



Neutral Citation Number: [2020] EWCOP 19

Case No: 13440994

IN THE COURT OF PROTECTION

Date: 20/04/2020

Before :

MR JUSTICE KEEHAN

Re: SF (Injunctive Relief)

Between :

A Local Authority

Applicant

- and -

SF

Respondent

Mr J Rylatt (instructed by **The Local Authority**) for the **Applicant**
Mr I Brownhill (instructed by **Donovan Newton**) for the **Respondent**

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE KEEHAN

This judgment was delivered in public. 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 SF 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.

The Hon. Mr Justice Keehan :

Introduction

1. In this matter I am concerned with one young person, hereinafter referred to as ‘SF’. SF is 20 years of age. She has a diagnosis of Autism Spectrum Disorder (‘ASD’) and has learning disabilities. She resides in a supported living establishment where she receives 1:1 support 24 hours per day. In September 2019 the care and support provider became aware that SF was communicating with a number of men via social media and the internet. Further, it became apparent that some of these men were attending her placement and having sexual relations with her.
2. Only one of these men has, to date, been identified, namely a man whom I shall refer as ‘VK’.
3. On 28 January 2020 the local authority applied for an injunction against VK to prevent him from attending SF’s accommodation. On 5 February 2020 the local authority applied for an injunction in the same terms against ‘persons unknown’.
4. On 5 February the circuit judge, who had hitherto been dealing with the case, directed that these applications should be heard by a Tier 3 judge. Accordingly, the applications were listed before Williams J. on 6 February. He made the following interim declarations and orders:
 - i) SF lacks the capacity to make decisions as to her contact with others and in her use of social media and the internet;
 - ii) it was in her best interests not to have contact of any description with VK
 - iii) pursuant to s.16(5) and s.48 of the Mental Capacity Act 2005 (‘the 2005 Act’) an injunction against VK from contacting SF or visiting her accommodation;
 - iv) VK was joined as a party solely on the issues of his contact with and having sexual relations with VK;
 - v) the matter was listed for a directions hearing before me on 10 February 2020 to consider whether the injunction against VK should be continued and whether I should grant the application for an injunction against persons unknown; and
 - vi) a further directions hearing was listed before me on 14 February to consider the issue of the injunction against VK.
5. At hearing on 10 February I raised with counsel the question of whether the Court of Protection had the power to grant injunctive relief. I invited submissions from the applicant local authority and from the Official Solicitor acting on behalf of SF.
6. At the hearing on 14 February I was not persuaded that the Court of Protection had the power to make an injunctive order against a party or against a non-party. Accordingly, I discharged the injunction made by Williams J on 6 February and made an injunctive order against VK in the same terms but pursuant to the inherent jurisdiction of the High Court. I heard oral submissions on the issue. The Official Solicitor requested further time to reflect on this point and to make written

submissions. I acquiesced to this request, made directions for the filing and serving of written submissions and reserved judgment.

7. Accordingly, the issue for me to determine is whether the Court of Protection has the power to make injunctive orders and, if so, from which provisions of the 2005 Act or other statutes this power emanates.

The Statutory Provisions

8. The Court of Protection is a creature of statute, namely the 2005 Act. The provisions of the statute are supplemented by Court of Protection Rules 2017 ('the 2017 Rules') and by practice directions.
9. The core principles of the 2005 Act are set out in s.1 of the act:

“The principles

- (1) The following principles apply for the purposes of this Act.
 - (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
 - (3) 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.
 - (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
 - (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
 - (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.”
10. What is in a person's best interest decision must be determined having regard to all of the relevant circumstances and the factors set out in s.4 of the 2005 Act:

“Best interests

- (1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—
 - (a) the person's age or appearance, or
 - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

- (2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
- (3) He must consider—
 - (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and
 - (b) if it appears likely that he will, when that is likely to be.
- (4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
- (5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.
- (6) He must consider, so far as is reasonably ascertainable—
 - (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
 - (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
 - (c) the other factors that he would be likely to consider if he were able to do so.
- (7) He must take into account, if it is practicable and appropriate to consult them, the views of—
 - (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
 - (b) anyone engaged in caring for the person or interested in his welfare,
 - (c) any donee of a lasting power of attorney granted by the person, and
 - (d) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—

(a) are exercisable under a lasting power of attorney, or

(b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

(10) “Life-sustaining treatment” means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.

(11) “Relevant circumstances” are those—

(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.”

11. The general powers of the Court of Protection are set out in ss. 15-21 of the 2005 Act. For present purposes only the provisions of ss. 15-17 are relevant which provide that:

“Power to make declarations

15(1) The court may make declarations as to—

(a) whether a person has or lacks capacity to make a decision specified in the declaration;

(b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;

(c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.

(2) “Act” includes an omission and a course of conduct.”

“Powers to make decisions and appoint deputies: general

16(1) This section applies if a person (“P”) lacks capacity in relation to a matter or matters concerning—

- (a) P's personal welfare, or
- (b) P's property and affairs.

(2) The court may—

- (a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or
- (b) appoint a person (a “deputy”) to make decisions on P's behalf in relation to the matter or matters.

(3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).

(4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that—

- (a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and
- (b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

(5) The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).

(6) Without prejudice to section 4, the court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms.

(7) An order of the court may be varied or discharged by a subsequent order.

(8) The court may, in particular, revoke the appointment of a deputy or vary the powers conferred on him if it is satisfied that the deputy—

- (a) has behaved, or is behaving, in a way that contravenes the authority conferred on him by the court or is not in P's best interests, or
- (b) proposes to behave in a way that would contravene that authority or would not be in P's best interests.”

“Powers: personal welfare

17(1) The powers under section 16 as respects P's personal welfare extend in particular to—

- (a) deciding where P is to live;
- (b) deciding what contact, if any, P is to have with any specified persons;
- (c) making an order prohibiting a named person from having contact with P;
- (d) giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P;
- (e) giving a direction that a person responsible for P's health care allow a different person to take over that responsibility.

(1) Subsection (1) is subject to section 20 (restrictions on deputies).”

12. The establishment of the Court of Protection and the supplementary powers of the court are set out in ss.45-56 of the 2005 Act. For the purposes of this judgment the relevant provisions are set out in s.45 & ss.47-48 of The Act:

“45(1) There is to be a superior court of record known as the Court of Protection.

(2) The court is to have an official seal.

(3) The court may sit at any place in England and Wales, on any day and at any time.

(4) The court is to have a central office and registry at a place appointed by the Lord Chancellor after consulting the Lord Chief Justice.

(5) The Lord Chancellor may, after consulting the Lord Chief Justice, designate as additional registries of the court any district registry of the High Court and any county court office.

(5A) The Lord Chief Justice may nominate any of the following to exercise his functions under this section—

- (a) the President of the Court of Protection;
- (b) a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005).]

(7) The office of the Supreme Court called the Court of Protection ceases to exist.”

“General powers and effect of orders etc.

47(1) The court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court.

(1) Section 204 of the Law of Property Act 1925 (c. 20) (orders of High Court conclusive in favour of purchasers) applies in relation to orders and directions of the court as it applies to orders of the High Court.

(2) Office copies of orders made, directions given or other instruments issued by the court and sealed with its official seal are admissible in all legal proceedings as evidence of the originals without any further proof.”

“Interim orders and directions

48. The court may, pending the determination of an application to it in relation to a person (“P”), make an order or give directions in respect of any matter if—

- (a) there is reason to believe that P lacks capacity in relation to the matter,
- (b) the matter is one to which its powers under this Act extend, and
- (c) it is in P's best interests to make the order, or give the directions, without delay.”

13. The power of the High Court to granted interlocutory injunctions derives from s.37(1) of the Senior Court Act 1981 which provides:

“Powers of High Court with respect to injunctions and receivers.

(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so”

14. In the course of written submissions counsel referred me to Part 21 of the 2017 Rules and PD21A. The relevant parts of these rules are Part 21.4, 21.5 & 21.9 and PD21A, para 1 which provide:

“21.4.—

(1) If a person—

- (a) required by a judgment or order of the court to do an act does not do it within the time fixed by the judgment or order; or
- (b) disobeys a judgment or order not to do an act,

then, subject to the Debtors Acts 1869 and 1878 and to the provisions of these Rules, the judgment or order may be enforced by an order for committal.

(2) If the time fixed by the judgment or order for doing an act has been varied by a subsequent order, or agreement of the parties under rule 3.7(4), then references in paragraph (1)(a) to the time fixed are references to the time fixed by that subsequent order or agreement.

(3) If the person referred to in paragraph (1) is a company or other corporation, the committal order may be made against any director or other officer of that company or corporation.

(4) So far as applicable, and with the necessary modification, this Section applies to undertakings given by a party as it applies to judgments or orders.”

“ 21.5.—

(1) Unless the court dispenses with service under rule 21.8 a judgment or order may not be enforced under rule 21.4 unless a copy of it has been served on the person required to do or not to do the act in question, and in the case of a judgment or order requiring a person to do an act—

- (a) the copy has been served before the end of the time fixed for doing the act, together with a copy of any order fixing that time;
- (b) where the time has been varied by a subsequent order or agreement, a copy of that subsequent order or agreement has also been served; and
- (c) where the judgment or order was made pursuant to an earlier judgment or order requiring the act to be done, a copy of the earlier judgment or order has also been served.

- (2) Where the person referred to in paragraph (1) is a company or other corporation, a copy of the judgment or order must also be served on a director or officer of the company or corporation before the end of the time fixed for doing the act.
- (3) Copies of the judgment or order and any orders or agreements fixing or varying the time for doing an act must be served in accordance with rule 21.6 or 21.7, or in accordance with an order for alternative service made under rule 21.8(2)(b).”

“21.9.—

- (1) Subject to paragraph (2), a judgment or order to do or not to do an act may not be enforced under rule 21.4 unless there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this Section, a warning to the person required to do or not to do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets.
- (2) An undertaking to do or not to do an act which is contained in a judgment or order may be enforced under rule 21.4 notwithstanding that the judgment or order does not contain the warning described in paragraph (1).”

“Requirement for a penal notice on judgments and orders – form of penal notice (Rule 21.9)

1. A judgment or order which restrains a party from doing an act or requires an act to be done must, if disobedience is to be dealt with by proceedings for contempt of court, have a penal notice endorsed on it as follows (or in words to substantially the same effect)—

“If you the within-named [] do not comply with this order you may be held to be in contempt of court and imprisoned or fined, or your assets may be seized.” ”

Relevant Authorities

15. I was helpfully referred by counsel to a number of authorities. The principal authorities which are relevant to the issue I have to determine are:
 - i) MASM v. MMAM (by her litigation friend, the Official Solicitor), MM, London Borough of Hackney & University Hospital NHS Foundation Trust [2015] EWCOP 3;
 - ii) Re Leslie Whiting [2013] EWHC B27; and

iii) North Yorkshire County Council v. Elliot [2019] EWFC 37.

Submissions

16. The local authority and the Official Solicitor both submitted that the Court of Protection does have the power to make injunctions for the purposes of safeguarding the best interests of an incapacitous person.
17. It is submitted that by virtue of the provisions of s. 48 of the 2005 Act the court has the power to make interim orders or directions pending the final determination of the application if it is in P's best interests to do so.
18. Counsel for the local authority and for the Official Solicitor asserted that the power to make injunctive orders derives from the provisions of s.16(2) of the 2005 Act which empowers the court to make decisions on behalf of P and s.16(5) which enables the court to:

“make such further orders or give such directions.....as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order.....made by it under subsection (2)”.
19. This power to make injunctive orders is reinforced by the provisions of s.17(1)(c) which enables the court to make “an order prohibiting a named person from having contact with P”. It is submitted that the opening words of s.17, namely “The powers under section 16 as respects P's personal welfare extend in particular to”, indicate that the section does not provide an exhaustive list of the powers of the court. The point is reinforced it is said by paragraph 70 of the Explanatory Notes to the 2005 Act which states:

“Particular mention is made in this section of issues which have arisen in the past and been dealt with by the High Court in the exercise of its inherent jurisdiction and may be more likely to arise in the future. This is not an exhaustive, merely an indicative, list.”
20. By virtue of s.47(1) the Court of Protection has the same powers, rights privileges and authority as the High Court. The High Court has the power to make interlocutory injunctions by virtue of the provisions of s.37(1) of the 1981 Act.
21. Counsel for the Official Solicitor referred me to the three authorities set out above. In the case of MASM (above) paragraph Hayden J. said,

“The Court of Protection's powers of enforcement are extensive. The Court has in connection with its jurisdiction the same powers, rights and privileges and authority as the High Court (COPR 2007, R89) which means that it may find or commit to prison for contempt, grant injunctions where appropriate, summons witnesses when needed and order the production of evidence. (COPR 2007, part 21 makes further provision RR183-194). The relevant practice directions

(PD21A) and "practice guidance notes" deal with Contempt of Court, Applications for enforcement may also be made; the CPR relating to third party debt orders and charging orders are applied as are the remaining rules of the Supreme Court 1965 in relation to enforcement of judgments and orders and writs of execution fieri facias (writs and warrants of control, post April 2014)".

22. And later at paragraph 39 he said,

"Section 16 it must be noted is framed in terms of the court making 'orders' and 'decisions' rather than the 'declarations' contemplated by Section 15. In this area Section 15 largely replaces the High Court's Inherent Jurisdictional powers under which aegis the Family Division, prior to the Mental Capacity Act 2005, made declarations in respect of mentally incapacitated adults in regard to medical treatment and personal welfare."

23. In the case of *Re Leslie Whiting (above)* Hayden J. made the following observations at paragraph 20,

"The Court of Protection is, as the title makes clear, here to protect the vulnerable. The breadth of its work is very wide; its injunctive powers may well not yet have been fully utilised, but it is important, as they develop, that they are deployed with forensic rigour and, where possible, as here, subject to public scrutiny."

24. Earlier in his judgment at paragraph 11 he had noted that,

"On 28th November, the case was transferred to the High Court because, as I understand it, it was thought that the offices of the Tipstaff might be required. That is, of course, concerned with the apparatus of enforcement but it is perhaps important to note that section 47(1) of the Mental Capacity Act 2005, which relates to the general powers and effect of orders et cetera made in the Court of Protection provides:

"(1) The court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court."

25. The factual background to this case and early history of the orders made in this case are set out by Hayden J. in paragraphs 7 and 8 of his judgment,

"Leslie Whiting formed a relationship with WAJ. During the course of the proceedings he was made a respondent. Social Services were concerned about the dynamic of this relationship. They were worried, too, about a conviction recorded against him in 2009. The details of that conviction are not in my papers but I have been told that it is a sexual offence relating to

exploitation of a vulnerable adult. Mr Whiting made it clear to the court that he did not want to play any part in the proceedings when the Court of Protection was looking at the issues that I have outlined as in its focus. He declined to attend. Nonetheless, in his absence, his role in WAJ's life fell under scrutiny and was the subject of detailed professional evaluation. The conclusion that was reached was that his influence was essentially malign.

On 21st August 2012 an injunction was made by District Judge Rogers, which was designed to protect WAJ and to extricate Leslie Whiting from her life. The terms of that order were as follows:

"(1) Leslie Whiting should be forbidden by himself or acting jointly with any other person from: (a) allowing or threatening any unlawful violence against the first respondent (WAJ); (b) coming within 100 metres of a property in which it was thought she was living at the time, or any other property that he became aware that she might be visiting; (c) communicating with the first respondent, whether by letter, telephone, text message or other means of communication; (d) threatening the first respondent; (e) instructing or encouraging any other person to do anything which is forbidden by the terms of the order."

26. He concluded the judgment at paragraph 20 with the following words,

“Having here found the fourth breach to be proved, I propose to take no action in respect of it. A year has passed since it occurred and there are no subsequent allegations. To that extent, the injunction appears ultimately to have been successful. I do, however, intend to continue the injunction in the terms made by District Judge Rogers for a further twelve months, with liberty to Mr Whiting to apply to discharge.”

27. In the case of North Yorkshire County Council (above) Cobb J. had made injunctive orders against an individual who posed a risk of harm to the vulnerable incapacitous adult who was the subject of the application in the Court of Protection. The factual matrix is set out in paragraphs 2 & 3 of the judgment of HHJ Anderson, before whom committal proceedings were listed for alleged breaches of the injunctions,

“The first of those injunctions was made without notice to George Elliot. The injunction order was set out in clear terms. The injunction prohibited him from contacting or attempting to contact the young woman who is the subject of these proceedings whether directly, face-to-face or indirectly by any means whatsoever including telephone, texting or messaging, email, Skype, FaceTime or through any social media platform including, but not limited to, WhatsApp, Twitter, Instagram or Snapchat.

28. At the time of that hearing, George Elliot was in prison following an alleged breach of a sexual harm protection order. The second injunction was made in his presence at an on-notice hearing, again before Cobb J. That hearing took place on 21 January 2019. Mr Justice Cobb amended the terms of the first injunction to make them more precise. It seems that the aim of the judge was to make it clear to Mr Elliot that the injunction included a prohibition on any communications even if initiated by the young woman at the heart of this case. So, therefore, an injunction was made in Mr Elliot's presence prohibiting him from communicating with or attempting to contact her, whether directly, face-to-face, et cetera. The word "communicating" was put in the injunction in place of "contacting".
29. At paragraph 10 of her judgment HHJ Anderson said,
- “I must take into account that this injunction was made in the Court of Protection to protect a vulnerable person from contact with Mr Elliot. I take into account that the terms of the injunction were spelled out clearly by Cobb J to Mr Elliot directly in court. The breaches were deliberate breaches of the court order where Mr Elliot had a choice and took the decision to breach the order.”

Discussion

30. I am extremely grateful to counsel for their succinct and helpful oral and written submissions.
31. The fact that Hayden J., now the Vice-President of the Court of Protection, and a judge with the huge experience of Cobb J. take the view that the Court of Protection does have the power to grant injunctions to support and ensure compliance with its best interests decisions and its orders is very persuasive.
32. Having had the benefit of counsels' submissions and the time to reflect on the authorities cited to me, I am now persuaded that the Court of Protection does indeed have the power to grant injunctive relief in support of and to ensure compliance with its best interests decisions and its orders.
33. I so find for the following reasons:
- i) s.47(1) of the 2005 Act is drafted in wide and unambiguous terms;
 - ii) it must follow that the Court of Protection has the power which may be exercised by the High Court pursuant to s.37(1) of the 1981 Act to grant injunctive relief;
 - iii) this conclusion is fortified by the terms of s.17(1)(c) of the 2005 Act which permits the court to prohibit contact between a named person and P;
 - iv) it is further fortified by the terms of ss. 16(2) & (5) of the 2005 Act. The provisions of s.16(5) are drafted in wide terms and enable the court to “make such further orders or give such directions.....as it thinks necessary or

expedient for giving effect to, or otherwise in connection with, an order.....made by it under subsection (2)”;

- v) finally, the 2017 Rules, r.21 & PD21A, make provision for the enforcement of orders made by the Court of Protection including committal to prison for proven breaches of court orders.
34. In the premises, I propose to discharge the injunction I made against VK on 10 February under the inherent jurisdiction of the High Court and to substitute it with an injunction in the same terms made in the Court of Protection.