Horwich Farrelly

THE *large & complex injury* SPECIALISTS

Insight

from Horwich Farrelly's Large & Complex Injury Group

Issue #166 | 16 July 2020

Alexander House
94 Talbot Road
Manchester
M16 0SP

T: 03300 240 711
F: 03300 240 712

www.h-f.co.uk

Welcome to Insight

Welcome to this week's edition of Insight in which we report cases relating to:

- The presumption of capacity under the MCA 2005
- Costs issues in two different types of disputes.

Malcom Henké
Partner & Head of LACIG

Mental Capacity

London Borough of Tower Hamlets v PB (Protected Party) (2020) EWCOP 34

This application concerned PB who was a 52-year-old man with a lengthy history of serious alcohol misuse. He had developed alcohol related brain damage and was assessed as meeting the criteria for a 'dissocial personality disorder'. He also had a range of physical comorbidities, including Chronic Obstructive Pulmonary Disease (COPD), Hepatitis C and HIV.

This hearing considered two central issues, namely:

i. Whether PB had capacity to conduct this litigation and/or make decisions relating to where he lived and the care he received;

ii. If PB lacked capacity whether his current care and accommodation provision were in his best interests (in this context it was important to highlight that the restrictions with these arrangements were aimed at preventing PB from gaining access to alcohol, which he strenuously resented). The judge hearing the application recognised that the case engaged some of the fundamental principles which underpinned the twin pillars of the Mental Capacity Act 2005 (the Act), i.e. mental capacity and best interests.

It was necessary to emphasise the cardinal principles of the Act. The presumption of capacity, S1(2), was the bench mark for decision makers in this sphere. The Act reinforced this by requiring that a person was 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".

The scope of these unambiguous provisions required fully to be recognised and vigilantly guarded. The philosophy informing the legal framework illuminated the point that this case highlighted, namely 'a person is not to be treated as unable to make a decision merely because he makes an unwise decision'.

Intrinsic to assessing capacitous decision taking was the ability to weigh and sift the relevant information. It was not necessary for a person to use or weigh every detail of the respective options available to them to demonstrate capacity, the salient factors were key.

Importantly, it must always be recognised that though a person might be unable to use or weigh some of the information objectively relevant to the decision in question, they might nonetheless be able to use or weigh other elements sufficiently well so as, ultimately, to be able to make a capacitous decision. It was not necessary to have every piece of the jigsaw to see the overall picture.

Even where an individual failed to give appropriate weight to features of a decision that professionals might consider to be determinative, this would not in itself justify a conclusion that PB lacked capacity. Smoking, for example, was demonstrably injurious to health and potentially a risk to life. Objectively, these facts would logically indicate that nobody should smoke. Nonetheless, many still did.

PB could be stubborn, uncompromising and he was certainly direct, to the point of bluntness, particularly when communicating his feelings. PB moved to live in the London area many years ago. For much of his life he had a heavy dependency on class A drugs, alongside his equally heavy consumption of alcohol.

Some years ago, in circumstances that were not wholly clear, PB experienced a moment of epiphany. He realised that he would die if he did not stop taking drugs and, in effect, he had chosen to live. PB continued to consume alcohol excessively, notwithstanding his break with and continued abstinence from class A drugs. He had spent much time living in hostels and in supported placements but each of these, seemingly without exception, had broken down directly in consequence of his continuing alcohol abuse and his behaviour which was described as "challenging".

Ultimately, PB moved to a specialist unit and building upon the inevitable enforced sobriety of his hospital admission, he spent a period in a Recovery Centre, with the aspiration that he would achieve strategies for abstinence from alcohol. This was not an unqualified success. PB expressed a wish to continue to drink alcohol but asserted an ambition to achieve moderation.

The evidence of a psychiatric expert was that:

"(A) if he is allowed to go out unsupervised, he will drink to excess

(B) drinking alcohol to excess will result in him developing extreme challenging behaviour with aggression which will likely result in him not being able to access support and becoming homeless

(C) drinking alcohol to excess will result in him developing life-threatening physical problems, including aspiration of his own vomit with repeated hospitalisations and a high probability of dying"

The expert specifically concluded that PB was able to understand and weigh the information identified as relevant at (B) and (C) above. Further that PB accepted that he had drunk to excess when unescorted. Following the provision of two addenda to his report, the expert's views were summarised for the court as follows:

''Despite finding that [PB] could understand and use all of this information, (the expert) nonetheless concluded that he lacked capacity to make decisions about his residence and care on the grounds that [PB] did not accept that recent episodes have demonstrated "beyond doubt" that he is unable to control his drinking, so that it is in fact "certain" that he will continue to drink to excess if he is not supervised."

The judge held that having determined that the flaw in PB's decision making was his inability to understand that he would never be able to drink alcohol other than to excess, the expert set a test which was too high and did not integrate those facets of PB's reasoning which had caused him, in his earlier assessment, to conclude that PB had the capacity to decide on issues relating to his residence and care. In to this also required to be factored, that PB was

perfectly happy to remain where he lived but with greater freedom surrounding his use of alcohol. The court was not being asked to consider whether PB had the capacity to decide to take alcohol or not but whether he understood the impact on his present living arrangements should he drink to excess.

Having concluded that the test for capacity settled upon by the expert was too high, it was not necessary for the judge to scrutinise his explanation of the likely cause of that deficiency. However, he was not persuaded that the evidence established the necessary nexus between the disturbance in the functioning of the mind or brain and inability to make a decision.

'The…instinct to protect vulnerable people from unwise, indeed, potentially catastrophic decisions must never be permitted to eclipse their fundamental right to take their own decisions where they have the capacity to do so'

It was useful to reiterate the following:

i. The obligation of this court to protect PB was not confined to physical, emotional or medical welfare, it extended in all cases and at all times to the protection of PB's autonomy.

ii. The healthy and moral human instinct to protect vulnerable people from unwise, indeed, potentially catastrophic decisions must never be permitted to eclipse their fundamental right to take their own decisions where they have the capacity to do so.

iii. Whatever factual similarities might arise in the case law; the court would always be concerned to evaluate the particular decision faced by the individual in every case.

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

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

vi. It followed from the above that the weight to be given to PB's expressed wishes and feelings would inevitably vary from case to case.

The applicant was represented by the London Borough of Tower Hamlets

PB was represented by Bindmans LLP

Comment

This ruling is of assistance to defendants facing cases of borderline capacity. It emphasises all of the factors that must be taken into account before the presumption of capacity is displaced.

Costs

There are two cases under this heading, one for personal injury and the other a commericial action.

Marbrow v Sharpes Garden Services LTD (2020) EWHC B26 (Costs)

The claimant was entitled to the costs of his claim for damages for personal injuries arising from an accident at work on 4th July 2016. The claim had settled shortly before trial. The terms of settlement provided that the defendant should pay the claimant's costs of the action on the standard basis.

The detailed assessment the costs of raised a number of issues of wider importance.

1. Whether the caps on recoverable costs provided by sub-paragraphs 7.2(a) and (b) of Practice Direction 3E of the Civil Procedure Rules 1998 excluded value added tax

Paragraph 7.2 of Practice Direction 3E provides:

Save in exceptional circumstances:

(a) the recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the total of the incurred costs (as agreed or allowed on assessment) and the budgeted costs (agreed or approved); and

(b) all other recoverable costs of the budgeting and costs management process shall not exceed 2% of the total of the incurred costs (as agreed or allowed on assessment) and the budgeted (agreed or approved) costs.

The defendant contended that the caps of £1,000 or 1% in sub-paragraph 7.2(a) and 2% in sub-paragraph 2(b) must be inclusive of value added tax because it was not expressly stated to be otherwise.

The Costs Master held that the caps provided by paragraph 7.2 could not include value added tax because they were expressed as percentages of figures which did not include value added tax. All of the figures set out in a budget excluded value added tax – as Precedent H made clear. 2% of £100,000 excluding value added tax, would be £2,000 excluding value added tax.

He took support for this view, in particular, from Friston on Costs (3rd edition) at paragraph 12.133:

While there is no authority on the point, it is likely that the percentage limits are exclusive of VAT. This is because Precedent H is designed in such a way as to discourage VAT being recorded therein, so it would seem odd if the costs were payable on a VAT-inclusive basis. Moreover, if it were not a VAT-exclusive limit, then a VAT-registered litigant would have the advantage over a non-VAT registered litigant – and that would be a curious state of affairs.

2. The recoverability of interest paid under a disbursement funding loan

The claimant claimed, as an item of costs,

the interest that he was liable to pay under a loan agreement with his solicitors in relation to the funding of disbursements. The agreed interest rate was 5%.

The Master held that it was clear following Hunt (1987) that interest incurred under a disbursement funding loan could not be recoverable as costs.

However, CPR.44.2(6)(g) did allow the court to order the payment of interest on costs from a date before judgment. There was no reason why a costs judge should have power to award interest from a date after judgment, under r.44.2(6)(g) but not from a date earlier than judgment, under the same rule.

3. Whether the Claimant's entitlement to interest should run from 3 months after the date of the order for costs

The defendant submitted that interest should run from three months after the order for costs. The claimant maintained its entitlement to interest at the Judgment Act rate of 8% from the date of the costs order.

'Interest was…payable on costs at 8 per cent from the date of judgment without an order to that effect unless the court made a different order…'

The entitlement to interest on costs under S17 Judgments Act 1838 was automatic. Generally, the court would not order it expressly. Interest was therefore payable on costs at 8 per cent from the date of judgment without an order to that effect unless the court made a different order under either CPR 40.8 or CPR 44.2(6)(g).

The court should depart from the incipitur rule only where that was what justice required in the particular case and should avoid awarding interest from different dates on different components of costs.

Most if not all of the cases in which the court had awarded Judgment Act interest only from a date after judgment had been commercial cases, in which orders for pre-judgment interest on costs at commercial rates were often made.

The defendant had argued that the default position should be that interest should run only from the date on which notice of commencement of detailed assessment was or should have been served. However, that was not the default position and no reason had been shown to depart from the general rule.

4. What order(s) should be made in relation to interest?

Given the decision that the claimant should be entitled to interest at the rate of 8% from the date of judgment, was there any particular reason to award interest on part of the costs before judgment?

Justice did not require a departure from the general rule in this case and the claimant should be entitled only to interest from the date of the costs order. The higher rate of interest under the Judgment Act should go some way to compensating the claimant for the interest that he was liable to pay for funding the disbursements.

The claimant was represented by Barratts Solicitors

The defendant was represented by Gibbs Wyatt Stone

Comment

This case illustrates the benefits of a paying party making a realistic payment on account of costs, to mitigate the interest otherwise payable.

Costs - Second Case

Sharp and others listed in a Group Litigation ORder v Blank and others (2020) EWHC 1870 (CH)

In this second case, the issues to be dealt with at the hearing of consequential matters included:

(a) What order for costs should be made as between the claimants and the defendants?

(b) What orders should be made in respect of interest on costs?

(d) Should any of those orders be made against Therium Finance ("Therium") which had been joined as an Additional Party for the purposes of costs?

The action was conducted by reference to a Group Litigation Order (GLO). There were approximately 5800 claimants covered by the GLO. The GLO provided that the liability of each claimant to the defendants for costs should be several and not joint. The costs with which the judge was concerned were all common costs.

In the action, the claims were dismissed. The defendants submitted that this was a case for the straightforward application of the "general rule" in CPR 44.2(2)(a) and sought an order that the claimants pay their costs of and incidental to the action, to be assessed (in default of agreement) on the standard basis. The claimants submitted that this was a case for making "a different order" under CPR 44.2(2)(b) and argued for an order that they pay only 65% of the defendants' costs.

The foundation of that argument was that although the claimants failed overall they did succeed on two issues in the case; and that CPR 44.2(4)(b) directed the court to take into account in deciding what order to make about costs whether (amongst other things) a party had succeeded in part of his or her case even though not wholly successful.

The High Court Judge rejected this argument.

'Costs were determined by reference to overall success'

It was a commonplace that a successful party would not succeed on every aspect of its case. But notwithstanding that very frequent occurrence in litigation, the general rule still applied. Costs were determined by reference to overall success.

This was a case in which the general rule should apply, and costs should follow the event. But that then raised the question of what that meant for individual claimants. It might well be that many of the 5800 claimants never foresaw this as a real question because they thought that they were litigating risk-free. But that was not the case.

The claimants (or at least those who were

claimants as at 14 January 2015) had primary ATE cover of £6.5m in respect of any legal obligation to pay costs to the defendants under an order of the court.

The costs claim of the defendants exceeded £30m. For the excess over the £6.5m primary cover the claimants were reliant on the provisions of a Deed of Indemnity granted in their favour by Therium. The claimants' openly stated position had always been that there were no concerns over Therium's ability to satisfy that indemnity. However, the arrangements made by Therium only provided an aggregate insurance cover available to the claimants and to Therium to £21.45m.

Even this level of cover was affected by the insolvency of some of the insurers. In those circumstances there was a risk that individual claimants might face a several liability for costs to the extent that it overtopped their direct ATE cover.

The order made was that the claimants would between them severally bear the costs of the defendants (the defendants' costs to be the subject of assessment on the standard basis in default of agreement), each several liability for a share of those costs being ascertained in accordance with the terms of the GLO.

Interest on costs

Two issues arose in relation to interest on costs. First, whether the court should award pre-judgment interest on costs. Second, from what date should the court order that interest at judgment debt rate should run?

CPR44.2(6)(g) provided that the Court might order interest on costs from a date before judgment. It was common ground that this jurisdiction would generally be exercised where a party had had to put up money to pay its solicitors and had thereby either lost the beneficial use of that money or had had to borrow it. It was also common ground that the rate awarded would be determined by weighing the factors, generally with the aim of identifying a commercial rate in the circumstances.

In the instant case there was no argument about the rate. The claimants submitted (and the defendants accepted) that, if ordered for any period, the appropriate rate was base rate simpliciter. The issue was whether interest should be awarded at all.

The defendants had a commercial interest in the level of ATE cover obtained by the claimants because of the great difficulties attending costs recovery under the GLO. But it was ultimately for the claimants to decide against what risks to insure and what risks to bear themselves.

A claim for pre-judgment interest on costs was commonplace, and it was for the claimants to decide whether any protective measures were required, not for the defendants to call for them. The court exercised its discretion in the way in which it was customarily exercised and order the claimants to pay interest on the defendants' costs at the applicable Bank of England base rate from the date of payment of each invoice until the earlier of (i) payment of such costs or (ii) the date from which interest at the rate prescribed by the Judgments Act 1838 become payable.

CPR 40.8 provided that interest should run from the date of judgment unless the rules made a different provision or "the court orders otherwise". The defendants submitted that the general rule (or what they called "the default position") should apply, whilst the claimants submitted that the court should order "otherwise" and direct that interest at Judgment Act rate (viz. 8%) should run from a date six months after judgment.

The essential question was: what, having regard to all the circumstances of the case, did the interests of justice require? Given (i) the likely size and complexity of the bill to be submitted for assessment; (ii) the complications inherent in triggering the insurance and indemnity arrangements which it was in the interests of both claimants and defendants should be put in place (because of the terms of the GLO) and the uncertainties that had since arisen; and (iii) the fact that, pending payment, the defendants were receiving interest on unpaid costs at a commercial rate, a period of about four months from the date of this

judgment should elapse before interest at judgment debt rate was payable on unpaid costs. 13 November 2020 was a convenient date.

Therium

By order dated 13 January 2020 Therium was joined as an additional party for the purposes of costs. Therium accepted, in principle, that as a commercial funder it was liable to pay costs awarded against the claimants. But it submitted that it should be so liable only (i) to the extent that the claimants did not satisfy the adverse order and (ii) to the extent of the funding that Therium actually provided (the Arkin cap).

It was accepted that a third-party costs order was in principle appropriate. There was no reason in principle why the liability of Therium should be secondary and not simply joint and several in the usual way.

As at 29 January 2020 the true nature of "the Arkin cap" was due for consideration by the Court of Appeal. Therium had funded the claimants' costs of some £17m together with the premiums on the excess layers insurance above £6.5m (up to £21.45m). Even if "the Arkin cap" were to be applied the amount of the interim payment on account of costs ordered by the court (£17m) would fall below that cap. The extent of Therium's liability beyond that must be adjourned for further consideration.

Permission to appeal was refused.

The claimants were represented by Harcus Sinclair UK Limited

The defendants were represented by Herbert Smith Freehills LLP

Comment

This judgment shows how the payment of interest on costs operates differently between personal injury and commercial cases. It also acts as a reminder of the potential liability of a third-party funder, where funded claims fail.

Horwich Farrelly