Neutral Citation Number: [2023] EWCA Civ 1483

Case No: CA-2023-001476
CA-2023-001476-A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
MR JUSTICE FOXTON
CL-2021-000399

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2023

Before :

LORD JUSTICE POPPLEWELL
LORD JUSTICE PHILLIPS
and
LORD JUSTICE NUGEE

- -

Between :

KEI KIN HUNG	**Appellant/ Defendant**
- and -	
HUA SHE ASSET MANAGEMENT (SHANGHAI) COMPANY LIMITED	**Respondent/ Claimant**

- -
- -

Charles Hollander KC and **Andris Rudzitis** (instructed by **Zhong Lun Law Firm**) for the **Appellant**
James McWilliams (instructed by **Reynolds Porter Chamberlain**) for the **Respondent**

Hearing date : 5 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 13 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE POPPLEWELL:

Introduction

1. The respondent ('Hua She') is a company incorporated in the People's Republic of China ('PRC'). The appellant ('Mr Kei') is a PRC national who acquired permanent residency in Hong Kong in about 2009-2010, and was at one time a very wealthy individual. Hua She pursued and obtained freezing orders against Mr Kei, together with orders for disclosure of assets. On 4 October 2021, Mr Kei's solicitors filed a certificate of suitability of litigation friend, pursuant to CPR Rule 21, ('the Litigation Friend Certificate') appointing his brother-in-law, Zhu Lei ('Mr Zhu') as litigation friend in the proceedings on the grounds that Mr Kei lacked mental capacity to conduct the proceedings in accordance with the Mental Capacity Act 2005 ('the 2005 Act').

2. Following a contested hearing, Foxton J delivered a judgment on 7 July 2023 ('the Judgment') holding that Mr Kei did not lack capacity under the 2005 Act. His decision was reflected in his Order dated 14 July 2023 ('the Order').

3. Mr Kei sought permission to appeal, challenging the reasons of Foxton J and, additionally, seeking to rely on fresh evidence in the form of a witness statement from Mr Kei's solicitor, Lin Hou ("Mr Hou"). Males LJ granted permission, stating that based on the evidence before the Judge, the latter was entitled to reach his decision and it would not warrant permission to appeal; but that the further evidence from Mr Hou called that conclusion into question such that it was appropriate that the issue of capacity be considered by this Court.

The Proceedings

4. Hua She is a judgment debtor of Mr Kei pursuant to an Order of 16 July 2021, by which Robin Knowles J granted Hua She leave to enforce as a judgment an arbitration award made by the Shanghai International Economic and Trade Commission Arbitration on 26 October 2020 against Mr Kei. By that order ('the July Order'), Robin Knowles J also granted a freezing order restraining Mr Kei from dealing with his assets within England and Wales up to the value of the Award in an amount, including interest, of RMB 188,072,095.57, roughly equivalent to US $22m. The grounds relied upon for establishing a risk of dissipation of assets were alleged failures to comply with a worldwide Mareva injunction and disclosure order made on 9 November 2020 in the British Virgin Islands; and with a freezing injunction and disclosure order made by the High Court of Hong Kong on 17 February 2021.

5. Hua She's evidence is that service of the July Order was effected on Mr Kei on 21 July 2021 and that Mr Kei was personally aware of the order by no later than 23 July 2021.

6. On 28 September 2021, Hua She applied to vary the July Order to require disclosure of assets within the jurisdiction. Shortly before the hearing of that application took place, on 4 October 2021 the Litigation Friend Certificate was filed pursuant to CPR Rule 21, appointing Mr Zhu as Mr Kei's litigation friend. The certificate was based on a report from Dr Wing-Kit Choi ('Dr Choi') dated 19 August 2021. Dr Choi is an experienced and well-qualified Hong Kong psychiatrist. The procedure set out in Rule 21 means that such a certificate takes effect to remove control of the proceedings from Mr Kei, and determines his incapacity, without any judicial scrutiny of whether that is justified.

7. On 8 October 2021 Robin Knowles J varied the July Order so as to require an affidavit of disclosure in relation to Mr Kei's assets within England and Wales ('the October Order'). In accordance with the Litigation Friend Certificate, the October Order permitted the affidavit to be sworn by Mr Zhu. The October Order specifically identified assets which were subject to the freezing order, namely: (a) a luxury flat in the One Hyde Park Development ('1HP'); (b) a property known as Hugh House at 7A Eaton Square ('Hugh House'); and (c) any bank accounts which Mr Kei used in the UK for the purposes of supporting his family or otherwise. The two London properties were of substantial value (documents later revealed that 1HP was marketed for sale at almost £9 million and that the mortgage on Hugh House was for some £46.8 million). The October Order required disclosure by affidavit of all assets within England and Wales of an individual value of £10,000 or more, and details of Mr Kei's interest in the two London properties.

8. On 18 October 2021 Mr Zhu swore the asset disclosure affidavit required by the October Order. He stated that it was based on information derived from Mr Kei. The only assets of Mr Kei within the jurisdiction which were disclosed were a half interest in a racehorse located in Newmarket with an estimated current value of €150,000; and the legal but not beneficial title in 1HP.

9. On the day before the October Order, Mrs Zhu had served a witness statement stating that Hugh House was owned by Sparkle Roll Capital Limited, the sole shareholder in which was Mr Kei's daughter, Qi Meihe; that Mr Kei used to own 1HP but had previously sold it to Liu Qiang; and that Mr Kei had no bank accounts in the United Kingdom; and that when she, Mrs Zhu, spent time in the jurisdiction she funded herself and her family from her own bank accounts.

10. On 13 May 2022 Hua She obtained interim charging orders over the two London properties. A charge had been registered against Hugh House which was understood to be security for a mortgage loan given by UBS AG ('UBS') to Mr Kei. Hua She sought disclosure of documents from UBS, who were not prepared to do so without its client's consent. That consent was given by Mr Kei on 15 February 2023. Disclosure of documents was given by UBS to Hua She on 22 March 2023 ('the UBS Documents'). Following some further queries, further disclosure was given by UBS to Hua She on 3 May 2023.

11. Hua She considered that the UBS Documents demonstrated (a) that there had been breaches of the July and October Orders; and (b) that that Mr Kei did not lack capacity. Accordingly they brought a number of applications, which included:

    (1) committal proceedings against Mr Kei, together with an application for case management directions;

    (2) an application that Mr Zhu be discharged from acting as Mr Kei's litigation friend;

    (3) the extension of the October Order to cover Mr Kei's assets worldwide; and

    (4) an order for an affidavit of disclosure of such worldwide assets to be given by Mr Kei personally, not through an intermediary.

12. The committal proceedings, which are due to be heard in March 2024, included allegations of the following conduct of Mr Kei as amounting to contempt:

(1) an instruction by Mr Kei given to UBS London on or about 28 July 2021, after service of the July Order, to move all assets held by him at UBS in London to his accounts at UBS in Switzerland;

(2) specific transfers from Mr Kei's UBS accounts in London on or around 29 September 2021, 5 January 2022, 30 March 2022, 30 June 2022, 30 September 2022 and 30 December 2022, in sums totalling roughly £1.5m;

(3) instructions for 1HP to be marketed and/or allowing it to continue to be marketed;

(4) failing to disclose the sums in his London UBS bank accounts, which were always in excess of £25m;

(5) interfering with the due administration of justice by causing or allowing the Litigation Friend Certificate to be filed on 4 October 2021 when he knew that he did not in fact lack capacity and that the contents of the document were false;

(6) causing or allowing Mr Zhu to provide a false affidavit of assets in response to the October Order.

13. The applications were supported by the second affidavit of Mr Cary, a partner in Reynolds Porter Chamberlain, Hua She's solicitor.

14. The applications that Mr Zhu cease to act as litigation friend, and that the freezing order be extended to worldwide assets in respect of which Mr Kei should personally give an affidavit of disclosure, were listed to be heard before Foxton J on 7 July 2023, along with some others not here relevant. Hua She relied upon the second affidavit of Mr Cary. The evidence served on behalf of Mr Kei in opposition to those applications was in the form of a second report from Dr Choi dated 27 June 2023.

Dr Choi's Reports

15. Dr Choi's first report dated 19 August 2021, which was filed with the Litigation Friend Certificate on 4 October 2021, recorded that he had examined Mr Kei at his clinic three times, on 10, 12 and 16 August 2021 respectively. He had also interviewed Mrs Zhu and Mr Kei's long-time friend, Mr Wu. The report recorded Mrs Kei's account that her husband had become quiet and socially withdrawn in the previous 18 months. At the initial consultation on 10 August, Mr Kei showed signs of depression and "psychotic symptoms in the form of auditory hallucination (with derogatory contents) and persecutory delusion could be elicited." On the third visit, when Dr Choi tried to ask further details of the legal cases in which Mr Kei was involved, Mr Kei became irritable and asked to leave the consultation immediately. Dr Choi's diagnosis was that Mr Kei was suffering from a Severe Depressive Disorder with Psychotic Symptoms (F32.3 of ICD-10) which expressed itself in symptoms of depressive mood, loss of interest, reduced energy level, reduced concentration and attention, bleak and pessimistic views of the future, ideas of suicide or self-harm, disturbed sleep, diminished appetite, auditory hallucination of derogatory contents, and persecutory delusion. The auditory hallucination consisted of hearing voices, which was much reduced following medication. The "persecutory delusion" was not identified. Dr Choi concluded: "judging from his current mental condition, it is unlikely that he could follow evidence and to give instructions in

court at the present moment [sic]. Currently, he is considered not having the required mental capacity to give instructions and to testify in court."

16. Dr Choi's second report dated 27 June 2023, some 22 months later, identified that he had seen Mr Kei on 19 June 2023. This was a pre-scheduled appointment, and the last of 40 occasions on which he had seen Mr Kei regularly as a patient since 10 August 2021. The report said that Mr Kei had a good therapeutic rapport with Dr Choi and his treatment compliance was very good all along. However he was continuously stressed by multitudes of psychosocial stressors. His mood was persistently depressed, he still had strong feelings of hopelessness. He believed that someone was trying to persecute him, and felt he was being followed and monitored whenever he tried to go out. He remained socially withdrawn, and was still frequently troubled by poor sleep and nightmares. Dr Choi's opinion was that he showed limited improvement in his mental state in spite of the vigorous treatment which had been provided.

17. The report continued that his activities for daily living were now mainly taken care of by a personal assistant his wife had arranged, a Mr Ho; he spent most of his time at home refusing to see anyone except his best friend Mr Wu; and that he would only stay for about 15 minutes at his regular appointments with Dr Choi and then be driven back home. The report also recorded Mrs Kei, whose contact was mostly by phone from England, as saying that his mental state was largely similar since the date of the previous report, although it had deteriorated further in the previous one or two months. He mentioned to her that he felt persecuted and followed. During a week's stay in the UK in late May 2023, he "appeared to be very sensitive suspicious, had repeatedly asked if there was anyone want to kill him." Mr Ho told Dr Choi that: "[Mr Kei] also mentioned more about feeling being followed and persecuted, and appeared to be very frightening" (sic). Mr Wu was recorded as telling Dr Choi that from time to time Mr Kei would "ask if there is anyone want to persecute him."

18. Dr Choi described the examination on 19 June 2023 as follows. Mr Kei was very nervous and suspicious when he was brought into the consultation room. His mood was anxious and depressive. "He was clearly delusional, kept asking me that if there were people following and monitoring him" [sic]. When Dr Choi asked him when his legal team would come, he became even more agitated and emotional and insisted on leaving immediately saying that he would not see them or talk with them. Whilst Mr Kei was calling Mr Ho and waiting for a response from him, he asked Dr Choi if his wife and her lawyers also wanted to kill him. At that point, Dr Choi stopped the session.

19. Dr Choi's psychiatric opinion was that Mr Kei was still suffering from a Severe Depressive Episode with Psychotic Symptoms and despite vigorous treatment remained unwell. He remained clinically depressed and was exhibiting psychotic symptoms in the form of persecutory delusion. Based on his examination and the observations from Mrs Zhu, Mr Wu and Mr Ho, Dr Choi concluded:

> "It is my opinion that Mr Kei is still considered mentally unfit to give instructions and testify in court. Currently Mr Kei is still a person who lacks of capacity within the meaning of Mental Capacity Act 2005 and CPR 21."

The UBS Documents

20. The UBS Documents include documents which appear on their face to be of a kind which would be produced in the normal course of business by such a bank's wealth management department, including "call reports", in which the account handlers at the bank purport to record communications with Mr Kei and others, either by telephone or in one case in a meeting.

21. If taken at face value they provide cogent and persuasive evidence of the following matters which were set out in the Judgment at paragraphs 11 to 24 (save for the reference in paragraph 23 to a meeting in London on 20 April 2022 which appears to be a mistake).

> "11. … As I mentioned, on 16 July 2021 Robin Knowles J made the freezing order in relation to assets in England and Wales. The documents suggest that on 28 July, Mr Kei sent UBS signed instructions, asking UBS to move all of his assets from his London bank account to his bank account in Switzerland. The instructions identified and gave the contact details for the Swiss account into which the payments were to be made. At that time, therefore, Mr Kei appeared to be able to take a rapid and financially significant decision in relation to moving assets and UBS does not appear to have had any concerns as to his ability to do so.
>
> 12. The documents suggest that that process of transfer had been initiated a little earlier, on 20 July, which led UBS to provide Mr Kei with a transfer form to be completed by Mr Kei and sent back. The documents also record that there was some form of telephone contact between UBS and Mr Kei at that stage.
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> 13. On 13 August 2021 Mr Kei's lawyers entered into a consent order extending the deadlines for applying to set aside the freezing order.
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> 14. On 19 August 2021 Dr Choi, who I accept is an appropriately qualified psychiatric doctor, prepared a psychiatric expert report stating that Mr Kei had been referred to him for an urgent psychiatric assessment by his lawyers, because he was suspected of experiencing mental health difficulties in giving instructions to his lawyers. I infer that that reference took place on or sometime prior to 10 August, because it was on 10 August that Dr Choi met Mr Kei for the first time, with further meetings taking place on 12 and 16 August.
>
> 15. In addition to his own observations of Mr Kei, Dr Choi also refers to information provided to him by Mr Kei's wife and by a close friend, the gist of which was that Mr Kei had become quiet, dull and withdrawn in the face of the disputes and legal

or arbitral proceedings that had been ongoing since 2019, and had become incapable of giving coherent instructions.

16. Dr Choi describes his own observations, gives a diagnosis of severe depression and explains the medication that he prescribed. He makes similar observations as to what he saw on 12 and 16 August, where he describes a more alert response attributed to the beneficial effect of the medication he had prescribed, but that Mr Kei was still very depressed and suffering hallucinatory episodes. Dr Choi said that Mr Kei became more depressed when asked about his financial affairs. It is apparent that the medication was further adjusted.

17. The conclusion Dr Choi expresses in that 19 August report is that Mr Kei had a severe depressive disorder with psychotic symptoms, which could date back to 2019 or 2020, and that he was not considered to have the mental capacity to give instructions and testify in court. The report does not explain what Dr Choi understood would be involved in giving instructions, or whether there are ways in which difficulties in that process might be ameliorated through the involvement of others.

18. It is significant, to my mind, that Dr Choi does not identify any recent, sudden deterioration in the medical condition that he diagnosed following the examinations he conducted in the 2021 consultations. It would appear from the report that Dr Choi was not informed of the significant financial instruction which Mr Kei had so recently given, and given in an apparently decisive and timely manner without any concern on the part of those receiving that instruction as to his capacity to do so. It would have been a serious and worrying event for a bank if it was asked to act on an instruction for a significant transfer of wealth when it had any concerns as to the mental capacity of the person giving that instruction.

19. On 5 November 2021, the contemporaneous documents suggest that Mr Kei had a wealth management call with UBS. This was in the nature of a follow-up call, because Mr Kei had himself contacted UBS in relation to a property at 7a Eaton Square to raise the issue of UBS releasing the mortgage on that property. The fact that Mr Kei had been able to take the initiative and raise that financial issue with UBS appears to me to be of significance. There is nothing in the call note to suggest that Mr Kei had any difficulty in explaining what he wanted to discuss, or in discussing it, or that UBS was left with any concern at the end of the call as to his capacity.

20. The note records Mr Kei giving quite detailed information about his shareholdings, his assets and liabilities and the plan for a potential sale of One Hyde Park, and it refers to an

agreement on his part to provide certain documents. That note suggests that Mr Kei was able at that point to engage with financial matters and make significant decisions in an active and informed way without apparent difficulty.

21. On 10 January 2022, UBS provided information to Mr Kei, following a call they had had with him, and raised a lot of detailed points for his consideration including a request for documentation. I would note the similarities between the request for information and documentation made by UBS and the exercise in relation to providing asset disclosure in response to orders made by the court. Once again there is nothing to suggest any concern on UBS's part as to Mr Kei's interactions on those issues.

22. There was a further interaction between UBS and Mr Kei on 22 February 2022 to discuss the mortgage facilities and repayment. It looks like three USB staff visited Mr Kei in his house. There, they received quite a detailed description from Mr Kei of his current financial situation, how it had changed, his future business plans, covering a variety of businesses and their prospects. Mr Kei offered UBS what I think can only be described as a multifaceted refinancing proposal for the mortgage facility. That visit to Mr Kei in his home, without any apparent presence or intervention of anyone else to explain matters to him or act on his behalf, the detailed nature of subject matter discussed and the sophisticated input that Mr Kei was apparently able to contribute are all highly significant matters when assessing his capacity.

23. By March 2022, the documents suggest that Mr Kei had taken the decision to market the One Hyde Park property, that he had instructed professionals to assist in that end, and on 7 March he spoke to UBS personnel about those marketing plans. There is documentary evidence that on 20 April 2022 Mr Kei came to London to meet with bank officials there. It would have been extremely easy for Mr Kei or those promoting his interests to demonstrate at this hearing if that was not in fact the case, given the obvious forensic significance of that event.

24. On 21 April 2022, a further wealth management call took place. It involves further discussions by UBS with Mr Kei about the expiry of a facility."

22. What is said there is in terms which are fully supported by the UBS Documents, and with comments on the significance of the documents and of Dr Choi's evidence which are, in my view, fair and fully justified. These are not conclusive findings of fact, which will have to be established to the criminal standard for the purposes of the contempt proceedings, with the benefit of evidence which we were told has now been served for that purpose on Mr Kei's behalf. They are, however, what the documents appear to show, in the absence of any answer or explanation, none having been put forward in the evidence before Foxton J (or us).

The "Fresh Evidence"

23. The "fresh evidence" which it is sought to adduce on behalf of Mr Kei comes in a third witness statement from his solicitor, Mr Hou, in which he details the circumstances of a video conference call arranged for 9:30am London time on 1 August 2023 attended (in Hong Kong) by Mr Kei and Dr Choi. Mr Hou states that Dr Choi had been asked to explain to Mr Kei the purpose of the meeting the previous day, and to attend in order to assist. His description of what happened is as follows:

> "15. Mr Kei was helped to sit in front of the camera by his assistants. He appeared very unstable and agitated. He recognised Dr Choi and immediately asked Dr Choi what Dr Choi wanted him for.
>
> 16. I then greeted Mr Kei and introduced myself; however, before I could then explain the purpose of the conference call, Mr Kei asked Dr Choi: "*why are they looking for me? What do they want from me? Do they want to harm me or arrest us? I don't want to hear any more, is that ok?*" Dr Choi then tried to explain the purpose of the meeting before Mr Kei interrupted asking, "*Dr Choi, do they want to kill me?*". Dr Choi tried to reassure Mr Kei that we did not want to kill him, but Mr Kei said "*I fear they want to kill me*".
>
> 17. As Dr Choi attempted to explain the purpose of the meeting, Mr Kei looked to me increasingly agitated and unstable. Mr Kei's assistants explained that he was too unwell to carry on and Dr Choi suggested stopping the meeting. Mr Kei then left the call looking very agitated and helped away by his assistants."

24. As I read these paragraphs, the video conference took place with Mr Hou in London and Mr Kei at an unidentified location in Hong Kong, with his "assistants" (who may have included Mr Ho but not his long-time friend Mr Wu). Dr Choi was not physically in the room with Mr Kei but present on the call from another location in Hong King: that is the natural inference from the third sentence of paragraph 15 involving Mr Kei first recognising Dr Choi when Mr Kei was placed in front of the "camera", which I take to mean a screen.

Mental Capacity: The law

25. There was no substantial dispute between the parties as to the relevant principles governing mental capacity in the current context.

26. So far as the procedural regime is concerned, CPR Rule 21.2(1) provides that a protected party must have a litigation friend to conduct proceedings on their behalf. Rule 21.1(2)(d) provides that "protected party" means a party or an intended party who lacks capacity to conduct the proceedings. CPR Rule 21.1(2)(c) provides that lack of capacity is to be determined in accordance with the 2005 Act.

27. The 2005 Act provides:

> "1. 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.
>
> ….
>
> 2. People who lack capacity
>
> (1) For the purposes of this 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.
>
> …
>
> (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities
>
> 3. Inability to make decisions
>
> (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
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> (a) to understand the information relevant to the 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).
>
> (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
>
> (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision
>
> (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
>
> (a) deciding one way or another, or
>
> (b) failing to make the decision."

28. The test of incapacity under the 2005 Act involves two limbs. The first, which has been referred to as the diagnostic test, requires an operative impairment of, or a disturbance in the functioning of, the mind or brain. The second, which is often referred to as the functional test, is that the effect of that impairment or disturbance must be that the person is unable to make a decision for himself, as defined in section 3.

29. The decisions, for which it is necessary in this case to examine whether Mr Kei has capacity as defined by the 2005 Act, are decisions in relation to the conduct of the proceedings up to and including the determination of the committal proceedings. The question of capacity is "issue specific" in the sense that it may have to be answered by reference to a particular phase or aspect of the conduct of litigation rather than the litigation as a whole: see *Bailey v Warren* [2006] EWCA Civ 51. However it is important to keep in mind that Foxton J's decision on capacity applies to Mr Kei's conduct of the proceedings against him not only up to the point of swearing an affidavit of worldwide assets, but also in relation to all the decisions thereafter which are necessary for the conduct of the committal proceedings, at least.

30. The courts have on a number of occasions emphasised that a finding of incapacity deprives an individual of their right of freedom of action, and in the litigation context, curtails their right of unimpeded access to the law; the policy of the 2005 Act and its predecessors is, therefore, that incapacity should not found lightly, and only where after careful inquiry it is necessary to do so: see for example *Masterman-Lister v Brutton* [2003] 1 WLR 1516 per Kennedy LJ at [27]; *Bailey v Warren* per Arden LJ at [105]; *V v R* [2011] EWHC 822 (QB) per Burnett J at [10]. For this reason Section 1 of the 2005 Act requires it to be assumed that a person has capacity unless it is established that he lacks it: the default position is that a person has capacity.

31. Expert evidence is of importance in making the determination, but it is not conclusive and the decision is one for the court not the expert: see, for example, *A Local Authority v P* [2018] EWCOP 10, per Baker J at [15(7)]:

> "In assessing the question of capacity, the court must consider all the relevant evidence. Clearly, the opinion of an independently instructed expert will be likely to be of very considerable importance, but as Charles J observed in *A County Council v KD and L* [2005] EWHC 144 (Fam) [2005] 1 FLR 851 at paras 39 and 44, "it is important to remember (i) that the roles of the court and the expert are distinct and (ii) it is the court that is in the position to weigh the expert evidence against its findings on the other evidence… the judge must always remember that he or she is the person who makes the final decision."

32. The weight to be given to expressions of opinion by an expert is dependent on the quality of the reasoning deployed, and a baldly stated conclusion is of little if any weight. In *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 [2016] 1 WLR 597 in Lord Reed and Lord Hodge JJSC, with whom the other Justices agreed, said at [48]:

> "48 An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or "bare ipse dixit" carries little weight, as the Lord President (Cooper) famously stated in *Davie v Magistrates of Edinburgh* 1953 SC 34, 40. If anything, the suggestion that an unsubstantiated ipse dixit carries little weight is understated; in our view such evidence is worthless. Wessels JA stated the matter well in the Supreme Court of South Africa (Appellate Division) in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft fur Schadlingsbekampfung mbH* 1976 (3) SA 352, 371: "an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert."
>
> As Lord Prosser pithily stated in *Dingley v Chief Constable, Strathclyde Police* 1998 SC 548, 604: "As with judicial or other opinions, what carries weight is the reasoning, not the conclusion."

33. In *TUI UK Ltd v Griffiths* [2023] UKSC 48 Lord Hodge DPSC, with whom the other Justices agreed, cited this passage and went on to cite with approval at [38] the statement of Jacob J in *Routestone Ltd v Minories Finance Ltd* [1997] BCC 180, 188:

> "What really matters in most cases is the reasons given for the opinion. As a practical matter a well-constructed expert's report containing opinion evidence sets out opinion and the reasons for it. If the reasons stand up, the opinion does, if not, not."

34. A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success: s.1(3) of the 2005 Act. Such steps, sometimes referred to compendiously as remedial measures, are therefore an essential consideration in the determination of whether capacity exists. If a person can make the relevant decisions, as defined, with the benefit of such measures, that person does not lack capacity. Remedial measures, in this sense, are not confined to the sort of special

measures often put in place in the courts to assist witnesses or defendants in criminal or family proceedings, they include all steps by which an impediment to capacity may be overcome.

The Judgment

35. Having set out the legal framework and the evidential material which I have summarised above, the Judge said that he was not presently persuaded, on the balance of probability, that Mr Kei lacked capacity to give instructions for the purposes of conducting litigation. That was because, for a significant period during which he was said to lack capacity, the documents available showed that he had, and exercised, capacity to make important financial decisions and give important instructions as to, and explanations about, his own complex financial affairs. When considering in particular the functional element of the 2005 Act test, evidence of Mr Kei's actual functioning, and actual functioning in relation to matters where there was a significant overlap with the issues in the litigation, was obviously material and of substantial evidential significance. In the face of that evidence, the suggestion that in the period from August 2021 to June 2023 Mr Kei lacked the functional capacity to conduct litigation, even with the benefits of such remedial measures as might be put in place, would require very compelling supporting psychiatric evidence, evidence which would need to explain why the evidence of actual functioning did not assist, or related to a period before there had been some form of medical deterioration. There was no attempt in Dr Choi's second report to address those questions. That was not a criticism, but was simply because he had not been provided with any material to enable him to do so.

The Appellant's submissions

36. On behalf of Mr Kei, Mr Hollander KC sought to identify five errors of principle in the Judgment on the material available at the hearing. They were:

    (1) The Judge was wrong to depart from the conclusions reached in Dr Choi's second report by reference to events that took place in late 2021 and early 2022. No evidence was produced on behalf of Hua She of either a psychiatric or other nature addressing Mr Kei's current capacity rather than his capacity at that much earlier period.

    (2) The Judge was wrong to rely on the UBS Documents. There was no statement of information or belief in Mr Cary's second affidavit so as to comply with CPR Rule 32.8 and PD32 Paragraph 18.2. Alternatively the Judge gave the UBS Documents unwarranted weight, given that it would be unfairly prejudicial to require Mr Kei to have responded to that evidence when it was at the heart of the contempt proceedings.

    (3) The Judge was wrong to rely on the fact that the call reports had not been shown to Dr Choi. The call reports were not properly in evidence, and in any event any comment Dr Choi might have made on that material would have been bound to point out that he would have had to have made assumptions about the evidence, which would be highly speculative, and would be of little value because it had not yet been answered and dealt with a period some time previously. It would have been professionally embarrassing for Dr Choi to address the material. It was therefore wrong for the Judge to criticise, or draw inferences from, the failure to provide that documentation to Dr Choi.

(4) Since the only evidence relied on by Hua She related to a period 14 to 22 months previously, and those matters were central to the contempt proceedings, the proper response would have been to recognise that it was reasonable not to engage with the material now, and to have accepted Dr Choi's second report based on substantial evidence from someone with unimpeachable expertise.

(5) The Judge was wrong to take into account the possibility of remedial measures. Dr Choi's instructions were to consider whether Mr Kei had capacity in the sense required by CPR Rule 21 and the 2005 Act, not how he might be assisted.

37. In relation to the fresh evidence of the conference call on 1 August 2023 with Mr Hou, Mr Hollander submitted that it eloquently demonstrated Mr Kei's functional lack of capacity to conduct the aspects of the litigation which were immediately required of him, and a fortiori in relation to the contempt proceedings more generally. It demonstrates that the Judge's conclusion was wrong, and has led to an unworkable state of affairs in these proceedings.

38. On behalf of Hua She, Mr McWilliams submitted that the Judge reached the right conclusion on the material before him for the reasons he gave, and that there is no merit in any of the criticisms advanced by Mr Hollander. So far as concerns the "fresh evidence", it does not satisfy the test for admissibility under *Ladd v Marshall* [1954] 1 WLR 1489.

Analysis

39. I find it convenient first to address whether the appeal can succeed on the material before the Judge, before considering whether the "fresh evidence" should be admitted and, if so, its effect.

The appeal on the material before the Judge

40. The decision involved an evaluative judgment of the different strands of evidence. In those circumstances an appeal can only succeed if it can be shown that the decision was wrong by reason of some identifiable flaw in the Judge's treatment of the question to be decided, or a failure to take into account some material factor, which undermines the cogency of the conclusion. It is not enough if this court might have arrived at a different evaluation. See *Re Sprintroom Ltd* [2019] EWCA Civ 932 [2019] BCC 1031 at [72]-[78].

41. None of the arguments advanced by Mr Hollander suggest any such error on the part of the Judge. His conclusions were reached by an evaluation of all the evidence in which the most important features were these:

(1) There was no clear or cogent reasoning in either of Dr Choi's reports to support his conclusion on incapacity by reference to functionality. His statements that Mr Kei lacked capacity within the meaning of the 2005 Act were merely conclusory. None of the symptoms which he describes self-evidently impose impairments which would prevent Mr Kei from making the necessary decisions, as defined. Dr Choi does not address the aspects of the 2005 Act which address decision making, or seek to link his diagnosis and observations to that decision-making process. Without such an analysis, there is simply no reasoning to support the functionality conclusion.

Depressive symptoms are unlikely to do so, at least at the level of severity identified. Auditory hallucinations, which appear to have responded well to medication, are equally unlikely to do so. Psychotic delusions may, but that depends heavily on an analysis of the delusions in question and how they impact on decision-making, all of which is unaddressed in Dr Choi's reports. Dr Choi does not identify the psychotic symptoms in a way which points to any conclusion as to an ability to give or receive instructions or understand matters necessary in order to do so or to conduct the litigation. Although his reports advert to an aversion to talking about the legal cases and a fear of persecution generally, it is notable that they do not identify a delusion that Mr Kei's own lawyers are trying to kill him.

(2) Against this, the UBS Documents are evidence of a clear capacity to conduct his financial affairs, apparently unaided and with a significant degree of cognitive sophistication, at a time when according to Dr Choi's evidence he lacked capacity; and of the bank's lack of any concern that his capacity might be impaired. They demonstrate functioning capacity to undertake some of the very decisions which fall to be taken in the continuing litigation, in particular in respect of disclosure of assets; and suggest an ability to take decisions, as defined, more generally. That evidence was unanswered.

(3) Dr Choi was not asked to consider, and did not consider this evidence which prima facie cast serious doubt upon his bald conclusion. That is not a criticism of Dr Choi as such: he could only address what he was asked to address. But it means that his opinion was not based on all the relevant material which was available. I would not accept Mr Hollander's argument that he could not usefully have addressed the material because its accuracy might be in issue. Experts are regularly asked to express opinions based on hypothetical assumptions of fact. Had it been the case that he could have explained why he maintained his opinion if the UBS Documents were to be taken at face value, that would have been helpful evidence. If, on the other hand, he would have had to concede that if the documents were taken at face value he could not maintain his conclusion, that too would have been of helpful evidential value. Either way, his opinion needed to take account of the material.

(4) Dr Choi did not consider whether such symptoms as he diagnosed or observed could be compensated for or ameliorated by remedial measures. Again, this is not a criticism of him if he was not asked to do so, but he shows no awareness that such measures are baked into the issue of whether a person lacks capacity under the 2005 Act, and again his conclusion is unsupported by any reasoning on this important aspect of the capacity test.

42. I am unable to accept that any of the points which Mr Hollander advanced undermine the cogency of these considerations, on which the Judge's decision was based. The exercise for him was not to decide whether "to depart from" Dr Choi's second report but to evaluate its weight as part of the totality of the evidence before him. That is what he did. The UBS documents were adduced in evidence in compliance with the Civil Procedure Rules and Practice Direction by Mr Cary identifying their source as being from the bank's own files, and attesting to a belief in their truth as coming from that source. The criticism that there was no further evidence from the account handlers at the bank who held the relevant conversations is misplaced. The documents prima facie spoke for themselves unless and until challenged. They were not challenged. Mr Cary's second affidavit relied on them in support of the applications, not just the Committal proceedings, and Mr Kei

chose not to answer them. Whether or not that involved a sensible tactical decision to await doing so until the moment when evidence was due in the committal proceedings is neither here nor there. The Judge was bound to give the UBS Documents such weight as they deserved on the basis of the evidence the parties chose to put before him. The UBS Documents were evidence which was unanswered, and fell to be treated as such.

43. Nor was there any significance in their relating to events over a year earlier than June 2023 as the date at which Mr Kei's capacity fell to be addressed. Dr Choi's evidence, and that of Mrs Zhu which he recorded, was that there was no significant change from the position in August 2021, at which time Dr Choi had opined that he lacked capacity. The UBS Documents cast doubt on his opinion as one expressed, in essence, as to Mr Kei's capacity for the whole period between August 2021 and June 2023.

The fresh evidence

44. In exercising the discretion under CPR 52.21(2), the starting point is the well-known test in *Ladd v Marshall*, under which leave to adduce further evidence on appeal will be granted if three conditions are fulfilled, namely: (1) the evidence could not have been obtained with reasonable diligence for use at the first instance hearing; (2) if given, the evidence would probably have an important influence on the result of the case, though it need not be decisive; and (3) the evidence is such as is presumably to be believed.

45. We read the fresh evidence contained in Mr Hou's third witness statement, and received submissions on it, *de bene esse*, that being necessary in order to consider the second limb of the *Ladd v Marshall* test on admissibility.

46. Mr McWilliams submitted that the evidence did not satisfy the first two limbs of the *Ladd v Marshall* test for three reasons. First, it was evidence which could reasonably have been made available before Foxton J. Although it related to events subsequent to the hearing, its nature was how Mr Kei reacted to an approach from his solicitor, Mr Hou, in conducting the proceedings, and in particular to the requirement personally to swear an affidavit of assets. That, it was submitted, was an approach which could and should have been made by Mr Hou prior to the hearing and in opposition to the applications, which were seeking orders which entailed that activity, an activity which it was being contended Mr Kei lacked the capacity to undertake. I am unable to accept this submission. At the time of the preparations for the hearing before Foxton J, Mr Kei had a litigation friend on the basis that he lacked capacity, a basis supported by the two reports of Dr Choi. Reasonable diligence did not require Mr Kei's legal advisers to ignore that status quo unless and until it was altered by the decision on capacity which was the very matter in dispute in the applications.

47. Mr McWilliams' second submission was that admitting the evidence offended the principle articulated by Brooke LJ in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA 982 [2005] 1 INLR 633 at [34] to [37] that evidence of changed circumstances since the date of the original decision will only sparingly be admitted. This too I am unable to accept. The evidence of Mr Hou is not relied on to show a change of circumstances, but the reverse. Mr Hollander submits that it confirms Mr Kei's incapacity at the time of the hearing before Foxton J, being further material to support Dr Choi's opinion in his second report.

48. Mr McWilliams' third point addressed the second limb of the *Ladd v Marshall* test. He submitted that the evidence, if given, would not probably have an important influence on the result of the case. On the contrary, this Court can be confident that it would have made no difference at all. In substance it was simply further evidence of symptoms of persecution, which were already evidenced in Dr Choi's reports. It was, as he put it, just more of the same.

49. There is a certain artificiality in seeking to apply the prospective merits test in the second limb of *Ladd v Marshall* once the evidence has been received *de bene esse* and examined with the benefit of adversarial argument for the purposes of determining whether, if admitted, it affects the outcome. Once the latter exercise has been conducted, the court is in a position to say whether the evidence if admitted would be decisive. If so, the evidence obviously fulfils the second limb; if not, and the conclusion is that the evidence would not be decisive in changing the result, it would logically follow that nor can it be said probably to have an important influence on the result so as to fulfil the second limb of the *Ladd v Marshall* admissibility test.

50. Nevertheless, and although I have concluded that the fresh evidence does not ultimately affect the outcome of the appeal for the reasons I develop below, if I perform the mental gymnastics of addressing the question prospectively, I conclude that it fulfils the test and should be admitted. That is for two reasons. First, it is not simply "more of the same". It is to be noted that there is nothing in either of Dr Choi's reports which says that Mr Kei's delusional psychosis or fear of persecution extended to a fear that his own lawyers wanted to kill him; nor had his views been based on any interaction between Mr Kei and his lawyers in the context of his lawyers seeking to engage with him in the conduct of the litigation. By contrast the fresh evidence addresses what has happened in the context of one such engagement and bears directly on his decision-making in that context. Secondly, Males LJ when giving permission to appeal contemplated that the fresh evidence would likely meet the *Ladd v Marshall* test because it was the only ground on which he regarded permission would be warranted. He had the benefit of applying the *Ladd v Marshall* test prospectively, in the circumstances for which it was propounded, without having to decide what its effect would be on the outcome, if admitted, as a matter of concluded decision.

51. I turn therefore to the effect of the fresh evidence. The principles in *Sprintroom* are no longer applicable; and as Mr McWilliams accepted in argument, the question for this court is whether on all the evidence, including the fresh evidence, the Judge's conclusion was wrong.

52. The Judge's conclusion did not depend upon his reaching any conclusion as to whether Mr Kei was dissembling in his presentation to Dr Choi (or whether the reports of his behaviour given by Mrs Zhu, Mr Wo and Mr Ho were accurate). Even assuming that there was no dissembling and no inaccuracy, the Judge was justified in concluding that incapacity had not been established for the reasons addressed above.

53. Mr Hollander submitted that the evidence of Mr Hou conclusively established a lack of capacity unless Mr Kei was dissembling during the video conference on 1 August 2023; and that the UBS Documents and other considerations taken into account by the Judge did nothing to suggest he was dissembling in his presentation on 1 August 2023, or at least nothing to raise a sufficient doubt about him dissembling to prevent the burden of proof as to capacity being established on the balance of probabilities, given that Dr Choi had

been treating him as a patient with psychosis continuously over a lengthy period without doubting the genuineness of symptoms which were akin to those displayed on 1 August 2023.

54. Whilst I see the force of the submission I am unpersuaded by it for essentially three reasons. First, the conclusions to be drawn from the fresh evidence are not limited to the binary alternatives on which the submission is based. Assuming that Mr Kei was not dissembling, the conduct is consistent with his having capacity under the 2005 Act, in particular because the test under the Act requires one to take into account any remedial measures which might exist. What was apparently intended to assist in that regard was that Dr Choi should speak to Mr Kei the previous day to explain the purpose of the discussion. It does not appear from the witness statement that that occurred. Other steps might have been taken. An approach to Mr Kei did not have to take the form of an impersonal confrontation on the screen with the solicitor from London. Mr Hou could have travelled from London to Hong Kong. Dr Choi could have been in the same room as Mr Kei. They could have spoken about it together first, without Mr Hou's presence or involvement. Mr Hollander himself submitted that the success of Dr Choi in reassuring Mr Kei and calming him would have been much more likely to be successful had Dr Choi been present in the room with Mr Kei. This submission was made in seeking to persuade us that we should interpret Mr Hou's evidence as being that Dr Choi was indeed in the same room as Mr Kei (which however is not the interpretation of Mr Hou's witness statement I feel able to adopt). The assistance of Mr Kei's long-time friend Mr Wu could have been enlisted.

55. Indeed there might well be no need for any direct contact between Mr Kei and Mr Hou. Communication from Mr Hou about Mr Kei's assets could have proceeded in the first instance, at least, by a series of questions and requests being made in writing, with the assistance of Mr Wu. Communications could have been passed on in both directions without direct contact between Mr Kei and his legal team. It is important to keep in mind that the impairment or disturbance in the functioning of the mind or brain in this case is not said to be a deficit in a cognitive understanding, but is rather a psychosis which revealed itself in an aversion to direct contact with his lawyers. However, direct contact with his lawyers is not obviously essential to the conduct of the litigation, for which purposes indirect communication may be both feasible and satisfactory.

56. Moreover, the fresh evidence is not addressed by Dr Choi, who has not been asked to provide a further report with reasoned conclusions as to capacity derived from this behaviour, nor, significantly, how communication from and to Mr Kei's legal team could be achieved by remedial measures. This would be very much a matter for his area of expertise.

57. For this reason the fresh evidence simply does not establish any necessary link between the conduct described and incapacity within the meaning of the 2005 Act.

58. Secondly, there remains no explanation for the UBS Documents, and they remain unaddressed by Dr Choi. They raise the question whether Mr Kei's asserted aversion to his lawyers is genuinely a matter of incapacity, as opposed to a decision by way of choice made with capacity, when he has no aversion to dealing with those conducting his financial affairs and no incapacity in doing so. There might or might not be good clinical reasons to draw a distinction between the two, but that is not something on which the

court can make assumptions in Mr Kei's favour. Dr Choi would need to address these questions.

59. Thirdly there remains an absence of any supporting reasoning in any evidence from Dr Choi for what is his bald conclusion on functionality, either by reference to the material he considered for the purposes of his two reports, or by reference to the fresh evidence. He does not address the latter at all. The expert evidence of incapacity advanced on behalf of Mr Kei remains of little weight in the absence of reasoning supporting the conclusory opinion.

60. Accordingly I would reach the same conclusion as Foxton J in the light of the fresh evidence, namely that Mr Kei has failed to discharge the burden of establishing incapacity on the balance of probabilities.

Conclusion

61. For these reasons I would dismiss the appeal.

LORD JUSTICE PHILLIPS:

62. I agree.

LORD JUSTICE NUGEE:

63. I also agree.