HEALTH, WELFARE AND DEPRIVATION OF LIBERTY
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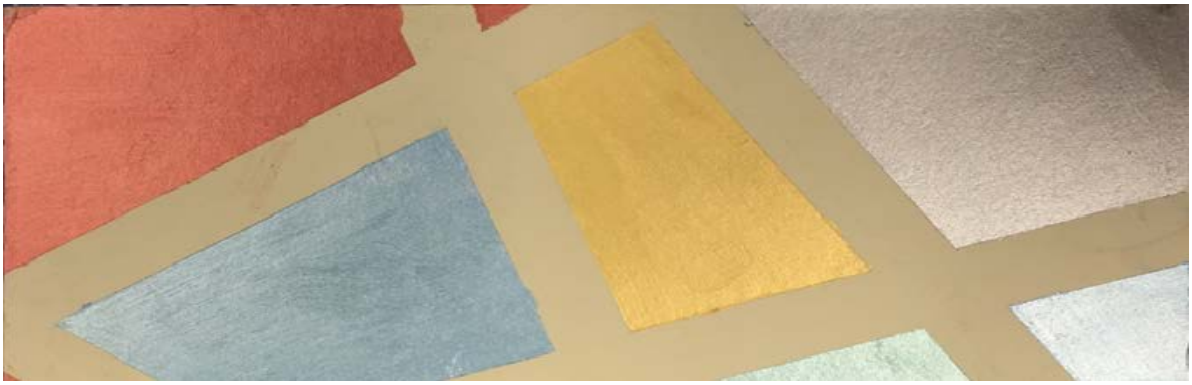

Welcome to the October 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: what to do where there is no reliable evidence of P's wishes and feelings;

(2) In the Property and Affairs Report: gifts, attorneys and deputies;

(3) In the Practice and Procedure Report: the perfect as the enemy of the good, and what to do when the situation changes;

(4) In the Mental Health Matters Report: the human rights consequences of outsourcing in the mental health context;

(5) In the Wider Context Report: the Law Commission consults on disabled children's social care law and the Grand Chamber of the European Court of Human Rights balances Articles 2 and 8 in the medical treatment context ;

(6) In the Scotland Report: AWI legislative reform on the cards?

There is one plug this month, for a free digital trial of the newly relaunched Court of Protection Law Reports (now published by Butterworths. For a walkthrough of one of the reports, see here.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

Editors
Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Nyasha Weinberg
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

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

Contents

What to do in the absence of wishes and feelings

Northumbria Healthcare NHS Foundation Trust v HX, CX, SX [2024] EWCOP 52 (T3) (Cusworth J)

Best interests – medical treatment

Summary[1]

HX was in her late 40s and suffered a cardiac arrest resulting in severe and irreversible brain injury with no prospect of recovery. She had been living with her son who opposed the withdrawal of treatment. Although they had not previously discussed end of life care, his view was that she would have wanted treatment "*to make her better or at least make her comfortable and give herself time to make a recovery*". Whereas her mother's view was that HX would want to be alive in these circumstances. The truth, however, was that there was very little evidence available as to what HX would want for herself in this situation. The hospital applied for a declaration that it would be lawful and in her best interests to receive palliative case.

Cusworth J reviewed the medical and family member's evidence. The main issue was whether there should be a delay before the decision was made. The medical evidence was that no treatment was available to improve her condition, and that further time would not be in her best interests. There was concern that she was unlikely to physically survive her illness or her admission to critical care over the coming weeks. If she did survive, she would do so to a catastrophically diminished level of neurological function. It was unlikely that HX would regain use of her higher functions (thoughts, feelings, communication, self-awareness, agency).

His Lordship decided that a delay would give the family more time to come to terms with her condition but would not serve to enable any treatment which could alleviate it. Although it could not yet be determined whether or not HX would eventually come to be diagnosed as being in a vegetative or minimally conscious state, it could be said with a very high degree of probability that her recovery trajectory would not enable her to progress beyond those levels. As Cusworth J noted at paragraph 63:

> *I must accept that if I had clear evidence that HX would favour a continuation of life-sustaining treatment in her current condition, it would be likely to be in her best interests for such treatment to continue. However, when I come to balance the factors for and against continuing the treatment, I am not able*

[1] Note, Nicola having been involved in the case, she has not contributed to this note.

to include HX's views as a determinative factor.

Instead, continued treatment would cause her great pain and distress if she were able to experience it, and that was all that lay before her with no real hope of recovery. His Lordship could not find that, if she had known of the situation that she would find herself in, she would have chosen to remain in her current condition indefinitely, with no prospect of ever returning to any level of function. Considering all the evidence, it was decided to be in her best interests to begin to implement for her a palliative care regime, the consequence of which (but not the aim) would be the end of her life.

Comment

This decision illustrates both the importance of knowing what P would want given their current predicament and the approach to be taken where P's view is not ascertainable. Following the line of case law since *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, it reflects the importance of considering best interests from P's vantage point. This CRPD-inspired move away from objective balance sheets towards P's perspective challenges the autonomous and non-autonomous decision-making binary in seeking to empower those who cannot decide themselves. However, as Lady Hale observed in *Aintree*, it is "*still a "best interests" rather than a 'substituted judgment' test, but one which accepts that the preferences of the person concerned are an important component in deciding where his best interests lie*."

Short note – when to rely on clinical willingness

Re CD (Treatment: Haemodialysis) [2024] EWCOP 55 T3 concerned a 66 year old man with end stage renal disease and dementia. He had been receiving haemodialysis since 2022, but following a third stroke in the summer of 2024, he had repeatedly pulled out the long-term catheter required for haemodialysis to be provided to him twice weekly. A short-term catheter had been inserted but could not remain in situ much longer, and the applicant Trust considered that the point had been reached where continued dialysis and insertion of catheters was not in his best interests. The court refused their application for declarations in support of that position. The Trust's evidence was that some doctors considered it unethical to insert a further catheter, but that there was one doctor who was willing to carry out the procedure if the court determined it was in CD's best interests. The evidence was that with a catheter and continued haemodialysis CD might live for 3-6 months and without it for only 1-2 weeks. There was a 10% chance the operation to insert the catheter would result in CD's death, and a further 10% chance that he would suffer another complication such as a further stroke. He would likely require monitoring and the use of mittens to prevent him pulling out the catheter again. Despite being seriously ill and approaching the end of his life, CD was able to demonstrate joy in the company of his family and was able to sing – there was '*a mix of burdens and benefits*' of continued life for CD. The court was told that some patients with capacity in CD's position would choose to continue with haemodialysis and others would not. CD's family were adamant that he would choose to continue – although as a Muslim he would not have wanted to suffer an intolerable burden from medical treatment, that stage had not been reached and he continued to enjoy aspects of life notwithstanding his illness. Weighing up all these factors, the court concluded that continued treatment was in CD's best interests and made a declaration that it was *"in CD's best interests and lawful for him to have a new tunnelled haemodialysis catheter inserted under sedation or general anaesthetic and to*

receive haemodialysis thereafter subject to any significant change in his clinical presentation and provided that the treating clinicians are willing to offer this treatment."

It is rightly unsurprising in a case where the medical evidence is that some patients with capacity would choose treatment and others would not, that the best interests decision is strongly influenced by the evidence of what the particular patient would have wanted and to reach a decision that gives effect to the patient's likely wishes or values. The declaration made hints at the difficulty that the parties in this case might find in the near future – whether doctors would continue to be willing to offer to re-insert a catheter under sedation or general anaesthetic to CD given the predictable deterioration in his condition, and whether agreement might be reached about when the burdens of treatment outweighed the benefits. To an observer, the case appears ideally suited to mediation given the apparently common ground that at some point it would be appropriate to move CD to palliative care to maximise his quality of life as he approaches his death.

Best interests on appeal

MA v A Local Authority & Ors [2024] EWCOP 48 (T2) (HHJ Smith)

Best interests – contact

Summary

This judgment (from February 2024 but only recently made available on Bailii) considered an application to appeal the decision we covered in the July 2024 report of District Judge Simpson to bar two spouses (MA and AA, both of whom lacked the material decision-making capacity) who had been married for more than 60 years, to be separated and have no contact with each other.

HHJ Smith, hearing the appeal, noted that there was no dispute that MA and AA lacked capacity to make decisions about their residence, care and contact with others. They were each deprived of their liberty in separate care placements; MA was considered to have challenging behaviours, and AA had significant health issues. They were initially placed in a care setting together, and it was reported that MA had resisted care being administered to AA, resulting in a deterioration of his condition. AA was hospitalised after a fall, and placed on a different floor of the care home when he was discharged; MA was not informed of this, and they were effectively separated from January 2023. In March 2023, the Court of Protection authorised a move for MA to a placement that was considered better suited to meeting her needs, with a plan to reintroduce contact between MA and AA. At an MDT meeting in May 2023, professionals considered that contact was detrimental to both MA and AA and should end. MA had not wished to engage in video contact.

The appeal was brought by the Official Solicitor on behalf of the wife, MA, and was opposed by the Official Solicitor acting on behalf of the husband, AA, as well as by an ICB and local authority which were responsible for providing their care.

HHJ Smith refused preliminary applications by MA that the appeal should be heard by a Tier 3 judge, and further evidence should be submitted. A rolled-up hearing on permission and the substantive appeal was listed on the eight grounds of appeal, set out at paragraph 20:

- Ground 1: 'When determining MA's best interests under s.4 MCA 2005, insufficient weight was placed on MA's past and present wishes and feelings';

- Ground 2: 'Insufficient weight was placed on AA's past and present wishes and feelings';

- Ground 3: 'Insufficient weight was placed on the mutual beliefs and values of both MA and AA that would be likely to influence their decision if they had capacity. The length of their marriage was compelling evidence of beliefs and values that would likely influence their decisions if capacitous and should have formed an integral part of the court's analysis.'

- Ground 4: 'the judge's analysis on the benefits/burdens of a move for AA to a separate placement was wrong in law,' as the judge saw 'no tangible benefit' to AA of such a move. This was resisted on behalf of AA as there was a complete lack of evidence that AA wished to live closer to MA.

- Ground 5: 'The judge's best interests' analysis on the benefits/burdens of contact between MA and AA was wrong in law as key factors are omitted.' A primary criticism under this ground was 'that the judge was wrong to produce only one table which dealt with both protected parties together. There should have been two separate and person-specific tables within the judgment, before a holistic decision was taken in respect of each protected party….Furthermore, there was a lack of evidence upon which to conclude that the option of exchange of letters and photographs was not available given there had been no proper trial of this means of contact.'

- Grounds 6 and 7: 'set out criticisms which go to overall approach adopted by the judge and raise no separate grounds but go to the balancing exercise. The appellant contends that the approach taken by the judge was overly risk-averse and, in respect of telephone contact, that the judge erred in his application of Aintree University Hospitals NHS Foundation Trust v James 2013 UKSC 67, formulating the wrong question.'

- Ground 8: 'The judge erred in his analysis under Article 8 ECHR and failed to provide adequate reasons for this decision.'

HHJ Smith granted permission to appeal on the first seven grounds, on the basis that the appellant had demonstrated an arguable case in respect of the overall balancing exercise undertaken by the judge. However, the appeal did not succeed on any ground.

After considering the "*proper approach of an appellate court to a decision of fact by a court of first instance*," HHJ Smith found that:

> *25.An error in findings as to wishes and feelings - past, present or both, has potential to undermine the validity of the overall best interest's analysis given the importance they are afforded in the statute and authorities. However, the finding complained of cannot be said to be wrong rather, it somewhat diminishes the strength of MA's present wishes. I do not accept that the judge mischaracterised MA's wishes nor that he reduced them to such extent that, if more firmly found in terms of strength and consistency and applied in the balance, it would have made any difference to his overall best interest's assessment.*
> […]
>
> *28.The failure to include the wishes and feelings in the balance sheet against the backdrop of lengthy written analysis within the body of the judgment is of little or no consequence and, in terms of*

any diminution by the judge's finding in terms of the strength of MAs wishes. Even if the judge made the strongest possible finding as to MA's wishes and feelings and consistency of expression, (which would not have been sufficiently nuanced or appropriate in any event) and found them to be the same as her past wishes, I am not persuaded that such a finding would or should have tipped the balance in terms of the balancing exercise under s4 Mental Capacity Act 2005.

29.In assessing and thus ascertaining MA's wishes and feelings the judge was entitled to draw not only upon her expressed words but also her behaviours and conduct which, as he notes, seemed to contradict her express wishes, and do not include any recognition or understanding of AA's failure to recognise her or the consequent distress this causes her. The District Judge was certainly entitled to conclude on the evidence that MA's requests to see AA were diminishing somewhat. Even if a more nuanced finding that MA's wishes to have contact continue to be daily and sometimes even vehemently and indignantly expressed, "people have pinched my husband", they would have to be placed in proper context. The judge expressly acknowledges the evidence that MA would be devastated if told she could no longer have contact with AA and weighed it in the balance.

[…]

32.The judge rightly, as in the case of MA, considered words and actions. He was entitled to examine AA's better presentation, the fact he is settled and presenting more happily and does not ask to see MA. His findings as to AA's wishes and feelings were consistent with the evidence before him, and I am not persuaded that any criticism can properly be advanced in terms of the weight the judge afforded AA's wishes and feelings - past or present in the circumstances of this case. It is clear that the judge fully engaged with the competing arguments advanced before him and undertook the necessary evaluative process, in accordance with the evidence.

HHJ Smith also noted that at the hearing, all "*parties accepted that face to face contact was not an available option given the difficulties and distress it caused MA and the consequential refusal on safeguarding grounds of both placements to facilitate it. Video contact also made MA distressed because AA would wander off. Continuing attempts at video contact at the time the judge heard the case had not got off the ground because MA was refusing it (and getting irritated by the requests which the court found could impact the good relationship between MA and the witness)*" (paragraph 38).

In respect of the other grounds, HHJ Smith consistently found that DJ Simpson had considered wishes, feelings, values and beliefs, and these had 'weighed heavily' on him, as had the value they had placed on the marriage. "It is plain from the entire tenor of the judgement that the court grappled with the issues on the basis that contact was the starting point rather than discounting it lightly as contended by the appellant" (paragraph 45). HHJ Smith considered that the first-instance judge "*was in the best position to determine the facts and to identify what was of most relevance to the decisions he had to make*" (paragraph 47). She accepted "*the proposition that such moments are intrinsically precious having value in themselves in that very moment, even if memories are not expressed, retained, or formed. I also note the point that MA was distressed when she saw J which gives context to her refusals to engage in video contact. However, the judge was faced with*

continuing refusals and concern that repeated requests would make MA resentful of those asking. He could not ignore that evidence, nor could he look at the earlier evidence of positives from the Spring without considering the later and more recent evidence given the degenerative and progressive nature of dementia as opined by Professor Burns. The judge rightly had to consider frustration, distress or anger occasioned by AA's inability to engage and would have been wrong to ignore it" (paragraphs 48-9).

HHJ Smith dismissed some of the latter grounds as follows:

> *57.Bluntly, the appellant's approach of minute scrutiny takes no account of the realities which faced the court. All evidence militated against AA being able to appreciate any such proximity or being able to manage MA's unfortunate behaviours in contact (even if a taxi ride were the key impediment to face to face contact) and thirdly, the application of judicial common sense that a move would be disruptive. I guard against any temptation to substitute my own view, but it is also clear that there was no evidence to support the contention that MA would benefit either from AA being geographically closer or that it may or may not increase her distress knowing he is so close but not responding. The overwhelming evidence was that AA is content, has made friends, including J, is relaxed and positive about his placement. I agree with the submission of Mr Garlick that not one piece of the evidential jigsaw supports such a move other than an assumption as to current wishes and feelings which ignore the realities. Even if it would better reflect long engrained values and beliefs, there was no evidence that AA wished to move in order to live closer to his wife. The District Judge was entitled to find that it was "clear and obvious".*

In relation to Article 8, HHJ Smith found that

> *62. The declaration sought in respect of breach of MA's article 8 rights after AA's fall in January when there was no capacity or best interests' assessment in respect of contact was not raised properly before the District Judge and thus cannot give rise to a ground of appeal, notwithstanding the judicial remarks recorded in the order of Judge Temple. My reading is that District Judge Simpson understood that he was being asked to make declaration as to ongoing breach. Defects in pleadings cannot be made good at the stage of appeal.*
>
> *63.As to breach of MA's article 8 rights, the court sanctioned the separation in March 2023 and approved staged approach to contact about which the judge heard much evidence. At paragraph 31 of the judgment, he addresses article 8 rights which are always accommodated in evaluation of best interests. He expressly sets out that the decision he has made is necessary and proportionate to protect MAs best interests. He need not, in a separate analysis devoted to European Convention rights, repeat all that he has already set out in his lengthy and careful judgment. His reasons had already been clearly stated and were soundly based on the overwhelming evidence.*

Comment

Over and above providing a further snapshot into the types of case which occupy the Court of Protection far more routinely than the ones which are heard by Tier 3 judges, the judgment reinforces how difficult it is to appeal a decision about the evaluation of best interests.

The Ombudsman, triaging and legal realities

Old-fashioned novels sometimes have elaborate subtitles. We might slightly impertinently suggest that if such a novel was being written about the decision of the Local Government and Social Care Ombudsman in the complaint against Stockport Metropolitan Borough Council (23 009 985), it would have the subtitle "in which the Ombudsman recommends that a local authority does something legally impossible." The complaint arose out of significant problems in the DoLS authorisation process for a Mrs Y. The story is summarised elegantly in the article about the case in the Local Government Lawyer, and we do not repeat it here. For present purposes, what we want to note is that one of the agreed actions was that "within three months, the Council will review its triaging procedures for DOLS requests to ensure they comply with the requirements of Schedule A1 to the Mental Capacity Act 2005."

The small problem with this agreed action is that there is no 'triaging' procedure within Schedule A1 to the MCA 2005. Schedule A1 was enacted on the basis that:

- In the event of a planned move into hospital or a care home, the standard authorisation procedure would and could be completed before the move took place (an authorisation being capable of taking effect up to 28 days after it is granted).
- In the event of a situation which could genuinely not be anticipated, and in which an urgent authorisation could therefore be in play, the process of considering whether to grant a standard authorisation would and could be completed before the urgent authorisation expired.

Schedule A1 is self-evidently law that does not match current realities, such that 'triaging' to identify which deprivations of liberty are 'merely' technical, and which are (or may be) causing harm to the person is required. Some might feel that it would be helpful if the Ombudsman (and, for that matter, CQC) explained how to square the law with current realities.

Editors and Contributors

Alex Ruck Keene KC (Hon): alex.ruckkeene@39essex.com
Alex 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 Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole KC: vb@39essex.com
Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She is Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. To view full CV click here.

Neil Allen: neil.allen@39essex.com
Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click here.

Arianna Kelly: Arianna.kelly@39essex.com
Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a full CV, click here.

Nicola Kohn: nicola.kohn@39essex.com
Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2022). To view full CV click here.

Katie Scott: katie.scott@39essex.com
Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click here.

Nyasha Weinberg: Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click here

Simon Edwards: simon.edwards@39essex.com

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

Adrian Ward: adrian@adward.co.uk

Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Adrian will be speaking at the European Law Institute Annual Conference in Dublin (10 October, details here).

Peter Edwards Law have announced their autumn online courses, including, Becoming a Mental Health Act Administrator – The Basics; Introduction to the Mental Health Act, Code and Tribunals; Introduction – MCA and Deprivation of Liberty; Introduction to using Court of Protection including s. 21A Appeals; Masterclass for Mental Health Act Administrators; Mental Health Act Masterclass; and Court of Protection / MCA Masterclass. For more details and to book, 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 next edition will be out in November. 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.

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

Chambers UK Bar
Court of Protection: Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and Community Care
Top Tier Set

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085