Neutral Citation Number: [2023] EWCOP 26

Case No: COP 13607573

IN THE COURT OF PROTECTION
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005
IN THE MATTER OF RB
On appeal from the decision of HHJ Cronin

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2023

Before :

MR JUSTICE PEEL

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Between :

Wiltshire County Council — **Applicant**
- and -
(1) RB
(by her litigation friend, the Official Solicitor)
(2) A NHS Foundation Trust
(3) NHS Bath and North East Somerset, Swindon and Wiltshire Integrated Care Board

Respondents

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Conrad Hallin (instructed by Biscoes Solicitors) for the first respondent RB (the appellant to this appeal)
Adam Fullwood (instructed by Wiltshire Council Legal Services and Bevan Brittan) for the applicant and third respondent
Saara Idelbi (instructed by Mills and Reeve LLP) for the second respondent

Hearing date: 16 June 2023

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Approved Judgment

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This judgment was handed down remotely at 10.30am on 23 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

MR JUSTICE PEEL

Mr Justice Peel :

1. On 5 May 2023, sitting in the Court of Protection at Bristol Civil and Family Justice Centre, HHJ Cronin declared that RB lacks capacity to decide:

   i) to consent to be discharged from the hospital to live at the bungalow; and

   ii) what personal care she should receive.

   As is made clear in her judgment, the crucial element of her finding was founded on an inability on the part of RB to "use or weigh [the information relevant to the decision] as part of the process of making the decision" (**s3(1)(c) of the Mental Capacity Act 2005**). She was satisfied that the other limbs at (a), (b) and/or (d) did not enable her to make a finding that RB is incapacitous.

2. In respect of litigation capacity, she made an interim finding of lack of capacity under **s48 of the MCA 2005,** on the basis that further evidence is required to reach a final conclusion.

3. RB, through the Official Solicitor as her litigation friend, appealed. On 12 June 2023, Judd J gave permission to appeal on 4 of the pleaded 7 grounds and listed the substantive appeal for before, as it transpired, me.

4. There is some confusion about the identification of the grounds of appeal in that the appellant's skeleton argument sets out grounds which are not the same as the formal Grounds of Appeal. Further, one of the headings for the grounds in the skeleton (ground 3) is in rather more limited form than the accompanying narrative. However, I am satisfied that Judd J gave permission to appeal in respect of the grounds numbered and identified in the skeleton argument, and on the basis of the narrative for each ground. I approach this appeal accordingly.

5. The appeal is not opposed by the Local Authority or the ICB. It is opposed by the Health Trust (save in respect of Ground 6, on which it is neutral) which holds responsibility for the area where RB is currently hospitalised. It is common ground that the hospital ward is not an appropriate environment for RB, and her presence allocates resources away from other requirements. The Hospital Trust is in the uncomfortable position of effectively housing RB until these proceedings resolve her future. It does strike me that the Trust's position in the litigation is somewhat peripheral. Its interest at a practical level is to secure the departure of RB from the hospital. The outcome of capacity and best interests assessments is only of relevance to the Trust in terms of potential delay. In saying this, I am not in any way downplaying the Trusts' commitment to the wellbeing of RB.

6. By rule 20.14 of the Court of Protection Rules 2017, the appeal shall be allowed where the decision of the first instance judge was:

   i) Wrong; or

   ii) Unjust, because of a serious procedural or other irregularity in the proceedings before the first instance judge.

Only the first of these two grounds is relevant in this appeal.

7. The wording cited above is almost identical to the appeal provisions in both the FPR 2010 and the CPR 1998. My task is to review the hearing below, not attempt to re-hear it.

8. RB is a 29 year old woman diagnosed with Autism Spectrum Disorder which drives her current presentation. She is intelligent and literate, having achieved 11 A* grades at GCSE. She has an unusual grasp of the Court of Protection process. She is described as logical in her thought processing. Since 2015 she has been electively mute, and chooses to communicate in writing or by pointing to words on an alphabet board. She has rheumatoid arthritis and was found in 2021 to have capacity to decline medical treatment for that condition, as a result of which her mobility is severely impaired.

9. Since entering sixth form, she has had several admissions under the MHA 1983. She has been in a number of placements which have been unsuccessful. In June 2020, she was found to have capacity to decide where to live after leaving a community placement. In August 2020, she was detained in a psychiatric hospital for over 2 years. On 3 January 2023, she was discharged to a bungalow with a 24/7 package of 2:1 care. She was clearly deeply unhappy there, partly as a result of being transported against her will and subject to physical restraint. Over two days, she undertook several acts of deliberate self harm including attempts to strangle herself. The judge below received evidence from the expert consultant psychiatrist that "….. *a return would be likely to cause her real physical, emotional and psychological injury that has the potential to be lifelong"*.

10. On 5 January 2023, RB herself emailed the Court of Protection seeking the court's assistance. She also contacted the emergency services as did her carers. She was admitted to a general hospital on 7 January 2023 where she remains to this day. She is medically fit for discharge but has consistently said that she does not want to return to the bungalow, nor does she agree to return there. The hospital is entitled to take steps to remove RB from its premises, and at some point, if it has to, it will.

11. Various interim hearings have taken place. A direction was made for the instruction of a consultant psychiatrist, Dr Camden-Smith, to report. Dr Camden-Smith initially emailed to say that RB would not engage with her, and accordingly suggested there was no point in reporting further. The parties nevertheless framed a series of questions for Dr Camden-Smith to answer. She encompassed her replies within a report of 3 May 2023. Because of RB's lack of engagement, the report was mainly based on written material and conversations she had with others who had worked with her.

12. In her report, Dr Camden-Smith said that RB staying in hospital is not an option and she should be moved as soon as possible. However, "*she should be given a viable option that is not the bungalow…the alternative option should be presented to her when it is a concrete and realistic possibility".* The evidence is that R struggles with "what if" scenarios.

13. On 5 May 2023, at the hearing below, Dr Camden-Smith gave evidence, saying that RB lacked capacity to make a decision about agreeing to hospital discharge on the

basis that she was unable to weigh or use information about living in the bungalow. On a number of occasions, she described this opinion as her "*best guess"*.

14. After Dr Camden-Smith's oral evidence had concluded, RB contacted the court directly and provided her own written position statement which says:

'Not obeying the relevant authority is not equivalent to a lack of capacity or symptom of mental impairment. Not doing what a particular profession tell you to do is not indistinguishable to a lack of capacity or mental impairment. It is not a decision, if there is only one option. It is submitting to the will of the authority who have sunk cost into the option. I have no interest in living as wished.'

'I do not wish to as I have inadvertently done so contribute to the enactment of my own terrors'. This sentence I take to be a reference to returning to the bungalow.

15. As the judge said, RB's document is "a letter which is articulate, on the point and can be easily understood".

16. The position statement prepared on behalf of RB for the hearing below suggested that the case should be adjourned in order to enable the ongoing search for alternative placements to be continued, so that RB could be presented with a range of concrete options. The position statement pointed out that RB has indicated she is open to going to other placements, including care homes, which would, if specifically identified, be concrete options, but not to the bungalow.

17. At the conclusion of the hearing, the judge produced the first draft of the order which declared that RB lacked capacity to decide "*where she should live*". Counsel instructed on behalf of RB by email to the judge requested an amendment to the order on the basis that the hearing had proceeded as a decision about hospital discharge. The judge partially accepted the request and altered the declaration to capacity to decide "*to consent to be discharged from the hospital to live at the bungalow*", which seems to me to be a significantly different declaration from either her original formulation, or that requested on behalf of RB.

Ground 1: When addressing capacity to make the relevant decision the learned judge did not correctly identify either the matter in issue or the decision to be made

18. It is well established that the court must identify the correct formulation of the subject matter in respect of which it is said that that the person (in this case RB) is unable to make a decision for herself, and then identify the information relevant to that decision, which includes information about the reasonably foreseeable consequences of deciding one way or another: paras 68 and 69 **of A Local Authority v JB [2021] UKSC 52**.

19. This was a difficult decision for the judge, as she acknowledged in her judgment. It seems to me at the hearing there was some confusion as to precisely what capacity issue required adjudication. The capacity declaration made by the court directly linked discharge from hospital to a return to the bungalow. The judge in her judgment said "*Is she to be discharged from hospital (in which case she can only go to the bungalow)?"*. In other words, the specific decision upon which the judge determined

lack of capacity included two components: (i) discharge from hospital and (ii) return to the bungalow. That is how it appeared in the final version of the order, albeit not in the first version drafted by the judge.

20. I observe that in eliding these two components in this way, the process adopted by the court departed from that recorded by agreement in a court order dated 21 February 2023:

'The information relevant to a decision regarding hospital discharge is:

a. That she is medically fit for discharge, i.e. has no physical reason to be occupying an acute medical bed.

b. That there is a place to which she can be discharged, i.e. the bungalow.

c. That there may be other places to which she could be discharged (to be confirmed by the applicant by 8 March 2023).

d. That if she does not agree to go, the [hospital] will take steps to remove her against her will, and the nature of those potential steps, including: potential legal proceedings; potential use of physical force and the police (if she is deemed to have capacity); and potential use of general anaesthetic (if she is deemed not to have capacity), following a further decision of the court'

The approach envisaged in this recital was that the capacity decision of RB to be assessed was discharge from hospital, and within that a number of pieces of information should be weighed including (but not limited to) the availability of the bungalow. Instead, a different capacity decision was assessed by the judge at the hearing, namely discharge from hospital and return to the bungalow. To put it another way, discharge from hospital was predicated on the basis that the only possible outcome was a return to the bungalow, and the capacity decision was therefore made on the basis. Instead, it should have been assessed as set out in the recital, with a more holistic view of the circumstances.

21. I note also that, although the recital to which I have referred appeared to indicate the required subject matter to be determined, no interim order prior to the final hearing specifically set out the precise subject matter on which a capacity decision was sought. In particular, in my judgment the nexus of hospital discharge and accommodation at the bungalow was never set out as the subject matter of the capacity decision; with hindsight, a clearer formulation of the issues for the hearing should have been articulated.

22. By eliding discharge and accommodation at the bungalow, it seems me that the judge may have unwittingly fallen into an "outcome approach" which is inconsistent with autonomy and the subjective patient's individuality, and does not form part of the framework of the Act; para 13 of **R v Cooper [2009] 1 WLR 1786.**

23. This is demonstrated vividly by RB herself who, in the letter to which I have referred, clearly thought that she was being presented with one option. She was being presented with a decision which to her mind was whether to return to the bungalow or not; essentially a fait accompli. Dr Camden-Smith refers to this in her report: *"[RB] is*

aware that the hospital wishes to discharge her, and that currently the only option available to her is the bungalow". That was a stark option with no nuances and, what is more, one that is, on the evidence of the expert, likely to expose her to grave physical, psychological and emotional harm.

24. Dr Camden-Smith's report at para 35 says: "*I told [RB] in the email that she cannot stay in hospital and that she will end up being discharged to the bungalow if she cannot make a decision".* Given that the judge, understandably, paid particular attention to the evidence of Dr Camden-Smith, my sense is that as a result she was led away from a focus on discharge to a focus on living arrangements. That is reinforced by the tenor of her judgment in which she said: *"The decision the court is ultimately asked to make, if RB cannot, is a decision about: first, where RB should live on her discharge from hospital".*

25. Thus, the court below defined the issue by framing it as discharge followed by return to bungalow, and in so doing started with outcome rather than capacity. It also seems to me that there was a degree of confusion as to the relevant question. Did it relate to (i) hospital discharge, or (ii) living arrangements or (ii) a combination of the two?

26. It is well established that capacity is decision specific: see s2 of the Act and **A Local Authority v JB [2021] UKSC 52 at 67-71.** In my judgment, there were, or should have been, two separate issues, and two separate capacity decisions, to consider, namely:

    i) Did RB have capacity to consent to hospital discharge? That evaluation depended upon, inter alia, the information recorded in the order of 21 February 2023. Inevitably, that includes a possible return to the bungalow (it would be unrealistic to separate this out) but that was not the only possible option, nor the only factor to be taken into account. Others included the Local Authority continuing searches for alternative placements, or RB simply refusing to leave hospital and accepting the potential consequence of a forced departure which might include living in a hotel or living rough (as she has done before). The latter might be deemed an unwise decision, but by s1(4) of the MCA 2005 that is not of itself indicative of lack of capacity. Moreover, as Dr Camden-Smith said, it is not irrational to refuse to leave hospital if the only alternative put to her is somewhere she adamantly refuses to go to because of previous traumatic experiences.

    ii) Does she have capacity to consent to going to the bungalow? That, it seems to me, would also need to be considered in the light of other relevant information such as alternative placements (as identified by Dr Camden-Smith, concrete options are required) and a full understanding of what caused her so much distress at the bungalow in the first place.

27. I also take the view that the approach taken risked, unintentionally, conflating capacity and best interests in RB's mind. The expert told her "*that she will end up being discharged to the bungalow if she cannot make a decision"*. For someone who thinks in logical steps, that suggests others have determined the bungalow as the place where she must live.

28. The linkage of the two issues of discharge and return to the bungalow is what, according to Dr Camden-Smith, leads to a declaration of lack of capacity because RB finds the inclusion of the bungalow in her thought process frightening and confounding. She would likely be able to choose between A or B if the bungalow were not included as an option, but if unable to separate hospital discharge from the bungalow then she is unable to weigh and use the relevant information to make a decision. The judge recognised that this is a difficult concept, since it is the second decision (the bungalow) which impacts the first decision (the discharge). In my judgment, this evidence of Dr Camden-Smith, and the conceptual difficulties flowing therefrom as identified by the judge, demonstrates that eliding two capacity decision issues into one led to error.

29. As I noted earlier, the capacity declaration made by the judge altered significantly from (i) in its first iteration, where RB should live, to (ii) in its second, and final, iteration, discharge from hospital to the bungalow. I sense from this change how the case departed from a capacity decision about hospital discharge (which was how it had been case managed on 21 February 2023) to a capacity decision about where RB should live (the first version of the order) and ultimately to combined capacity decisions about discharge and living at the bungalow (the final version of the order).

30. In my judgment, had the judge considered the two decisions separately, she may (I emphasise the word "may") have reached a different decision on capacity to consent to discharge, and would have needed to go on to consider the question of returning to the bungalow as a separate capacity decision issue.

31. I well understand the difficulty faced by the judge, who described this as an enormously difficult decision. But in the end, I have reached the conclusion that the judge was wrong to elide the declarations as she did.

32. That disposes of ground 1.

Ground 2: The learned judge erred by merely adopting the expert's conclusion on capacity, and not performing her own analysis of RB's ability to make the decision in question

33. I accept, as the authorities make clear, that the decision on capacity is one for the judge, not the expert. I am, however, not persuaded that the judge simply adopted the expert's evidence without any independent analysis. She said herself in her judgment that the decision "*is one that the court needs to make*". It is clear to me that the judge faced an immensely difficult decision, and applied her mind to it conscientiously. She did not simply parrot the expert's conclusions. Due to time constraints, she delivered an ex tempore judgment and I have no reason to suppose that she did not take into account everything she had read and heard. On the contrary, my assessment is that the judge approached the case with care, conscientiousness and sensitivity. This ground of appeal is dismissed.

Ground 3: The expert had taken an erroneous approach to capacity, confusing the concept of having mental capacity with the exercise of that capacity. By merely adopting the expert's decision, without any reasoning of her own, the judge fell into the same error

34. RB is presumed capacitous (s1(2) of the **MCA 2005**). To find otherwise the court must be satisfied that:

    i) At the material time she is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain (the so called 'diagnostic test'); and

    ii) She is unable (a) to understand the information relevant to decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate her decision whether by talking, using sign language or any other means (the so called 'functional test'); and

    iii) There is a causal link between the functional test and the diagnostic test.

35. In my judgment, the reasoning adopted by the judge in reaching her decision is not entirely clear, even allowing for the exigencies of court life and the nature of an ex tempore judgment.

36. The bar must not be set too high when determining capacity: **PH and A Local Authority v Z Ltd [2011] EWHC 1704 (Fam).** The judge concluded that lack of ability to use and weigh information *"may come about because of the inclusion in the information of the bungalow, which she has such a negative feeling about…*.". But I am not convinced that the judge sufficiently weighed on the other side of the scales:

    i) The evidence of the expert that RB's fear of moving to the bungalow was not irrational. It is not clear to me why that fear alone, which is reasonable and understandable, constitutes a factor (indeed, as I see it, the only real factor relied upon by the judge) which rebuts the presumption of capacity.

    ii) The fact that in simply accepting that RB would have to go to the bungalow if discharged from hospital, there was no analysis of capacity in the context of how to transport her there and use of general anaesthetic, which had previously been highly traumatic for her. This was potentially of particular relevance given that RB's position statement to the judge had said that if she was to receive general anaesthetic, she would want not to wake up. On the face of it, this was somebody weighing up one aspect of moving to the bungalow and expressing a view which, while highly charged, was reflective of the acuteness of her previous trauma.

    iii) RB's clearly expressed wishes and feelings set out, inter alia, in her letter to the judge which the judge found to be articulate.

    iv) The evidence that RB is aware, and understands, that the hospital wants to discharge her and that she would be bound to be returned to the bungalow.

    v) The fact that RB had spoken of a willingness to go into a care home which is an example of someone apparently weighing options, even if that option was not presented to her as part of the assessment of her capacity in the context of hospital discharge. Equally, she has in the past lived rough, which she might willingly prefer to living in the bungalow.

vi) She was found capacitous in earlier proceedings concerning serious medical treatment and community placements.

vii) The elision of discharge and the bungalow to which I have referred, which to RB's mind had a pre-determined outcome, rather than giving her an autonomous choice.

viii) The desirability of offering her concrete options whereas her she was being presented with no option.

ix) The intelligence of RB who has an unusually high level of understanding of the Court of Protection process.

x) The fact that the judge was, to use her own word, "wary" about making a finding on RB's litigation capacity, which is relevant to capacity in other areas such as hospital discharge. As Munby J (as he then was) said at para 49 of **Sheffield City Council v E and another [2004] EWHC 2808 Fam:**

> "Whilst it is not difficult to think of situations where someone has subject-matter capacity whilst lacking litigation capacity, and such cases may not be that rare, I suspect that cases where someone has litigation capacity whilst lacking subject-matter capacity are likely to be very much more infrequent, indeed pretty rare"

If the judge she was guarded about litigation capacity, she needed to be extra cautious when considering subject matter capacity.

37. It is not for RB to establish capacity or justify her autonomous wishes; she is presumed to be capacitous. To interpret a refusal to contemplate returning to the bungalow as indicative of lack of capacity, or causative of lack of capacity, as the expert seems to do, should be weighed against an alternative explanation that she was simply expressing a capacitous wish not to go there again after her prior experiences. In my judgment, the judge did not adequately weigh up these competing factors in circumstances where by any measure a strongly held wish not to return to the bungalow, with clearly stated reasons, was understandable. This ground of appeal is allowed.

Ground 6: Insufficient evidence, analysis or reasoning in the decision regarding capacity to decide upon care

38. The question of capacity to decide upon care seems not to have been referred to in the judgment, but was added upon a request for clarification. There does not appear to have been any substantive analysis and in the circumstances this ground, too, in my judgment, should be allowed.

Conclusion

39. At the end of this somewhat long judgment, I summarise my principal conclusions as follows:

i) To elide discharge from hospital and proposed living arrangements, and present them to RB as the only option, wrongly conflated separate decisions which needed to be assessed on their separate merits, and was based on the false premise that living in the bungalow was the only option.

ii) Insufficient weight was given to the various factors referred to above which in my judgment pointed in the direction of capacitous decision making.

iii) The decision about personal care was not adequately reasoned.

40. Although I have concluded that in the end the judge fell into error, I am not convinced that the case was presented to her as clearly as it might have been, identifying the issues accurately and clearly. No order before the hearing set out with clarity the issues to be decided and as a result the elision of discharge and best interests was allowed to develop unchecked. Further, I observe that in my view the judge approached the case with great care and sensitivity. Nevertheless, for the reasons given, I will allow the appeal and remit for a rehearing.

41. As to the way forward, I understand that this case can be accommodated on 27 June 2023 for 3 days before HHJ Robertshaw on 27 June 2023. I propose to allow the appeal, and remit for rehearing. The next hearing should address capacity and (if relevant) best interests.

42. I suggest (but invite comments from the parties) that the capacity issues to be considered are, in this order:

i) Does RB have litigation capacity?

ii) Does RB have capacity to consent to hospital discharge?

In considering this the court should direct itself to the relevant factors identified in the order of 21 February 2023 and should in particular consider the position if the bungalow is a residence option or, in the alternative, is not a residence option.

iii) Does RB have capacity to decide where she should live?

iv) Does RB have capacity to make decisions about personal care?

43. For the avoidance of doubt, I do not consider that I can or should substitute my own decision on these capacity issues. Nor should this judgment be read as indicating towards one particular outcome or another. The judge will have a clean sheet of paper to consider the issues.

44. I suggest the best interests decisions (depending on the capacity finding) will be in respect of:

i) Discharge from hospital; and

ii) Living arrangements; and

iii) Personal care.

45. Finally, I consider that I can and should make a general comment about the bungalow. I appreciate the complexities of this case which is challenging to all involved. I appreciate also the immense pressure on resources. Nevertheless, from what I have seen and heard, for RB to return to the bungalow risks causing her profound harm. What happened during her time there is shocking. The expert's view about the potential impact on her physically, emotionally and psychologically is compelling. Transportation would almost certainly take place against her will, and require physical restraint. It seems to me that alternative options simply have to be sourced. The expert says that RB should be given a viable alternative that is not the bungalow, and I agree. If the bungalow is removed from the equation, it is possible (indeed, I suspect, likely), that capacity and best interests issues may well resolve themselves.