

IN THE COURT OF PROTECTION
SITTING AT KINGSTON-UPON-HULL

Case No: 12952790

Insert Court Address

Date: 26/05/2020

Before:

HHJ SARAH RICHARDSON

Between:

A Local Authority

Applicant

- and -

AB

First Respondent

SB (by her litigation friend, the Official Solicitor)

Second
Respondent

Miss Thomas QC for the Applicant
Miss Twist for the First Respondent
Miss Roper for the Second Respondent

Hearing dates: 11 May 2020

APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10.30am on 26 May 2020.

HHJ Sarah Richardson:

1. These proceedings concern SB, a young woman of 30 years of age and the patient in proceedings originally brought by her mother, Ms C (AB), who is now the first respondent. The local authority ('The LA') is the applicant. SB acts through her litigation friend, the Official Solicitor.
2. There is a dispute as to whether the conclusions of Dr Rebecca O'Donovan, the second independent expert psychiatrist instructed in this matter, should be accepted, and final declarations made in accordance with those conclusions. The Official Solicitor and The LA accept Dr O'Donovan's conclusions; AB does not. All parties agree that the dispute should be determined on written and oral submissions. This is my judgment following that process.
3. Directions are also requested for the instruction of a third expert to assess SB's capacity to make decisions about contact, which is agreed between the parties to be necessary.

Background

4. SB, who was born on 2 June 1989, lives for most of the week with her mother, and spends weekends with her partner CJ. She has been diagnosed with a mild to moderate learning disability.
5. AB brought proceedings in the Court of Protection in 2016 when her daughter left home to live with a previous partner, JL. On that occasion, SB returned

voluntarily to live with her mother and the proceedings were withdrawn. In May 2017, SB began a relationship with CJ, and then moved to live with him. Her mother thereupon initiated these proceedings in March 2018. Subsequently, SB has returned to live with her mother for the majority of the week, although she still spends weekends with CJ.

6. In the course of these two sets of proceedings, expert reports have been obtained from two independent expert psychiatrists, both with considerable experience in this court:
 - i) Dr Peter Carpenter provided reports dated 28 November 2016 and 6 December 2018;
 - ii) Dr Rebecca O'Donovan has provided a report and an addendum report in response to further questions, dated 31 January 2020, 16 March 2020, with a short section on vulnerability added on 5 April 2020.

Dr Carpenter

7. Dr Carpenter's initial assessment concluded that SB had capacity to make some decisions (namely around sex and contraception and the withholding of information) but lacked capacity in relation to others (namely the conduct of proceedings and decisions about support needs, residence, care and contact, although with potential to gain capacity as regards support needs and care). In his second report, he concluded that SB lacked capacity in all domains assessed, namely, capacity to conduct the proceedings and to make decisions in respect of residence, care and support needs, contact and contraception, although he

felt SB could gain capacity to make decisions about contraception with extended support.

Declarations – care and contact

8. Following that assessment, on 25 February 2019 the court made declarations pursuant to s15 MCA 2005 that SB lacks capacity to make decisions about the conduct of proceedings, as to the care she should receive, and as to contact. Interim declarations were made that there was reason to believe that SB lacks capacity to make decisions as to residence and contraception. These declarations remain in force to date.
9. Subsequently, the court gave permission for the instruction of Dr O'Donovan to assess SB's capacity to make decisions about her residence, contraception, access to the internet and social media, and the management of her finances.

Dr O'Donovan

10. Dr O'Donovan assessed SB on 15 January 2020 and then spoke with her by phone on 27 January 2020. She was provided with a detailed letter of instruction agreed between the parties, the full court bundle, and SB's medical records.
11. In her first report, Dr O'Donovan concludes that SB *has* capacity to make all the decisions which were the subject of the assessment, namely:
 - i) to make decisions regarding her residence
 - ii) to manage her finances

- iii) to make decisions about internet and social media access
- iv) to make decisions about contraception.

12. Dr O'Donovan's report was sent to all the parties on 31 January 2020. The parties were informed on 3 February 2020 that Dr O'Donovan would be going on maternity leave in mid-March. The Official Solicitor told the parties that she accepted Dr O'Donovan's conclusions, and raised her concern that the content of the report gave rise to a real concern that it was no longer possible to rely on Dr Carpenter's previous conclusion that SB lacked capacity to make decisions about care and contact, and that accordingly the declarations to that effect would need to be revisited. In particular, the section in Dr O'Donovan's report concerning decisions about residence strongly suggested that SB would also have capacity to make decisions about her care. Paragraphs 14.2.10-14.2. 11 stated as follows:

"14.2.10 SB was of the opinion that day to day she required assistance with a number of activities of daily living. She was able to recognize that when she had lived without the support of her mother previously, she had struggled to adequately care for herself. Furthermore, she was able to draw comparisons between the level of support provided by both her mother and her partner. While she stated that her partner is very attentive and happy to support her, she felt that her mother enabled her to feel "safer" and was able to support her with different tasks in a way that her partner was unable to. SB was therefore asked to consider what she would do in the event that her mother was taken ill for example and was unable to reside at the property in order to support SB.

She stated that in these circumstances she would seek support from her sister or her brother. Again, she felt that they would be able to meet her needs better on a more consistent and regular basis than her partner. However, if they could not support her, she believed that her partner would. SB did not consider that supported accommodation or support from carers would ever be necessary. However, during the initial assessment she did agree to view material detailing such options.

14.2.11 There is evidence that historically SB has struggled to understand and weigh up decisions in regards to her residence, particularly when considering this in the context of her own care needs. During previous assessments SB had the opportunity to reflect on her experience of different environments but was unable to weigh up the information to make a decision. However, during this assessment, SB did demonstrate an understanding of the different residential options that are currently available to her. She could use the necessary information and weigh it up.”

13. SB indicated that she did not want to speak to Dr O’Donovan again; the parties agree that it would not be appropriate or effective to require her to do so.

Having obtained Dr O’Donovan’s views, it was agreed that:

- i) Dr O’Donovan should address SB’s capacity to make decisions about her care, on the basis of her previous interview and the papers;
- ii) a further assessment of SB’s capacity to make decisions about contact would be necessary, given Dr O’Donovan’s overall opinion; this requires

a further face to face assessment, which cannot be undertaken by Dr O'Donovan in light both of her maternity leave and SB's preference.

14. AB wished to speak to Dr O'Donovan, and provided her with a list of questions. They spoke on 18 February 2020.
15. Dr O'Donovan produced the major part of her addendum report on 16 March 2020: her conclusions were unchanged, and she set out her further opinion that SB has capacity to make decisions about her care.
16. Dr O'Donovan augmented this report on 5 April 2020 (after the arrival of her baby) with a short section as to SB's potential vulnerability.

The current situation

17. The current situation can best be expressed as a table. I am very grateful to Ms Roper for the preparation of the same, which was included in her helpful and detailed written submissions. The areas of dispute are set out in bold:

Capacity	Declaration & provision of MCA 2005 under which made	Expert: latest	THE LA	OS	AB
to conduct proceedings	s15: lacks	Dr C	Agreed: lacks capacity		
to decide where to live	s48: lacks	Dr D: has capacity	Accepts Dr D	Accepts Dr D	Disputes Dr D

to decide on care	s15: lacks	Dr D: has capacity	Accepts Dr D	Accepts Dr D	Disputes Dr D
to decide on contact	s15: lacks	Dr C: lacks but could gain with education Dr D: requires reassessment	Agreed: re-assessment required		
to decide on access to the internet and social media	None	Dr D: has capacity	Accepts Dr D	Accepts Dr D	Disputes Dr D
to consent to sex	None*	Has capacity	Agreed: has capacity		
to decide on contraception	s48: lacks	Dr D: has capacity	Accepts Dr D	Accepts Dr D	Disputes Dr D
to withhold information	None*	Has capacity	Agreed: has capacity		
to manage finances	None	Dr D: has capacity	Accepts Dr D	Accepts Dr D (but see para [] below)	Disputes Dr D

* These issues arose in the previous COP proceedings; Dr Carpenter considered that SB has capacity to consent to sexual relations and to withhold information; these conclusions have not been challenged.

18. Dr O’Donovan considers SB’s presentation is consistent with a moderate intellectual disability (this accords with Dr Carpenter’s professional opinion, in particular in his second report where he opined that SB’s intellectual disability was moderate rather than mild to moderate). No party seeks to dispute this evidence.

19. It is accepted by all parties that Dr O'Donovan has applied the appropriate legal tests to the assessments of capacity. No party submits that Dr O'Donovan should be cross examined.

20. The one area outstanding is that of capacity to make decisions about contact. All parties accept that that is an area which requires assessment. Unfortunately, Dr O'Donovan was not able to conduct that assessment prior to her maternity leave and the COVID 19 restrictions coming into effect. Whilst it is highly regrettable that SB will have to engage with a further expert, it was agreed at the hearing before me that Dr Camden-Smith should undertake an assessment in this area. Following submissions on whether this report should also contain an assessment of SB's capacity to conduct litigation (it being suggested by those acting for AB that the third expert should be asked to report on this area as well) I handed down a short oral judgment indicating that it was not necessary for there to be a further assessment of SB's litigation capacity.

21. Following discussion during the course of the hearing it was also agreed (subject to Miss Twist, Counsel for AB obtaining specific instructions) that the order following the hearing include a recital that all parties agree that SB is a vulnerable adult who falls within the category of vulnerable persons to whom the inherent jurisdiction could apply. If the parties cannot agree the precise terms of such recital, this discrete issue will need to be returned to court for a short hearing to consider whether the scope of Dr Camden-Smith's report should be extended in this regard.

22. In paragraph 3 of her position statement AB says this:

“It is accepted that Dr O'Donovan has correctly applied the legal tests in each area of capacity assessed, however AB considers that the factual information upon which Dr O'Donovan has relied is inaccurate and may have affected the conclusions reached.”

The submissions made on behalf of AB

23. It is worth considering these submissions in further detail, to ascertain precisely what is being said on behalf of AB and why. Before I do so, I wish to make it very clear that AB is clearly a concerned and committed parent. It is abundantly clear that SB's past experiences and decisions have not always been ones that AB, as a caring and committed parent, has found easy to either observe or condone. Many parents at one time or another (and often more than once) struggle to balance support for their capacitous adult child's decision making, more so during the child's formative years as a young adult, with the need to allow their adult child to grown and learn from their experiences (and mistakes).

24. In the case of SB the natural parental desire to support, protect and facilitate the development of one's child has no doubt been made more difficult for AB due to her daughter's vulnerabilities and her concerns (previously corroborated to a large part by Dr Carpenter's reports) that her daughter lacks capacity to make critical decisions. It is clear from the evidence (and the details of the conversation between AB and Dr O'Donovan set out in Dr O'Donovan's first addendum report) that AB was shocked by Dr O'Donovan's expert opinion in

her report. From AB's perspective, the overriding factor has been the desire to keep her daughter safe. This can be seen from, amongst other pieces of evidence, paragraphs 22-25 of her witness statement dated 10 November 2019:

"21. SB has a recognised history of leaving 3-4 times with known offenders and dangerous individuals and has been pregnant by them in the past. This is a real risk which will not be reduced by a period of stability and could be caused by any level of uncertainty.

22. I do believe that any male could take control of SB in an instant and she is so vulnerable that she could easily be persuaded to cut all ties with her family, change her phone number and not inform anyone of her whereabouts.

23. Despite me reporting her as missing in the past, the police appeared unable to assist me and would not bring her home. Instead, I had to track her down myself and bring her home which was very traumatic as a parent but also meant that SB was subjected to a longer length of abuse at the hands of those purporting to 'care' for her.

24. The authorisation sought from the Court is for SB's welfare and to prevent her being in immediate danger if she were to leave without agreement and so I maintain that this is vital and feel strongly about this issue.

25. SB continues to be extremely vulnerable and needs to be safeguarded from harm. As stated in my previous statement, any action that I take, and continue to take, is proportionate and based on learned experience of her behaviour

displayed over several years and the deep understanding I have as her mother and carer.”

Residence

25. In relation to SB’s capacity to make decisions about her residence, AB is concerned that Dr O’Donovan has not placed sufficient weight on SB’s past behaviour when considering this area. She says this, in her written submissions:

“6. Dr O'Donovan limited her assessment to the options available to SB at the time of the interview and did not explore hypothetical options with SB. It is accepted that, on a legal basis, the test for capacity around residence does not require the assessor to present the individual being assessed with hypothetical options, nor to consider the specific risks associated with any potential option. However, ***AB strongly believes that in line with SB's specific, identified vulnerabilities, this should have formed part of Dr O'Donovan's analysis.***

7. AB further considers that in respect of the options discussed with SB, she will simply repeat what she has been told and therefore without an in-depth exploration of her understanding, can appear to be capable of making a capacitous decision.” [emphasis added]

Care

26. AB’s position is as follows:

“AB does not accept that SB has capacity to make decisions about her care for the same reasons as set out in respect of her capacity around residence. In AB's view,

SB is not able to weigh the risks of placing herself in a situation where her care needs would not be met as demonstrated by her historic behaviour and absconsions. *It is accepted that the current arrangements are meeting her basic care needs, however this could change in the event of SB's relationship breaking down and in the development of any future relationship, at which point SB would not be capable of making a capacitous decision.*" [emphasis added]

Property and Affairs

27. AB's submissions in relation to this issue are as follows:

"9. AB considers that SB can be very secretive as to how she spends her money and is unable to budget appropriately. AB has advised her instructing solicitors that SB frequently runs out of money and asks for additional funds, however is unable to provide an account of how her funds have been spent that month.

10. It is noted that Dr O'Donovan discussed whether SB lent money to her partner, which was denied by her. Dr O'Donovan considered that there was no recent evidence that SB's partner had been financially exploiting her. AB remains concerned that *Dr O'Donovan has not placed sufficient weight on the possibility that SB largely funds her partner's flat*, whilst he uses his own money to gamble and purchase illicit substances. Whilst this may fall short of 'financial exploitation', AB does not consider that SB is able to make an informed decision as to how she spends her money each month and will do what is asked of her, which in AB's view demonstrates a lack of capacity.

11. *Dr O'Donovan does not reach a conclusion as to whether SB's understanding of her property and affairs was limited and superficial, or whether SB deliberately provided inaccurate information. It is submitted on behalf of AB that this is essential to determining whether SB has capacity in this area.*

12. AB is further concerned that Dr O'Donovan did not undertake a basic assessment of SB's understanding of denominations of notes and coins with her. AB has reported occasions whereby SB has gone out with a £20 note for a portion of chips and returned with no change. She has significant concerns that SB is not able to recognise and count different denominations of money which goes directly to the question of her capacity in this area. It is not accepted that this part of the assessment is unnecessary.

13. In terms of SB's understanding of her benefits, AB does not accept that SB has even a basic understanding of the amount of benefits she is entitled to. AB reports that SB continues to ask AB when her benefits are due and how much she receives.

14. *Dr O'Donovan confirms that as SB would not cooperate in a re-assessment of her capacity in this area following the questions posed by AB, she was unable to assume that any inaccurate information provided indicates a lack of capacity. It is AB's view that this issue needs to be explored in more depth with SB, to include both basic understanding of her money and whether she is able to provide an accurate account of her income and outgoings in order to establish, reliably, whether SB has capacity in this area.* It is accepted that what SB spends her money on may be unwise decision making, however it is not accepted that the

evidence is clear at present that she can account for her expenditure at all, whether it be unwise or not. In the event that SB is deemed to have capacity, there will be no authority for AB, or another identified person, to assist SB in the management of her benefits and ensuring that she is receiving the maximum amounts to which she is entitled." [emphasis added].

Contraception

28. AB's concerns in relation to Dr O'Donovan's assessment of SB on this issue are as follows:

15. It is AB's position that *she does not consider that Dr O'Donovan has placed sufficient weight on SB's history of terminations*. SB has had a significant number of terminated pregnancies (7), with one full-term pregnancy and her son now being cared for by a family member. Whilst SB understands how to get pregnant, AB does not consider that she is able to consider the consequences of a further pregnancy and whether this would result in a further termination and distress for her. It does not appear that this was explored by Dr O'Donovan within her report.

16. In respect of the different forms of contraception which Dr O'Donovan discussed with SB, AB considers that SB was simply reciting back the different forms of contraception without any real understanding of each option. AB reports that in the past SB has not used contraception on the basis of the belief that she will not catch a sexually transmitted infection if the man she is engaging in sexual intercourse with is in love with her. *AB does not consider that SB has*

developed a deeper understanding of contraception and Dr O'Donovan has taken SB at face value during the interview, without exploring the extent of SB's understanding in this area." [emphasis added]

Social media

29. AB says this in relation to social media:

"17. AB is concerned that whilst SB was able to state that she understood the risks of social media, SB does not apply her apparent understanding of those risks when actually accessing social media. SB continues to add unknown individuals to her Facebook and to converse with them, providing personal information. Historically, AB reports that SB has met men on social media and determined that they are safe, despite warnings from others around her. **AB considers that this behaviour demonstrates a lack of ability to weigh up the relevant information around risk when using social media.**

18. *Dr O'Donovan has not, in AB's view, placed sufficient weight on SB's past behaviour and whether she actually understands why that behaviour was unacceptable in the context of social media.* An example cited by AB has been that SB has previously posted pictures of her son on social media, however when it was explained to her why these had to be taken down, SB was angry and confused. Dr O'Donovan does not appear to have discussed with SB as to whether she now understands why this was necessary, or whether her understanding of the risks is beyond superficial." [emphasis added]

30. It is submitted on behalf of the Official Solicitor that AB's submissions in fact place more emphasis not on the inaccuracy of Dr O'Donovan's information, but on the weight which she attributed to that information.
31. It is accepted by all parties that if an expert is inadequately or inaccurately instructed as to the factual background of a case, or if the expert demonstrably fails to consider that factual background, this could undermine their conclusions: it is fundamental to an assessment of capacity that the expert identifies the information relevant to the decision and then assesses whether P has the ability to understand, retain, use and weigh that information. The position of the Official Solicitor and The LA is that it would be surprising if that had happened in the present case, since AB jointly instructed Dr O'Donovan, and had an additional opportunity to provide her with information when she spoke to her on 18 February 2020. She has been able to provide Dr O'Donovan with all the information she considers relevant.

Capacity: the legal framework

32. The relevant law is set out in section 1-3 MCA 2005, and the principles to be applied set out comprehensively in *Kings College Hospital NHS Foundation Trust v C & V* [2015] EWCOP 80, per MacDonald J:

'25. First, a person must be assumed to have capacity unless it is established that they lack capacity (Mental Capacity Act 2005 s 1(2)). The burden of proof lies on the person asserting a lack of capacity and the standard of proof is the balance of probabilities (Mental Capacity Act 2005 s 2(4) and see *KK v STC and Others* [2012] EWHC 2136 (COP) at [18]).

26. Second, determination of capacity under Part I of the Mental Capacity Act 2005 is always 'decision specific' having regard to the clear structure provided by sections 1 to 3 of the Act (see *PC v City of York Council* [2014] 2 WLR 1 at [35]). Thus capacity is required to be assessed in relation to the specific decision at the time the decision needs to be made and not to a person's capacity to make decisions generally.
27. Third, 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 (Mental Capacity Act 2005 s 1(3)).
28. Fourth, a person is not to be treated as unable to make a decision merely because he or she makes a decision that is unwise. It is important in this regard to recall the words of Peter Jackson J in *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP) at [7]:

"The temptation to base a judgment of a person's capacity upon whether they seem to have made a good or bad decision, and in particular on whether they have accepted or rejected medical advice, is absolutely to be avoided. That would be to put the cart before the horse or, expressed another way, to allow the tail of welfare to wag the dog of capacity. Any tendency in this direction risks infringing the rights of that group of persons who, though vulnerable, are capable of making their own decisions. Many who suffer from mental illness are well able to make decisions about their medical treatment, and it is important not to make unjustified assumptions to the contrary."
29. Likewise, the outcome of the decision made is not relevant to the question of whether the person taking the decision has capacity for the purposes of the Mental Capacity Act 2005 (see *R v Cooper* [2009] 1 WLR 1786 at [13] and *York City Council v C* [2014] 2 WLR 1 at [53] and [54]).

...
31. Fifth, pursuant to s 2(1) of the 2005 Act a person lacks capacity in relation to a matter if at the material time he 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'). It does not matter whether the impairment or disturbance in the functioning of the mind or brain is permanent or temporary (Mental Capacity Act 2005 s 2(2)). It is important to note that the question for the court is not whether the person's ability to take the decision is *impaired* by the impairment of, or disturbance in the

functioning of, the mind or brain but rather whether the person is rendered *unable* to make the decision by reason thereof (see *Re SB (A Patient: Capacity to Consent to Termination)* [2013] EWHC 1417 (COP) at [38]).

32. Sixth, pursuant to s 3(1) of the 2005 Act a person is "unable to make a decision for himself" if he 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 his decision whether by talking, using sign language or any other means (the so called 'functional test'). An inability to undertake any one of these four aspects of the decision making process set out in s 3(1) of the 2005 Act will be sufficient for a finding of incapacity provided the inability is because of an impairment of, or a disturbance in the functioning of, the mind or brain (see *RT and LT v A Local Authority* [2010] EWHC 1910 (Fam) at [40]). The information relevant to the decision includes information about the reasonably foreseeable consequences of deciding one way or another (Mental Capacity Act 2005 s 3(4)(a)).
33. The order in which the relevant terms of the Mental Capacity Act 2005 are drafted places the 'diagnostic test' in s 2(1) before the 'functional test' in s 3(1). However, having regard to the wording of s 2(1), namely, "he 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" (emphasis added), the order in which the tests are in fact applied must be carefully considered. In *York City Council v C* [2014] 2 WLR 1 at [58] and [59] McFarlane LJ (with whom Richards and Lewison LJ agreed) held as follows:

"It would be going too far to hold that in approaching matters in this way Hedley J plainly erred in applying the law. His judgment refers to the key provisions and twice refers to the nexus between the elements of an inability to make decisions set out in s 3(1) and mental impairment or disturbance required by s 2(1). There is, however, a danger in structuring the decision by looking to s 2(1) primarily as requiring a finding of mental impairment and nothing more and in considering s 2(1) first before then going on to look at s 3(1) as requiring a finding of inability to make a decision. The danger is that the strength of the causative nexus between mental impairment and inability to decide is watered down. That sequence - 'mental impairment' and then 'inability to make a decision' - is the

reverse of that in s 2(1) – 'unable to make a decision ... *because of* an impairment of, or a disturbance in the functioning of, the mind or brain' [emphasis added]. The danger in using s 2(1) simply to collect the mental health element is that the key words 'because of' in s 2(1) may lose their prominence and be replaced by words such as those deployed by Hedley J: 'referable to' or 'significantly relates to'...Approaching the issue in the case in the sequence set out in s 2(1), the first question is whether PC is 'unable to make a decision for herself in relation to the matter', the matter being re-establishing cohabitation with NC now that he is her husband and now that he is has regained his liberty."

34. Within this context, it is important to remember that for a person to be found to lack capacity there must be a causal connection between being unable to make a decision by reason of one or more of the functional elements set out in s 3(1) of the Act and the 'impairment of, or a disturbance in the functioning of, the mind or brain' required by s 2(1) of the Act.' ...
36. In *PCT v P, AH and The Local Authority* [2009] COPLR Con Vol 956 at [35] Hedley J described the ability to use and weigh information as "the capacity actually to engage in the decision making process itself and to be able to see the various parts of the argument and to relate one to another".
37. Within the context of s 3(1)(c) **it is not necessary for a person to use and weigh every detail of the respective options available to them in order to demonstrate capacity, merely the salient factors** (see *CC v KK and STCC* [2012] EWHC 2136 (COP) at [69]). Even though a person may be unable to use and weigh some information relevant to the decision in question, they may nonetheless be able to use and weigh other elements sufficiently to be able to make a capacitous decision (see *Re SB* [2013] EWHC 1417 (COP)).
38. It is important to note that s 3(1)(c) is engaged where a person is *unable* to use and weigh the relevant information as part of the process of making the decision. What is required is that the person is able to employ the relevant information in the decision making process and determine what weight to give it relative to other information required to make the decision. **Where a court is satisfied that a person is able to use and weigh the relevant information, the weight to be attached to that information in the decision making process is a matter for the**

decision maker. Thus, where a person is able to use and weigh the relevant information but chooses to give that information no weight when reaching the decision in question, the element of the functional test comprised by s 3(1)(c) will not be satisfied. **Within this context, a person cannot be considered to be unable to use and weigh information simply on the basis that he or she has applied his or her own values or outlook to that information in making the decision in question and chosen to attach no weight to that information in the decision making process.** [Emphasis added]

33. My attention was also drawn to the following passage in Cobb J's comments in *Re Z* [2016] EWCOP 4:

1. It is well known that young people take risks. Risk-taking is often unwise. It is also an inherent, inevitable, and perhaps necessary part of adolescence and early adulthood experience.

.....

67. As indicated at the outset of this judgment, some risk-taking in adolescents and young adults can be perfectly healthy, such as in sporting activities, or artistic and creative pursuits, travelling, making new friends (including internet dating and friendship groups), or entering competitions. **Healthy risk-taking helps young people to learn.** Some adolescent risk-taking can be unhealthy and dangerous – casual sexual relationships, unprotected sex, driving too fast on the roads, excessive consumption of alcohol, consumption of non-prescribed drugs, dealing with anger and confrontation. These forms of risk-taking are inherently unwise and unsafe. In dealing with risk issues in relation to a young person in the context of assessment under the MCA 2005, **it is necessary to separate out as far as is possible the evidence which indicates that second category of risk taking (unhealthy, dangerous, unwise) from that which reveals or may reveal a lack of capacity.** As Lewison LJ said in *PC v City of York* (above) "adult autonomy" includes the freedom "to make unwise decisions, provided that they have the capacity to decide" (see [64]). [Emphasis added]

34. It was submitted on behalf of SB that this judgment is particularly relevant in a case such as this, where capacity has been assessed over a number of years,

and where the person being assessed has had a varied range of experience over that period, on which she has been supported to reflect and from which she has been able to learn. I note that in his second report Dr Carpenter also referred to this case in his Appendix setting out the general principles for the assessment of capacity.

Capacity: residence - discussion

35. In her first report Dr O'Donovan acknowledged that there is evidence that historically SB has struggled to understand and weigh up decisions relating to her residence. In this context paragraphs 14.2.11 to 14.2.12 are particularly pertinent:

“14.2.11 There is evidence that historically SB has struggled to understand and weigh up decisions in regards to her residence, particularly when considering this in the context of her own care needs. During previous assessments SB had the opportunity to reflect on her experience of different environments but was unable to weigh up the information to make a decision. However, during this assessment, SB did demonstrate an understanding of the different residential options that are currently available to her. She could use the necessary information and weigh it up.

14.2.12 SB was clear that she has no plans to live with her partner. She stated that whilst they were engaged, they currently were not in a position to get married as they were not ready for this as a couple, which is in keeping with many couples who choose long engagements. She accepted that once they felt

that they were ready to commit to marriage that it would be likely that she would live with her partner at this time. However, she said at present she had no plans to do this, in part because the couple were not ready and partly because she liked living with her mother.”

36. Dr O’Donovan was therefore of the opinion that SB has demonstrated an ability to understand, weigh up and retain information in regards to her residence and communicate her decision. Thus she is currently able to make a capacitous decision in regards to her residence (paragraph 14.2.13). It should be remembered that in reaching this professional opinion Dr O’Donovan will have been familiar with the fact that within the context of s 3(1)(c) Mental Capacity Act **it is not necessary for a person to use and weigh every detail of the respective options available to them in order to demonstrate capacity, merely the salient factors** (see *CC v KK and STCC* [2012] EWHC 2136 (COP) at [69]).
37. It should be noted that Dr O’Donovan was assessing SB’s capacity in this area of decision making as between the two possibilities currently available to her. The legal test that the expert (and the court) must apply does not require the consideration of hypothetical alternatives. However, in this context I note firstly that Dr O’Donovan did discuss two hypothetical situations with SB (the first of AB moving to Scotland and the second of AB being too unwell to care for SB) and SB was able to weigh up information in relation to these options and reach a decision. I note in passing that AB agrees with the conclusions that SB reached in relation to both of these hypotheses; it happens that in both of these scenarios SB placed the same or similar weight on factors as her mother would

have done if she had to make the decision for SB. That however is not the test for considering capacity. Ultimately, it is for P alone to decide how much weight to place on different aspects of available information. An evaluation of capacity does not and must not require or allow the court or others to substitute its own values and priorities with those that belong to a patient.

38. I do however note that Dr O'Donovan said this, at paragraph 14.2.14 of her first report:

“14.2.14 It is understood from previous reports that it was considered that SB would benefit from having access to information about alternative forms of accommodation. SB has stated that she would be willing to review such information. *In the absence of her receiving such information it is not possible to assess her capacity to make a decision about specific alternative accommodation arrangements outside of the two possibilities that she currently has available to her.* However, it is possible that with the relevant information she could apply the same cognitive style to considering such options as she has when considering her decision to live with either her mother or her partner.”

39. That is the context in which Dr O'Donovan has reached her professional conclusion. In this context, having considered all of the submissions and evidence, I am of the view that Dr O'Donovan's professional opinion that SB has the capacity to make decisions around her residence is thorough, comprehensive and unimpeachable.

Capacity: care - discussion

40. AB's reasoning in relation to care is the same as that in relation to residence. In AB's view, SB is not able to weigh the risks of placing herself in a situation where her care needs would not be met as demonstrated by her historic behaviour and absconsions. For the reasons given above in the section titled Residence: capacity - discussion, the professional opinion of Dr O'Donovan in relation to SB's capacity to make decisions in relation to her care must also stand.

41. Before I move to the next area of discussion, I would however like to endorse the submissions made by Miss Roper that the question of SB's capacity to consider her care needs and make decisions accordingly is an area which exemplifies a change in SB's presentation since she was last assessed by Dr Carpenter. He accepted AB's account of SB's care needs as accurate and found that SB did not recognise her need for support. Dr O'Donovan, some 15 months later, found that SB has come to appreciate this:

"4.1 SB stated that she required assistance day to day either from her mother or her partner in order to manage a number of her needs. She stated that she was unable to cook for herself without supervision as she had previously sustained injuries and had not been able to follow the instructions properly. She also stated that she required support with cleaning and washing her clothes. SB admitted that whilst she was able to manage her personal care for herself, she did require prompts from her mother to remind her to attend to this and believed that in the absence of this, she would forget to do it for herself.

4.1.2 SB stated that in addition to requiring support with her day to day needs, she also needed to spend the majority of her time with her mother or her partner due to "safeguarding". On further exploration of this, SB stated that she was not "safe" being on her own and that she was at risk from other people. She considered this in the context of her previous relationships. However, she stated that she was able to catch public transport to familiar places on her own and gave the example of travelling

to her partners house. Although, she said that her mother talked to her along the way and her partner would meet her in Scarborough to ensure that she arrived safely.

4.1.3 SB was able to draw on her previous experience of residing with her previous partners who had not been able to meet her needs and had prevented her from spending time with her mother. She was able to recognise that at these times she had not been able to care for herself adequately and that she had been at risk. SB went on to state that she felt safe when she was with her mother. Whilst she said that she also felt safe with her partner, she considered that her mother was able to meet her needs better than CJ as she was more organised and maintained a clean and tidy household.”

42. I agree that this final paragraph is indicative of the progress which SB has made since she was last assessed by Dr Carpenter. It is clear from Dr O’Donovan’s report that SB has reflected on her experiences of life, and can apply the knowledge gained from reflection to the decision-making process.

43. I note that in this regard, in December 2018 Dr Carpenter opined that:

“88. Due to the severity of her LD I believe SB is not able to gain capacity [to make decisions about her care needs] in the foreseeable future. However, with clinical assessment of her practical skills (such as an occupational therapist assessing her skills), she will be more able to be educated as to how her practical skills need support and with repetition of the information may come to accept it even when in other settings.

88.1 I would expect that extended externally structured discussion with diagrams over each element of her care SB would agree that her mother does her washing for her, her mother prompts her to change clothes and to wash and she does not do this much when at CJ's; her cooking is limited. She does

not budget well. She does not know how to pay domestic bills. However due to her level of disability I seriously doubt that she would be able to put this together to decide independently that in general she needed a certain level of support in different areas and that this needed to be provided by either her partner or co-habitee or external carer, where ever she lives. If such a statement was drafted and put to her I would expect her to be able to agree with what was stated, as she is pliant, but not retain it as she would not fully understand its implication.” (Dr Carpenter’s second report dated 6 December 2018).

44. In fact, when assessed by Dr O’Donovan SB was able to volunteer those matters set out in paragraphs 4.1 – 4.1.3 of Dr O’Donovan’s report. SB’s presentation went far beyond pliant agreement with a proposition put to her. This is again indicative of the progress that she has made since Dr Carpenter last reported. I make it clear that in making these observations I make no criticism of Dr Carpenter’s stated views, which were matters of considered professional *opinion*. By its very nature expert psychiatric evidence is ultimately opinion evidence. That subsequent events establish that such opinion is superseded does not in any way undermine the initial validity of the original opinion.

Capacity: property and affairs – discussion

45. This is the area of assessment that has caused me the most difficulty.

46. In her written submissions Miss Roper stated that:

“Having received Dr O’Donovan’s report, AB has now provided further information to suggest that SB regularly borrows money from her mother. It is

frankly inexplicable that this information was not provided in the first instruction, and that even now, the witness statement provided on this point [G65-67] is lacking in detail. Dr O'Donovan did however consider the information which AB provided to her on this aspect; she concluded:

Having considered AB's account of SB's financial affairs, there is an indication that SB is unable to effectively budget. However, this does not necessarily indicate that she is unable to manage her property and financial affairs. A large proportion of the population who are in control of their own finances struggle to effectively budget and instead are considered to make unwise decisions in regard to their financial affairs, as opposed to lacking capacity. Following the discussion with AB however, it would have been helpful to explore this matter further with SB. However, after arrangements were made to do this, the teleconference subsequently did not go ahead on the basis of the instruction of the Official Solicitor and the relevant parties. In the absence of SB cooperating openly in the assessment, in my view **it cannot be assumed that inaccuracy of the information she provided indicates that she lacks capacity to make decisions about her finances.** [165/§3.3.2] [emphasis added]

The Official Solicitor considers that the evidence recently provided by Ms Carter is worth exploring but does not by itself suggest that SB lacks capacity to manage her finances."

47. There are two matters that arise from this. Firstly, as was submitted by Miss Twist on behalf of AB, in her first witness statement dated 2 March 2018 AB raised concerns that CJ may be financially abusing SB:

"33. I am also concerned that CJ may be financially abusing SB. CJ gambles frequently and I am concerned that he is using SB's money in order to do so. CJ attends the Amusement Arcade around four times per week. He receives his

benefits from the DWP once fortnightly and attends the Arcade as soon as he has been paid, I asked SB how CJ affords to gamble and she stated that she provides him with money once he has spent his own. SB informed me that CJ spends all of his money gambling and she has to pay for the electric and gas in their home. Around every 2 weeks SB asks me for money. I usually give SB £60-£80 at the end of the month, every couple of months, and she states that she spends this on gas, electric and food, I have given SB £60-£80 on around four occasions. I have asked SB where she spends her money at the end of every month and she states "I try to stop him gambling mum. He doesn't have any money mum."

48. It is difficult to see what further information/evidence AB can provide in this regard if she is not privy to SB's financial affairs and does not know what she spends her money on. However, the evidence of what SB is reported to have said to her mother is potentially important. The second issue, which arises from this, is that there has been no factual determination of what SB may (or may not) have said to AB and whether there is any truth in these comments, if made. The arbiter of facts is the court.

49. In paragraph 1.4 of her second report Dr O'Donovan records the further instructions that she received, and the questions posed to her, in relation to SB's capacity to manage her property and affairs:

"1.4 Following submission of the report, dated 31st January 2020 | received further instruction to speak with AB who expressed concerns in regards to the

conclusions of the initial report. I was also instructed to answer the following questions:

1. The conclusion reached that SB has capacity to manage her property and affairs is based on "SB's account and ... the absence of evidence that contradicts this". What steps did you take to obtain information from AB and SB's partner to verify that SB's account of her financial management was an accurate reflection of what is happening in reality?

2. AB subsequently informed you that SB does not provide her with £50 per week, nor does she provide any form of financial support to her sister. AB in fact provides SB with additional funds each week as she has spent her benefits. What steps did you take to verify the accuracy of SB's account of her spending, for example, reviewing her bank statements with her and discussing expenditure?

3. You note that SB's list of expenses are realistic. Did you explore the value of each identified expense against the amount of benefits she received? Do you consider that in light of AB's subsequent disclosure that suggests that SB is not successfully budgeting from her benefits entitlement, this calls into question whether she is able to manage her property and affairs?

4. Did you discuss with SB what support she currently receives in relation to claiming her benefits? Do you hold the view that she was able to independently find out what benefits she is entitled to and apply for the same? If yes, please provide evidence to support your answer.

5. Did you discuss the value of different denominations of money with SB, for example, was she able to recognise the different values of coins and accurately count change from a transaction? If not, why did you not do so and do you consider that this ability is relevant to her capacity to manage her property and affairs?

50. Questions 3 to 5 are dealt with comprehensively in Dr O'Donovan's first supplemental report and do not cause me any concern.

51. In relation to the first question Dr O'Donovan said this in paragraph 3.1.3 of her first supplemental report:

"3.1.3 The contrast between SB and AB's account of the money exchanged between them does not in my opinion bear any relevance to the question of the SB's capacity to make financial decisions as SB is required to demonstrate an understanding of the necessary information and weigh it up. During the assessment she was able to demonstrate an understanding of her income and some of her necessary outgoings. Whilst she omitted that her mother lends her money, this does not necessarily indicate that she lacks capacity and could be an indication of an inability to budget as a consequence of unwise decisions."

52. Dr O'Donovan went on to state that:

"3.2.5 The specific details of SB's budgeting and financial accounting are not necessary in order to determine whether she has the ability to understand, weigh up, retain and communicate the necessary information in regard to her financial affairs. Whilst there is no specific test for managing financial affairs it

is necessary to consider a checklist as endorsed by Mr Justice Wright in *Mastermann vs Lister*. Within this checklist an individual is required to know the extent of their property and affairs in terms of how much income they receive, what they spend, their financial liabilities, financial needs and responsibilities and that a person would be likely to seek, understand and act on appropriate advice were it necessary.

3.2.6 Based on the information available, SB was able to provide an account of her income, her financial liabilities, needs and responsibilities. Whilst there is an issue in relation to what SB spends her money on, this alone does not necessarily render her incapable of making decisions around her finances.

3.3.2 Having considered AB's account of SB's financial affairs, there is an indication that SB is unable to effectively budget. However, this does not necessarily indicate that she is unable to manage her property and financial affairs. A large proportion of the population who are in control of their own finances struggle to effectively budget and instead are considered to make unwise decisions in regard to their financial affairs, as opposed to lacking capacity. Following the discussion with AB however, it would have been helpful to explore this matter further with SB. However, after arrangements were made to do this, the teleconference subsequently did not go ahead on the basis of the instruction of the Official Solicitor and the relevant parties. In the absence of SB co- operating openly in the assessment, in my view it cannot be assumed that inaccuracy of the information she provided indicates that she lacks capacity to make decisions about her finances."

53. Whilst it is undoubtedly the case that many individuals with capacity are unable to budget (the county court is replete with examples on a daily basis) my concern is that if it is the case that AB regularly provides SB with money, this is either a gift (which is a form of income) which SB does not appear to acknowledge that she receives, or it is a debt (financial liability) which again she does not acknowledge. These are issues that go to the test for capacity in this area. Having read and re-read the reports of Dr O'Donovan, I am not afraid to acknowledge that this is an issue that I have really wrestled with. I have serious concerns that on balance this issue has not been fully investigated or addressed. The parties agreed at the hearing that the local authority do by 4pm on Friday 15 May 2020 file and serve a statement setting out what consideration it has given as to whether any investigations should be carried out into SB's financial affairs, and the outcome of any investigation undertaken so far, whether any further declaration or order is sought from this court and the reasons for that position, if any further declaration or order is sought and its proposal as to the way forward.
54. There is also to be a further direction that by 4pm on Friday 22 May 2020 the first and second respondent shall file and serve their response to the applicant's evidence setting out whether each agrees with its proposals and if not, the reasons and its proposal as to the way forward. In the event that there is a dispute as to how to proceed which requires the court's determination, an application shall be made by COP9 by 4pm on Friday 29 May 2020.

55. In light of the manner in which the hearing was conducted (with documents being sent to me too late for me to read/consider) and the fact that I did not have the opportunity to raise my concerns with the legal representatives for the parties at the hearing, which ordinarily I would do, I have set them out in this judgment. I have no doubt at all that they will be taken into account by all parties when they consider how best to proceed in relation to this area of capacity. In the event that there is no agreement as how best to proceed, I have provisionally listed a hearing in my diary for 2pm on 2 June 2020 (t/e 2 hours) to deal with any applications issued in accordance with the directions made at the hearing.

Capacity: contraception: discussion

56. AB's concerns arise from the fact that she does not consider that Dr O'Donovan has placed sufficient weight on SB's history of terminations. In fact, this was a factor that SB was able to take into account when discussing her decision making in relation to contraceptive choices. Dr O'Donovan said this at paragraph 14.5.2 and 14.5.10:

“14.5.2 SB was able to reflect on her experience of using different types of contraception, citing the pill, the coil and the implant, together with condoms and the practice of the withdrawal method.”

“14.5.10 SB demonstrated an ability to use her experience of trialling different forms of contraception together with her experience of not using

any contraception at all, which has resulted in her having several unwanted pregnancies. In addition, she has been able to use this information to consider her wishes in regards to further pregnancies and has been able to reach the conclusion that she does not wish to have another child at present.”

57. I agree with the submission made by the Official Solicitor that it is clear from Dr O’Donovan’s report that SB understands that her pregnancies arose from not using effective contraception, and can use that information in deciding what if any contraception to use now. The weight to attach to that information is a matter for SB. The consequences that have in the past arisen as a result of the weight that she has attached to this information are in my view a quintessential example of an unwise decision.

Capacity: social media: discussion

58. This is another area where AB asserts that Dr O’Donovan should have placed more weight on SB’s past behaviour. It is clear from Dr O’Donovan’s report that SB is able to understand the risks of social media and weigh them up:

“14.4.3 SB went on to explain that people that she met on social media may not be who they claim to be. She said that such people could mislead her and give her incorrect information. She said that on the basis of her previous experience of meeting others on social media that if she were to accept a friend request from somebody she did not know in the future, she would want to have evidence that they did not have a “Police record”.”

59. In her addendum report Dr O'Donovan addressed AB's concerns and concluded, at paragraph 3.9.4 that:

"I therefore do not consider that SB's understanding of the methods and rationale for sharing personal information to be superficial in such a way that this would impact on her ability to use and weigh the relevant information when posting on social media."

60. There is no proper basis for questioning that conclusion.

Conclusion: declarations

61. The paragraphs below reflect the way forward in light of my rulings in this judgment.
62. The current extant declarations that SB lacks capacity to decide where she lives, about her care and to make decisions about contraception should be discharged. The final declaration that SB lacks capacity to conduct proceedings will remain in place.
63. The final declaration that SB lacks capacity to make decisions about the contact that she has with other people should be discharged. The more neutral position of there being no declaration in relation to this area of capacity should pertain pending the outcome of the third report from Dr Camden Smith. The submission on behalf of AB that the declaration in relation to capacity should remain in place because the final declaration in relation to litigation capacity will remain in place was always illogical, more so after I indicated at the hearing

that I would not order that Dr Camden Smith re-assess the question of litigation capacity.

64. The current position in relation to SB's capacity to manage her property and affairs (namely no declaration whether final or interim) will continue to pertain.
65. There will be final declarations pursuant to section 15 that SB has capacity to make decisions about her residence, care, access to the internet and social media and contraception.

HHJ Sarah Richardson