IMPORTANT NOTICE

The judge has given permission for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family and of any individual referred to in this judgment must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Case No: 13163099

[2019] EWCOP 20

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTER OF BP

First Avenue House
42-49 High Holborn,
London, WC1V 6NP

Date: 14 June 2019

Before :

District Judge Sarah Ellington

- -

Between :

BP **Applicant**
(by his litigation friend, the Official Solicitor)
- and -
The London Borough of Harrow(1)

Respondent

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Sian Davies (instructed by Steel and Shamash) for the Applicant by his litigation friend, the Official Solicitor
Sarah Helier of HB Public Law for the Respondent

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JUDGMENT

Introduction

1. This is a decision in respect of costs within proceedings brought under Section 21A of the Mental Capacity Act 2005 ("the Act").
2. The Applicant is BP, by the Official Solicitor as Litigation Friend. The Respondent is the London Borough of Harrow.
3. The case had been listed for a final hearing on 24 and 25 January 2019 ("the January hearing"). The hearing opened on 24 January 2019, but was adjourned to 25 and 26 April 2019 and costs were reserved.
4. As it turned out, the day before the adjourned final hearing I considered an application dated 18 April 2019 on 24 April 2019 and made a final order in respect of the substantive S21A challenge.
5. Pausing there, we can see that the court had by then set aside 4 days of hearing time, a scarce resource, which were not in fact needed.
6. The application dated 18 April 2019 proposed by consent a final order on the substantive S21A challenge, and I made a final order. However, the parties identified a dispute in respect of the costs of the January hearing. The parties submitted draft directions to resolve the dispute on costs in respect of the January hearing which proposed a mechanism for the dispute to be decided on the basis of written submissions. The order I made on of 24 April 2019 adopted that mechanism, but also listed the matter for hearing on 14 June in the event that oral submissions were necessary. Oral submission are not necessary and the hearing of 14 June 2019 is retained for the formal handing down of this judgment. The parties may be excused from attendance at that hearing if an order is agreed and they notify the court in writing that they both request to be excused by 4pm 10 June 2019.
7. The relevant circumstances of the adjournment of the January hearing are that the Respondent, the London Borough of Harrow, offered at the hearing a trial of BP returning home. If the trial at home had been successful, the possibility of a return home would then have been relevant in the court's consideration of whether the qualifying requirements for a deprivation of liberty were met. If the trial at home had not been successful, this would also have been relevant to the court's consideration of whether the qualifying requirements for a deprivation of liberty were met.

8. The trial at home was unsuccessful and BP returned to the Care Home where he was and is deprived of his liberty on the basis of a final order proposed by the parties by consent without a hearing.

The protected person

9. It is common ground that BP lives with vascular dementia and depression, with a history of a stroke in 2013 and various physical ailments. Various reports explored the impact of alcohol intake and challenging behaviour, including verbal and physical aggression to carers and family, BP's family including his wife. BP had received care at home up until October 2016. He was placed in the Care Home on 3 May 2017. S21A proceedings were issued on 8 November 2017. Pausing there, it is clear that the proceedings were protracted and took longer than one would have hoped. However, that is not something I need to address. The relevant question is whether the costs of the January hearing should be paid by the Respondent due to the Respondent's conduct.

The issues for determination

10. For the Applicant, it is submitted that this is a case where it is appropriate to depart from the usual costs rule and to order the costs of the January hearing be paid by the Respondent because of the Respondent's consistent failure to offer a trial period at home before the start of and for the duration of the proceedings, and its decision to do so only after the January hearing had commenced.

11. The Applicant says the issue has been raised in correspondence and Harrow has declined to accept liability for the costs thrown away at the January hearing.

12. For the Respondent, it is said that this is a case where it is not appropriate to depart from the usual costs rule and that if it is, an order in the terms affixed to the Respondent's submissions is appropriate. That draft order provides that the Applicant do pay the Respondent's costs arising out of and occasioned by

the Respondent's preparation of the bundle, attendance at court on 24th January 2019 and the drafting of a cost's rebuttal.

13. The Applicant's costs submissions are dated 1 May 2019 and I have had the benefit of reading and considering them closely. The Respondent's costs submissions are dated 14 May 2019 and I have had the benefit of reading and considering them closely.

Preliminary issues

14. The court does not retain the hearing bundle and called for copies of the documents in support of the submissions on costs. These had been supplied by the Respondent with the Respondent's submissions. The Applicant's submissions referred to documents in the hearing bundle by page number, further copies of which were supplied following the court's request. The Respondent says these should be disregarded. They have not been. I find it wholly artificial to consider submissions based on documents which the court has already had before it and then to disregard the copies of those document supplied on request. It is not clear whether the court disposed of bundles which should have been retained. It is in furtherance of the overriding objective at Rule 1.2 (3) (a) and (d) to consider the documents provided.

The law

15. It is common ground that the usual order for costs is for each party to bear their own costs. This is set out in Rule 19.3 of the Court of Protection Rules 2017 ("the Rules"):

15.3 Personal welfare – the general rule

15.4 Where the proceedings concern P's personal welfare the general rule is that there will be no order as to the costs of the proceedings, or of that part of the proceedings that concerns P's personal welfare.

16. Rule 19.5 of the Rules does however provide as follows:

16.3 19.5 Departing from the general rule

(1) The court may depart from rules 19.2 to 19.4 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances including—

(a) the conduct of the parties;

(b) whether a party has succeeded on part of that party's case, even if not wholly successful; and

(c) the role of any public body involved in the proceedings.

(2) The conduct of the parties includes—

(a) conduct before, as well as during, the proceedings;

(b) whether it was reasonable for a party to raise, pursue or contest a particular matter;

(c) the manner in which a party has made or responded to an application or a particular issue;

(d) whether a party who has succeeded in that party's application or response to an application, in whole or in part, exaggerated any matter contained in the application or response; and

(e) any failure by a party to comply with a rule, practice direction or court order.

(3) Without prejudice to rules 19.2 to 19.4 and the foregoing provisions of this rule, the court may permit a party to recover their fixed costs in accordance with the relevant practice direction.

17. As the Respondent submits, the Act itself provides as follows at Section 55:

55 Costs

(1) Subject to Court of Protection Rules, the costs of and incidental to all proceedings in the court are in its discretion.

(2) The rules may in particular make provision for regulating matters relating to the costs of those proceedings, including prescribing scales of costs to be paid to legal or other representatives.

(3) The court has full power to determine by whom and to what extent the costs are to be paid.

(4) The court may, in any proceedings—

(a) disallow, or

(b) order the legal or other representatives concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with the rules.

(4) "Legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on his behalf.

(5) "Wasted costs" means any costs incurred by a party—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

18. In addition, the parties have referred to the case law authorities.

Applicant:

Manchester City Council v. G, E and F [2010] EWHC 3385 In particular Baker J at paragraph 40 (which the Applicant says was approved by Hooper LJ in the Court of Appeal at *[2011] EWCA Civ 939 at [17]*.):

"40. Of course, it is right that the Court should follow the general rule where appropriate. Parties should be free to bring personal welfare issues to the Court of Protection without fear of a costs sanction. Local authorities and others who carry out their work professionally have no reason to fear that a costs order will be made. The submission that local authorities will be discouraged from making applications to the Court of Protection if a costs order is made in this case is a thoroughly bad argument. The opposite is, in fact, the truth. It is only local authorities who break the law, or who are guilty of misconduct that falls within the meaning of [Rule 19.5], that have reason to fear a costs order. Local authorities who do their job properly and abide by the law have nothing to fear. In particular, the Court of Protection recognises that professional work in this very difficult field often involves very difficult judgments and decisions. The Court is not going to impose a costs burden on a local authority simply because hindsight demonstrates that it got those judgments wrong.

41. In this case, however, I am entirely satisfied that the local authority's blatant disregard of the processes of the MCA and their

obligation to respect E's rights under the ECHR amount to misconduct which justifies departing from the general rule."

Re M [2015] EWCOP 45:
The court retains a residual power, which it exercises occasionally, where one or other party has been found …conduct that can be described as "significantly unreasonable".

LB Harrow v AT [2017] EWCOP 37 (at paragraph 28).
The Applicant submits that these authorities distil to a test of whether the conduct of the local authority was 'significantly unreasonable' and that a broad or holistic approach is to be taken to the issue of conduct related costs orders.

Respondent:
London Borough of Lambeth v MCS & Anor [2018] EWCOP 2018 (the Respondent submits that costs were awarded against London Borough of Lambeth and the Lambeth Clinical Commissioning Group on the basis a) that the proceedings should never have been brought and b) their conduct of the proceedings once commenced)

SHC NHS Dorset Clinical Commissioning Group v LB & Anor [2018] EWCO 7, (the Respondent submits that an Application for costs by the OS after a test case relating to DoLS was withdrawn. The application was refused).

Garylee Grimsley – 23 December 1998 Master O'Hare referred to R -v- Legal Aid Board Ex Parte Bruce (1991), (the Respondent says it was noted that the latter case did not allow for 2 or more attendances).

The decision

Issues not considered

19. I find that the outcome of the trial at home is immaterial to my decision. The Respondent's offer of a trial at home at the January hearing meant that the

January hearing was not effective as a final hearing. The Respondent cannot rely on this to submit, as it may appear to at paragraphs 14 and 15 of its submissions that this is a factor to consider under Rule 19.5 (1) (b). To do so would be contrary to the Respondent's submission that it 'proposed a short trial to further its understanding of what was in BP's best interests'. It would also be contrary to the Official Solicitor's submission, which I accept, that the trial home enabled the parties to propose an order in respect of the substantive S21A challenge. There is also an element of the Respondent wanting it both ways, that it always supported a trial at home and that the failure of the trial at home supported its position that a move back home was never a viable option. Finally, the conduct of the parties should only be considered prospectively and cannot be considered retrospectively with the benefit of hindsight.

20. On the submissions and material in support, I make no finding on the conduct of the parties generally, only in respect of conduct relevant to the question of the offer of a trial at home. The submissions of the Respondent include reference to aggressive and threatening conduct. I remind myself that these are professional representatives acting for public authorities, and that the court does not have the benefit of all the communications between them.

21. I also note that although there is some mention of alternative orders being discussed, where I consider the orders made in this case, I consider that any order proposed by both parties was proposed by consent, irrespective of any communications between the parties leading up to that proposal.

Issues considered

22. I repeat that I find the Respondent's offer of a trial at home at the January hearing meant that the January hearing was not effective as a final hearing. The relevant issue then is whether the Applicant sought a trial at home earlier than the January hearing, which was resisted by the Respondent.

18 June 2018 hearing

23. The Respondent did not support a trial at home and sought a final order dismissing the proceedings.

24. The Applicant identified that the best interests analysis 'is a finely balanced one and ultimately a decision for the court to make taking into account all relevant circumstances', but the Applicant did submit that 'The Court may consider that the finely balanced nature of the decision would be best reflected in a best interests decision' (in favour of a trial at home, my paraphrasing).

25. I do not consider that to be a request for a trial at home as such. It is a neutral position.

26. In any event, there was insufficient evidence at the hearing of 18 June 2018 to order a trial at home and I ordered evidence by way of witness statement to include consideration of a trial return home in a balance sheet and best interests analysis.

After the 18 June 2018 hearing

27. The matter was to be referred back to me on the papers, once the Respondent's position was clarified in the further evidence which had been directed. In retrospect, perhaps the case would have been on a surer timetable if it had been relisted.

28. On 23 August 2018, the parties agreed a statement of issues agreed and disputed. I find the Applicant did positively put forward a request for a trial return home at this point. The Respondent proposed only remaining in the current care home. The Respondent was opposed to a return home, including for a trial period. The relevant extract is:

"8 There are 3 best options before the court:

1 Remain at [the Care Home] with no plan for return home as LA proposes;

2 Return home on a long term basis as BP wishes with LA package of care and NHS mental health support; or

3 A trial period at home with LA care package and NHS support and the BG placement being retained as a

fallback in the event of care at home breaking down (retainer being reviewed on a weekly basis).

9 The LA favours option1. BP's wishes would be met by options 2 or 3. The OS advances 2 and 3 on the basis of BP's wishes and feelings and the prospect that he otherwise faces potentially lifelong deprivation of liberty in a care home, albeit subject to the statutory annual review."

29. The Respondent submits that the Round Table meeting of 2 August 2018 shows its agreement to BP having a trial return at home. I do not find that it does. The relevant extract is that:
'the Trial period was discussed in detail. The LA confirmed that if the Court decided that BP should return home the bed [at the Care Home…] would be kept open for the first week initially.'

That does not evidence the Respondent's agreement to BP having a trial at home.

30. The case was referred to me in November 2018. On 15 November 2015 I ordered both the final hearing of January 2019 and a final case management hearing be listed. The final case management hearing, listed for 21 November 2018, was vacated on the application of the Applicant dated 20 November 2018, with the Respondent's consent.

The January hearing

31. The Applicant's position statement dated 21 January 2019 includes (paragraph 20) 'that there should be careful consideration of a trial period at home in order to respect BP's wishes and his article 8 ECHR rights'.
I find that was an active proposal for a trial at home.

32. The final hearing on 24 January began without the Respondent offering BP to have a trial at home as an available option. The Respondent's position statement dated January 2019 expressly opposes BP having either a permanent or trial return home (paragraph 12).

33. I remind myself that the January 2019 final hearing was adjourned due to the Respondent's offer, at that hearing and for the first time, to trial BP returning home. There was no change in evidence or circumstances after the filing of position statements and before the offer was made to prompt the offer a BP having a trial return home.

34. The respondent's change of position prompts the current application. The Applicant submits that Rule 19.5 (1) (a) supports an order for costs against the Respondent based on:

    (a) Before the proceedings, failing to comply with the BIA's recommendation that there should be a trial period at home;

    (b) During the proceedings, maintaining the position that there should not be a trial period at home when such a trial had been recommended by Harrow's assessor;

    (c) Continuing to contest the need for a trial period at home when it was raised on BP's behalf in November 2017, June 2018, August 2018 and up to the point at which the final hearing had already commenced on 24 January 2019.

35. The Applicant's submissions also include:

' 21. The number of occasions when this issue [a trial of BP returning home] was raised demonstrates the many opportunities Harrow had to review its position on this issue, which it declined to do until at court for a final hearing. The 23 August 2018 statement of agreed issues shows that at that stage Harrow had reviewed and declined to accept the need for a trial at home.

22. In terms of "success" the Official Solicitor on behalf of BP was able to achieve a trial period at home. The fact that the trial did not result in a permanent return home is not the measure of success, because the trial itself enabled a return home to be ruled out as a viable option.

23. The Official Solicitor seeks an order that Harrow should pay the costs of and occasioned by the final hearing on 25 and 25 January 2019 which were

wasted by reason of the last-minute volte face. The amount of costs claimed is £10,525.87 exclusive of vat.'

36. I have found that there was no evidential trigger for the Respondent's change in position at the January 2019 hearing.

37. I accept the Official Solicitor's submission that the standard authorisation granted in November 2017 was subject to a condition that the Managing Authority was to work with social services and BP's family to arrange trial periods at home. No trial period at home was arranged. This would be relevant pre-action conduct for the purposes of Rule 19.5 (2).

38. I find that further evidence was required to determine whether a trial return home was required at the hearing of November 2017, before I came to the case, and do not criticise the Respondent's position at that time.

39. I find that there was no positive request for BP to trial a return home at the hearing before me in June 2018. There was a positive request on behalf of BP for a trial return home at the round table meeting of 2 August leading to the document 'Issues agreed and not agreed' of 23 August 2018.

40. Overall, I can see the basis on which the Applicant considers an application for costs to be justified. However, this was a finely balanced case on the Applicant's own submissions in position statements, in particular that of 15 June 2018. I bear in mind the authorities on which the parties rely, in particular the Applicant's reliance on the comments of Hooper LJ in the Court of Appeal. I note the circumstances of *Manchester City Council v. G, E and F [2010] EWHC 3385* were quite different. On balance and considering the circumstances as a whole, I am not persuaded that it is appropriate to depart from the general rule on this occasion. I decide this based on the chronological position of the parties set out above and all the circumstances. The Respondent's conduct falls short, to what degree is immaterial, of the necessary test. This case does not represent a blatant disregard of the processes of the Act and the Respondent's obligation to respect BP's rights under ECHR as in the Manchester case (paraphrased slightly)

41. Although it is not now material, I will add that if I had been minded to not apply the general rule on costs, which I am not, there would have been no prospect in all the circumstances, of making an order in the terms requested by the Respondent