England and Wales Court of Protection Decisions

The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Neutral Citation Number: [2017] EWCOP 12
Case No: 12826376

COURT OF PROTECTION

Coverdale House
East Parade
Leeds
28/07/2017

B e f o r e :

SIR MARK HEDLEY SITTING
AS A JUDGE OF THE COURT OF PROTECTION

Re: CH (by his Litigation Friend, The Official Solicitor) — **Part 8 Claimant**

And

A Metropolitan Council — **Part 8 Defendant**

Ms Bridget Dolan QC (instructed by Switalskis) for the Claimant
Mr Sam Karim QC and Ms Natalia Levine (instructed by Local Authority Legal Services) for the Defendant.
The Local Authority were not represented and did not attend the hearing.

Hearing date: 10 July 2017

HTML VERSION OF JUDGMENT APPROVED

Sir Mark Hedley:

1. I have decided that this judgment should be given in public but should be anonymised on the usual basis. Accordingly nothing may be reported which is intended or might reasonably lead to the identification of the claimant or his immediate family.

2. This is an application on behalf of the claimant for approval of a proposed settlement of his claim against the Local Authority. Although this claim arises out of proceedings in the Court of Protection, it is in substance a claim for damages pursuant to the Human Rights Act 1998 (HRA 1998). Pursuant to the decision of Cobb J in *Luton* v SW [2017] EWHC 450 (Fam), the claim is brought under the Civil Procedure Rules as a Part 8 claim.

3. Under CPR 21.10 where a party is a protected party, any proposed settlement requires the approval of the court. CH is such a party, a declaration having been made that he lacks capacity to litigate. Whilst the Court of Protection Rules do not make specific provision for approving a settlement, the court has power to do so as explained by Charles J in *YA(F)* v *A Local Authority* [2010] EWHC 2770. Accordingly this court may consider approval of this proposed settlement under CPR 21.10.

4. The proposed settlement can only be understood within its own factual matrix, which must therefore be shortly set out. The material facts of this case are uncontentious.

5. CH is 38 and was born suffering from Downs Syndrome and has an associated learning difficulty. In 2010 he married WH and they have since lived together in CH's parent's home. They enjoyed normal conjugal relations until 27th March 2015.

6. Given CH's needs, the Local Authority has certain responsibilities towards him. In late 2014 he was assessed by a consultant psychologist, who concluded that he lacked capacity to consent to sexual relationships. The assessment had come about because CH and WH had sought fertility treatment. CH and WH were informed of this by a letter dated 27th March 2015 and WH was advised that she must abstain from sexual intercourse with CH as that would, given CH's lack of capacity to consent, comprise a serious criminal offence: see Sections 30-1 of the Sexual Offences Act 2003. WH had reasonably understood from the Local Authority that should she fail to comply, safeguarding measures would be taken which would require the removal of CH (or herself) from their home.

7. The parties did indeed comply and WH moved into a separate bedroom. CH could not of course understand why she did that. However in order not 'to lead him on' she significantly reduced any physical expressions of affection. The impact of all this on CH is not difficult to imagine.

8. The consultant psychologist made it clear that CH needed a course of sex education to assist him to achieve the necessary capacity. That advice was of course in line with the principle set out in Section 1(3) of the Mental Capacity Act 2005 (MCA 2005) which provides - "A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success." For reasons that have never been

satisfactorily explained, the Local Authority failed to implement that advice despite requests and protracted correspondence.

9. In the end CH's sister, SH, acting as his litigation friend instituted proceedings in the Court of Protection in February 2016. It required an order of the court to implement the original psychological advice and the relevant course finally began on 27th June 2016 and was completed within the expected time scale. The therapist reported that CH had made sufficient progress in all areas save the understanding of health risks from a sexually transmitted disease. However, given that CH and WH were in a committed monogamous and exclusive relationship, he questioned whether that was 'relevant information'.

10. In the event the single jointly-appointed court expert, a consultant psychiatrist, Dr David Milnes, advised that further sex education would be necessary and this was delivered by the same therapist in early 2017. On 19th March 2017 Dr Milnes then advised in writing that CH now had capacity to consent to sexual relations. That view was accepted by the Local Authority and on the 2nd May 2017 given effect by Cobb J's Declaration to that effect. At this point CH and WH were entitled to and did resume a normal conjugal relationship, which has subsisted.

11. A letter before action was then sent to the Local Authority on behalf of CH. This was in compliance with the guidance given by Keehan J in the case of *H v Northamptonshire CC* [2017] EWHC 282 (Fam) at paragraph 117. The Local Authority are of course a public body who are subject to the provisions of Sections 6- 8 of the Human Rights Act 1998. Section 6(1) provides - "It is unlawful for a public authority to act in a way which is incompatible with a convention right". The right in question is that provided by ECHR Article 8 - "(1) Everyone has the right to respect for his private and family life, his home and his correspondence." No-one seeks to suggest that an enforced abstention from conjugal relations is not on the face of it a breach of that right.

12. However, Article 8 is a qualified right and it is important to note where it is alleged the breaches occurred. There can be no criticism of the fact that there was an assessment in late 2014. Given the outcome, the letter of the 27th March 2015 was inevitable having regard to the provisions of the criminal law. The sex education was a response wholly consistent with Section 1(3) of the MCA 2005. Whilst there may have been legitimate debate about the necessity for the second course in early 2017, it would not be actionable given the advice tendered to the court and the court's acceptance of it. It follows that some incursions on the conjugal relations of CH and WH would have been justifiable by Article 8(2).

13. The gravamen of the claim is the delay in implementing the advised programme of education: that is to say the period between 27th March 2015, when conjugal relations were required to cease, (although the lack of capacity had been established in January 2015) and the start of the first sexual education programme on 27th June 2016. Given that the Local Authority would have needed some time to set up the programme, the actionable delay over all is one of not less than 12 months. The Local Authority has not sought to contest that conclusion nor that they are apparently in breach of Section 6(1) of the HRA 1998.

14. The relevant remedy is one in damages and is governed by Section 8 of the HRA 1998. There is no simple entitlement to damages which by Section 8(3) may only be awarded where an "...award is necessary to afford just satisfaction to the person in whose favour it is made." On an award being made the Court must by Section 8(4) "... take into account the principles applied by the European Court of Human Rights in relation to the awards of compensation under Article 41 of the Convention." In her Advice to the Court on the proposed settlement (for which the court is most grateful and from which it has derived

considerable assistance), Ms Bridget Dolan QC draws the relevant distinction between damages which are restitutionary (as in tortious or contract claims including those for personal injuries) and those which are vindicatory as under the HRA 1998. This may have significant impact on the actual quantum of damage.

15. Before turning to the proposed settlement itself one further observation may be ventured. This case is unusual; indeed thus far it may be unique in being applied to a settled, monogamous and exclusive married relationship. In those rare cases where the courts have made declarations of incapacity to consent to sexual relations, they have generally been cases of restraining sexual disinhibition to protect from abuse or the serious likelihood of abuse. However, logically the question of capacity must apply also to married relations and the criminal law makes no distinction between settled relations and sexual disinhibition or indeed between sexual relations within or outside marriage. Society's entirely proper concern to protect those who are particularly vulnerable may lead to surprising, perhaps even unforeseen consequences. Such, however, may be the price of protection for all.

16. The Defendant has made the following offer-

    (i) to make a formal apology to CH for the delay from January 2015 to June 2016 in providing him with the sex education to which he was entitled;

    (ii) to pay to CH damages in the sum of £10,000 as a result of that delay;

    (iii) to pay CH's pre-action costs associated with this claim in the sum of £7,395 (inclusive of VAT);

    (iv) to pay CH's costs of the Part 8 application and seeking the approval of the court for this settlement (in respect of which outline agreement has been reached).

17. In considering this offer two extraneous matters need to be taken into account. First, WH has pursued her own claim under the HRA 1998 in respect of these matters and that claim has been settled but on terms that are confidential to those parties. Secondly, the Local Authority has agreed to pay CH's costs of the Court of Protection proceedings agreed at £21,600 (inclusive of VAT). Although that order is outside the scope of this approval, it is relevant to it in that it ensures that no recouping of costs against damages will occur under Section 25 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

18. In those circumstances the only remaining relevant question for my consideration is the quantum of damages. The litigation risks on liability are effectively negligible but of course there may be some possible costs implications over offers. In short this can really be considered on a full liability basis.

19. Thus I turn to the vexed question of the appropriate quantum of damages for CH's deprivation for at least 12 months (as explained in paragraph 13 above) of normal conjugal relations with his wife. For all his disability, CH is psychologically and emotionally resilient for there is no evidence of any long term impact on him. That said, the impact at the time must have been profound not only for the loss of sexual relations but for two further matters peculiar to him: first, he would have been unable to understand why what was happening should be so, and secondly, in order as she put it, "not to lead him on", WH understandably and forseeably, withdraw to another bedroom and withheld much physical affection.

20. It is not possible to find any close, let alone exact comparators in reported cases in England and Wales either in tort law or under the Convention relevant to compulsory cessation of

conjugal relationships. In her advice, Ms Dolan QC ranges over a possible field but in my judgment all one can conclude is that the figure offered lies within the very wide bracket indicated by these possible comparators. I think that this is a case where a broad, instinctual view is required.

21. Nothing that I have seen, at least in relation to vindicatory damages, would justify the award of a figure in excess of £20,000. The possible range would suggest the lower end as being less than £10,000. Accordingly I regard the offer as being within but towards the lower end of the range, uncertain though that range may be.

22. At this point, the court needs to bear in mind three matters: First, the matters set out in paragraph 17 above; secondly, it is accompanied by a public apology; and thirdly, it averts contested proceedings which would be likely to be difficult for and unwelcome to CH and which would delay the payment of compensation. It might also involve intrusive enquiries into the nature and quality of the couple's sexual relationship for all that was known was that it was 'normal' and that, so far as CH was concerned, 'it made him happy,' as well as now continuing on as satisfactory basis to the couple as had been the case before.

23. Having reflected on all these matter, assisted as I have been by Ms Dolan QC's written and oral submissions favouring approval, I have concluded that the proposed settlement is indeed in the best interests of CH and reflects a fair outcome to these proceedings. Accordingly the litigation friend is authorised to accept this offer on behalf of CH.

24. Since CH does not have a property affairs deputy, it has been agreed that any funds will be paid into a Court Funds Office Account. The Official Solicitor will not continue beyond this stage as litigation friend (in accordance with his established practice) and is content that he should be succeeded by CH's sister, SH, who is content to act. £10,000 will therefore be paid to this account. I authorise an immediate payment out of £2000 to allow an ensuite bathroom to be added to CH's matrimonial bedroom. Given the modest sum remaining and the highly responsible attitude demonstrated by SH throughout this matter, I would by no means be averse to the whole sum being paid out to her to use (as she would) for CH's benefit; such a course might well save time and expense all round. This, it should be noted, is merely an expression of view; any order is confined to the sum of £2000.

25. I have set the matter out at some length as it seems to me to raise some important questions both about liability and damages under the HRA 1998 but also about the risks or cost of protecting the vulnerable. Many would think that no couple should have had to undergo this highly intrusive move upon their personal privacy yet such move was in its essentials entirely lawful and properly motivated. As I have said, perhaps it is part of the inevitable price that must be paid to have a regime of effective safeguarding.

Mark Hedley
