deprivation of liberty. For more details, and to book see here.

Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing and speaking at this conference in London on 8 December which looks both at the present and potential future state of the law in this area. For more details, see here.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our last report of 2017 will be out in December. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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