Neutral Citation Number: [2019] EWCOP 4

Case No: 12874856

IN THE COURT OF PROTECTION
AND IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

On appeal from His Honour Judge Dancey sitting in Bournemouth Civil Justice Centre on 20 December 2017

The Court of Protection sitting in
Bournemouth Civil Justice Centre

Date: 11/02/2019

Before :

THE HONOURABLE MRS JUSTICE ROBERTS DBE

Between :

DM **Appellant**

- and -

Respondent

DORSET COUNTY COUNCIL

- -
- -

Emma Stacey of Emma Stacey Legal for the Official Solicitor representing DM as his Litigation friend in place of CB of Dorset Advocacy[1]

Simon Edwards, counsel, instructed by Dorset County Council

Hearing dates: (Directions only on 11 February 2019)
Permission to Appeal to be dealt with on paper
- -

[1] Sophia Roper of counsel, instructed by Emma Stacey Legal, prepared a skeleton argument to assist the court for the purposes of the directions hearing listed on 11 February 2019 although she did not appear on that occasion. Whilst the Official has given his formal consent to act as DM's litigation friend subject to agreement as to the payment of his costs, CB has withdrawn his consent to continue acting in this capacity, although there is, as yet, no formal order removing him from the court record.

Approved Judgment

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

.....

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

Mrs Justice Roberts:

The subject matter of this ruling

1. This is an application made by DM for permission to appeal a decision of His Honour Judge Dancey sitting as a judge in the Court of Protection following a hearing in Bournemouth on 20 December 2017. On that occasion the judge found that that DM lacked capacity to litigate on his own behalf in proceedings brought by Dorset County Council ("DCC") in May 2016. By its originating application, DCC sought the appointment of a deputy to manage DM's property and affairs on the basis of his apparent inability to do so on his own account.

2. The judge on that occasion heard evidence from a Special Visitor, Dr Andrew Barker, the author of two reports commissioned pursuant to section 49 of the Mental Capacity Act 2005. Dr Barker gave oral evidence at the hearing on 20 December 2017 and responded to questions put to him by counsel instructed for DCC, by counsel instructed for DM's (then) litigation friend, CB, and (with the permission of the judge) by DM himself. The judge delivered an ex tempore judgment at the conclusion of which he declared himself satisfied that DM lacked capacity to litigate on his own account in the context of these ongoing proceedings because he was suffering from an impairment of, or disturbance in, the functioning of his mind or brain arising out of a persistent delusional disorder, as diagnosed by Dr Barker. The judge's principal concern, as explained in his judgment, was DM's inability to use and weigh information in the context of decision-making. The judge specifically identified what he perceived as an incapacity to engage in the overall decision-making process inherent in the litigation in terms of DM's lack of ability to see the various aspects of the arguments and to relate the one to the other in a rational and considered manner.

3. In the context of the pending application for permission to appeal, it is important to bear well in mind the nature and scope of the declaration which the court made on 20 December 2017. This is the single aspect of the court's decision which is the subject of the current application for permission to appeal. Section 15(1)(b) of the Mental Capacity Act 2005 empowers the court to make a declaration as to whether or not a person has, or lacks, capacity "to make decisions on such matters as are described in the declaration". This includes the initial decision as to whether there is a lack of capacity which itself engages the jurisdiction of the Court of Protection. DM's capacity had been identified as an issue from the outset of these proceedings and, on 15 June 2017, His Honour Judge Dancey had made an interim declaration in relation to his lack of capacity.

4. The issue before the court on 20 December 2017 was DM's ability to conduct the substantive proceedings on his own account (i.e. his litigation capacity). That was the subject of the declaratory relief granted by the court pursuant to paragraph 1 of its order flowing from the hearing on 20 December 2017. In relation to the separate (and wider) issue of 'subject matter capacity' (i.e. DM's ability to make decisions about his property and financial affairs), the court made no final determination, recording in paragraph 2 of its order simply that 'there is reason to believe that DM lacks capacity' in this respect.

5. The functional impairment which the judge found to exist deprived DM of capacity to conduct the proceedings on his own account. Whilst the judge made it clear that such impairment did not prevent DM from understanding or retaining information relating to both the substance and procedure concerning the litigation, the judge found that his inability to use and weigh information rationally as part of the process continued to engage the jurisdiction of the Court of Protection. The judge reached no final conclusions about whether or not DM lacked capacity in relation to the specific subject matter of the mainframe proceedings brought by DCC. In paragraph 38 of his judgment, he specifically reserved that decision as "a question yet to be determined". Indeed, I am aware that there is a direction as part of the ongoing case management of the substantive proceedings for a fresh section 49 report into that very issue and the two substantive questions which will need to be determined in relation to:-

   (i) whether DM lacks capacity to make decisions for himself regarding his property and financial affairs; and

   (ii) whether or not it is in his best interests to appoint a deputy to act on his behalf in relation to such matters.

6. It is clear, therefore, that the decision which His Honour Judge Dancey reached on 20 December 2017 in relation to DM's capacity to litigate was anchored to the medical and other evidence which was available to him at that point in time. He made no final determinations in relation to capacity in the wider context of the subject matter of the substantive litigation or the issues to be decided in that specific context.

7. In the context of considering the current application for permission to appeal his decision in relation to DM's capacity to litigate at that point in time, I have to apply the test prescribed in CPR rule 52.6 which provides as follows:

> "**52.6 Permission to appeal test – first appeals**
>
> (1) Except where rule 52.7 applies *[i.e. second appeals]*, permission to appeal may be given only where –
>
> (a) the court considers that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason for the appeal to be heard.

Some procedural issues

8. DM issued his application for permission to appeal His Honour Judge Dancey's on 12 January 2018. At that point in time, there was no transcript of the judgment and no order. That was due to no fault of DM whose notice was filed within the prescribed time limits. An approved transcript became available in February 2018. Following correspondence with the Court of Protection Office at Bristol Civil Justice Centre, DM wrote on 24 March 2018 indicating that he intended to seek a judicial review of the capacity decision. That application was dismissed by Mrs Justice Cockerill on 27 April 2018 on the basis that the decision was not susceptible to judicial review in circumstances where (a) a claimant has an adequate alternative remedy; and (b) the application pertained to matters which have not yet been decided (i.e. subject matter capacity).

9. The notice of intended appeal was put before me for directions in my capacity as Family Division Liaison Judge for the Western Circuit. At that point, there was still no order on the court file. Having made enquiries directly with His Honour Judge Dancey, it became clear that the parties had been unable to agree and/or had failed to lodge an order (including future case management steps) following the hearing on 20 December 2017. As a result of those enquiries, an order was eventually drawn and approved by the judge on 23 July 2018. At that point it was apparent that the case was no further forward in terms of the substantive case management directions which the judge had put in place at the conclusion of the December 2017 hearing, albeit that these had not been reduced to writing at that stage. This delay was highly regrettable, to say the least. It will have done nothing to reassure DM about the ability of the legal system to ensure that his Article 6 rights are accorded priority in the context of his present appeal.

10. Matters were further complicated by the fact that by this stage DM's litigation friend, CB, had taken the decision that it was no longer appropriate for him to act in that capacity and he withdrew his consent to act. Consequent on that decision, I extended an invitation to the Official Solicitor to act in his place. That consent was forthcoming subject to an agreement in relation to the costs which would be incurred

by the Official Solicitor in relation to DM's representation in the current appeal proceedings. On 3 August 2018, I listed the proposed appeal for a directions hearing in the Royal Courts of Justice. By my order on that date, the application for permission to appeal and further directions in the substantive application were to be listed on the first open date after 1 October 2018. I gave the Official Solicitor permission to file revised Grounds of Appeal on behalf of DM, if so advised.

11. Following my order, there has been yet further delay occasioned, as I understand it, by ongoing disagreement between the lawyers in relation to the payment of the Official Solicitor's costs. This ongoing dispute has served to compound the delay in making progress with both the pending appeal and the substantive application made by DCC. We are now over a year on from the original decision which is the subject of that application for permission to appeal.

12. On 23 January 2019, DCC issued a fresh application inviting me to deal with the issue of permission on the basis of the papers. In order to halt the ongoing "drift", I listed the matter for a further hearing on the basis I would accommodate the parties by sitting in Bournemouth. That hearing took place on 11 February 2019. DCC was represented by Mr Simon Edwards of counsel who was new to this case. Ms Emma Stacey, who has acted throughout these proceedings, appeared on the instructions of the Official Solicitor without counsel, albeit that I had a helpful skeleton argument in advance of the hearing from Miss Sophia Roper of counsel. She was not available for the hearing but has been instructed throughout and represented DM's previous litigation friend at the hearing before His Honour Judge Dancey on 20 December 2017. DM himself attended the hearing on 11 February 2019.

13. At the hearing earlier this week, I made a raft of case management orders in relation to the substantive application including an order for a further section 49 report in relation to DM's capacity to represent himself in relation to the issue of whether a deputy should be appointed to manage his property and financial affairs. That further assessment also has the potential to influence the determination of the jurisdiction of this court in relation to the substantive issue. Subject to the outcome of the pending appeal with which I am currently dealing, should the court find that DM has regained litigation capacity and/or that he has capacity in relation to the subject matter of the substantive appeal, this court will have no further role to play in these proceedings.

14. I have within the material before me the grounds of appeal dated 12 January 2018 which DM lodged with his original notice of appeal. I have also read (and reconsidered) the contents of his witness statement dated 14 December 2017 sworn in advance of the hearing on 20 December 2017. In addition, by way of background, I have the evidence which he put before the court in the context of his earlier application for a restraining order against his elder brother, JM, whose further involvement in these proceedings he sought to exclude. That evidence was filed in November 2016, although the date of that document is not particularised. DM has confirmed to me that these are the matters which he wishes me to take into account in relation to his application for permission to appeal the decision made by His Honour Judge Dancey in relation to his lack of litigation capacity.

15. DCC, as respondent to the proposed appeal, maintains that the application for permission to proceed with the appeal should be dismissed. The authority has not

filed a respondent's notice but relies on the judgment of His Honour Judge Dancey and the reasoning set out within it.

16. The Official Solicitor, instructed thus far for the purposes of the proposed appeal and the substantive issues subject to a satisfactory resolution of the ongoing issue in relation to his future costs, maintains a strictly neutral position. He does so, through Ms Stacey, on the same basis as the neutral stance adopted by Miss Roper before the judge on 20 December 2017. As Ms Stacey has confirmed, the Official Solicitor does not consider it appropriate to advance a case in relation to the appeal which is contrary to that which DM seeks to put before the court. That said, she accepts that, on the basis of the evidence which was before the trial judge and on the basis of the reasons which he gave for his decision, she is not in a position to support the appeal despite the obvious conviction with which it is advanced by DM.

17. As Miss Roper acknowledged in her position statement for the capacity hearing in December 2017,

> "The appointment of a litigation friend where P asserts that he has capacity to conduct proceedings and no final determination of litigation capacity has been made is unusual, and the role of that litigation friend at a hearing which will determine that sole issue is therefore complex (para 5)."

18. In the ordinary course of events and in circumstances where litigation capacity is disputed, the Official Solicitor will not usually accept appointment until a final determination has been made (including an appeal) that an individual lacks litigation capacity. In this instance, as is conceded by Miss Roper and Ms Stacey, there is an imperative to make progress. This is particularly so in view of the protracted nature of these proceedings, the delay which has already occurred, the need to engage DM in the Court of Protection proceedings and the court's obligation to comply with the overriding objective to ensure a case is dealt with justly and at proportionate cost having regard to the principles set out in the 2005 Act. Notwithstanding the position of neutrality which the Official Solicitor adopts in relation to the appeal, I am satisfied that it is appropriate for me to deal with the permission application. I am well aware that those instructed by CB (the previous litigation friend who appeared on 20 December 2017) and by the Official Solicitor have sought to assist DM and the court as far as they are able pending a final determination on whether the decision at first instance can stand.

19. In her written presentation for the court on 20 December 2017, Miss Roper made the following submission in her position statement (para 8):

> "… having met [DM] on more than one occasion and with the benefit of the legal advice of those he has instructed (who have also found that more than one meeting was necessary), [CB] has come to the conclusion that he cannot advance that positive case [i.e. that DM has capacity to conduct these proceedings without the imposition of a litigation friend];
>
> [CB] does not consider that he can or should advance a positive case contrary to the one which [DM] wishes: if his appointment is upheld, he will have an ongoing duty to present [DM's] case fairly and it will as a practical matter be

> harder to secure any engagement with [DM] if he feels those acting for him have already acted against him over this issue."

20. As I have said, whilst he has not been formally removed from the court record as DM's litigation friend, CB feels sufficiently compromised that he no longer wishes to continue in this role. The position which the Official Solicitor adopts in respect of the permission hearing in relation to his inability to present a positive case in support of the permission application flows from a similar evaluation of the position, as Ms Stacey confirmed to me at the hearing on Monday of this week.

21. At the end of a long day on 11 February 2019 when all outstanding issues were resolved in relation to future case management of the substantive proceedings, there was insufficient time for me to deliver an ex tempore ruling or judgment in relation to the application for permission to appeal. I agreed to hand down a written judgment In order to ensure that DM's Article 6 rights are fully engaged in the context of the application for permission to appeal, and notwithstanding the conclusion reached by His Honour Judge Dancey in December 2017, I have nonetheless considered in detail the grounds advanced by DM in the context of all the material to which I have referred above. I have read in full the two section 49 reports produced by Dr Barker on 2 June and 6 December 2017. I have the transcript of the fourteen-page extempore judgment delivered by His Honour Judge Dancey at the conclusion of the hearing in December 2017. I am entirely satisfied (i) that I have before me all the material which I need insofar as it is relevant to that determination; and (ii) that DM's Article 6 rights in relation to the determination of the preliminary issue of permission are engaged and have been met in terms of his ability to put before the court the arguments he would wish to have considered notwithstanding the position of neutrality which has been adopted by the Official Solicitor.

Preliminary observations

22. As has been observed by others who have had occasion to consider this case, I can see for myself that DM is a highly intelligent and articulate individual. For many years, he had a successful practice as a solicitor in a leading London law firm. The judge at first instance remarked upon his "qualities of courtesy and patience" and thanked DM for the manner in which he had conducted the litigation throughout. In his judgment, he offered two separate examples of the intelligence and articulation he had observed: see paragraphs 30 and 31.

23. The judge found that, despite these qualities, "he can very quickly go into a set of beliefs which are self-evidently delusional" (para 31). In his judgment, he set out various examples of the manner in which these delusions had been manifested during the course of the written and oral evidence: paras 32 and 33.

24. As a result of various life events which have overtaken him in recent years, including divorce and the loss of his employment as a senior lawyer, DM now finds himself in significantly reduced circumstances. He has been obliged to sell properties which he owned in London and elsewhere and is currently living in a modest cottage in Dorset

where he exists on a meagre budget of some £50 per week being monies which he earns for doing various jobs for his neighbours. He has none of the amenities of modern living which most of us take for granted. I am told he has had no heating or hot water in his home for several months. He has no access to the internet unless he visits his local library and thus no way of accessing emails on a regular basis. He appears to have lost regular contact with his children and has no means of transport save for his bicycle and the occasional trips which he can afford to make on public transport. DCC became involved with DM because of concerns expressed by family members, and by his brother in particular. It appears that he was then refusing to accept state benefits and the mortgage on his home had fallen into substantial arrears. I am told that there are pending possession proceedings which remain unresolved pending the outcome of these proceedings.

25. All of this background was well known to His Honour Judge Dancey. I mention it here purely for the purposes of giving some context to my ruling in relation to the application for permission to appeal.

26. In relation to the law, His Honour Judge Dancey was clearly well aware of the principles which he had to apply in reaching his decision in relation to litigation capacity. He referred to the legal framework which had been set out in Miss Roper's position statement and adopted it, in line with the position advanced on behalf of the local authority by counsel then representing DCC, Mr Lewis. In the context of the present appeal, it may be convenient for me to set out the relevant legal principles which the learned judge had well to the forefront of his approach to the case.

LEGAL FRAMEWORK[2]

27. The relevant MCA 2005 principles are set out in the Mental Capacity Act 2005 as follows:

> **1 - The Principles**
> (1) ….
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
> (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
> (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
> ..
>
> **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.
> (2) It does not matter whether the impairment or disturbance is permanent or temporary.
> (3) A lack of capacity cannot be established merely by reference to—
> (a) a person's age or appearance, or
> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
> (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—
> (a) to understand the information relevant to the decision,
> (b) to retain that information,

[2] I have extracted these headline principles from the document prepared on behalf of DM's (then) litigation friend.

(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 MCA Code of Practice refers to a two-stage capacity test comprising:

> Stage 1 (the "diagnostic test"): Does the person have an impairment of, or a disturbance in the functioning of, their mind or brain? and
>
> Stage 2 (the "functional test"): Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to?

29. The Court of Appeal has also confirmed that the court will need to be satisfied that any inability to make the relevant decision(s) flows from the disturbance in the functioning of the mind or brain (usually referred to as "the causal nexus").[3]

30. It is accepted principle that capacity to conduct legal proceedings requires the ability to take the series of decisions required in litigation (rather than considering each separate decision), and that this should be assessed by reference to the nature of the specific proceedings before the court. The judge is best placed to consider the type of decisions which are likely to arise as part of the particular proceedings and how the nature of the proceedings impact on the issue of capacity.[4]

31. In addition, the court must take full account of, and give due weight to, the significant interference with individual autonomy entailed in a finding of lack of litigation capacity. In *Bailey v Warren* [2006] EWCA Civ 5, the Court of Appeal cautioned against a finding of incapacity on inadequate evidence on this ground. Per Arden LJ:

> "Capacity is an important issue because it determines whether an individual will in law have autonomy over decision-making in relation to himself and his affairs. If he does not have capacity, the law proceeds on the basis that he needs to be protected from harm. Accordingly, in determining an issue as to an individual's capacity, the court must bear in mind that a decision that an individual is incapable of managing his affairs has the effect of removing decision-making from him. The decision is not made lightly: as Kennedy LJ put it in *Masterman- Lister v Brutton* [2003] 1WLR 1516, "no court should rush to interfere" (para. 27). This is so even though, if he were declared to be incapable for the purpose of any decision, his advisers could maximise his contribution to that decision-making process by seeking and taking into account his views so far as he was able to express them. It is surely necessary in a democratic society to maximise an individual's contribution in this way, and the law should encourage this to be done. Although no court should rush to interfere with the power of an individual who is competent to make decisions, it must not shirk the duty of intervening where an individual is not so capable and needs to be protected by the law. Finally, it should be noted that the law presumes that a person is competent. Accordingly, the burden lies on those who seek to assert that an individual is not competent to manage his own affairs."

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[3] *PC, NC & City of York* [2013] EWCA Civ 478
[4] *Bailey v Warren* [2006] EWCA Civ 51

32. The leading case is *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162 in which Lord Justice Chadwick stated:

> "..the test to be applied….is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisors and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law whether substantive or procedure should require the imposition of a next friend or guardian ad litem (or, as such person is now described in the Civil Procedure Rules, a litigation friend…)" [paragraph 75]

> "..a person should not be held unable to understand the information relevant to a decision if he can understand an explanation of that information in broad terms and simple language; and that he should not be regarded as unable to make a rational decision merely because the decision which he does in fact make is a decision which would not be made by a person of ordinary prudence" [paragraph 79]

33. In the same case Lord Justice Kennedy commented as follows:

> "…the mental abilities required include the ability to recognise a problem, obtain and receive, understand and retain relevant information, including advice; the ability to weigh the information (including that derived from advice) in the balance in reaching a decision, and the ability to communicate that decision…" [paragraph 26]

34. He further observed at paragraph 27:

> "…What, however does seem to me to be of some importance is the issue-specific nature of the test; that is to say the requirement to consider the question of capacity in relation to the particular transaction (its nature and complexity) in respect of which the decisions as to capacity fall to be made… Of course as Boreham J said in White's case, capacity must be approached in a common sense way, not by reference to each step in the process of litigation, but bearing in mind the basic right of any person to manage his property and affairs for himself, a right with which no lawyer and no court should rush to interfere."

35. As his judgment makes clear, His Honour Judge Dancey was very well aware that the issue of DM's capacity to conduct these proceedings is separate from that of his capacity to manage his property and financial affairs. That is perfectly plain from the case management directions he proceeded to make at the conclusion of the hearing on 20 December 2017. It is not a foregone conclusion that an individual who lacks capacity to make a decision in relation to that issue ("subject matter capacity") will also lack capacity to conduct litigation about the same: per Munby J (as he then was) in the case of *Sheffield City Council v (1) E (2) S* [2004] EWHC 2808 (Fam):

> "There is no principle either of law or of medical science, which necessarily makes it impossible for someone who has litigation capacity at the same time to lack subject-matter capacity. That said, however, it is much more difficult to imagine a case where someone has litigation capacity whilst lacking subject-matter capacity than it is to imagine a case where someone has subject-matter capacity whilst lacking litigation capacity…"

36. In relation to the burden of proof in relation to the issue of litigation capacity, Mr Edwards - who appeared to represent DCC at this week's hearing (but who did not

appear on 20 December 2017) - accepts that, in the light of the presumption of capacity enshrined in section 1(2) of the 2005 Act, the local authority bore the evidential burden for displacing that presumption, a burden which they were found to have discharged. Further, the judge made it clear that, in terms of a causal nexus between the inability to make relevant decisions and the disturbance in the function of the brain or mind, he was satisfied that, in this case, the former was the direct result of the latter: see paragraph 35 of his judgment.

37. In terms of his analysis of the medical evidence which was before the court, His Honour Judge Dancey dealt with this at some length from paragraph 21 of his judgment. In particular, he referred to DM's delusional beliefs about a "lifelong conspiracy" which had been diagnosed as long ago as November 2013. In relation to litigation capacity, Dr Barker had reported that, in the context of the delusional beliefs held by DM about his brother's role in the wider conspiracy, "[these] delusional beliefs are directly affecting his ability to use and weigh relevant information in the selection of a deputy and therefore his instructions to his legal representatives are based on this same matrix of delusions": see paragraph 27 of the judgment.

38. The judge referred to a manifest example of DM's delusional beliefs as it emerged during his cross-examination of Dr Barker at the December hearing: see paragraph 32 of the judgment. He quoted from a passage in DM's witness statement which the judge offered as another example of what he described as "a very disturbed delusional state of mind": see paragraph 33 of the judgment.

39. The evidence before the court, viewed through the prism of the law as set out in his judgment, led His Honour Judge Dancey to the following conclusions (and I set them out here as they are recorded in paragraphs 35 and 36 of his judgment):

> "35. What is the relevance of that ? Well, first of all, so far as the diagnostic test is concerned, I am satisfied that DM is suffering from an impairment or disturbance of the mind or brain, as diagnosed by Dr Barker. From the point of view of the functional test, the second stage test, I am satisfied that that does mean that he is unable to make specific decisions for this reason. I do not doubt, for the purposes of section 3(1) of the 2005 Act that DM is able to understand information both in relation to the mechanics and the substance of the substantial issues within the litigation. I also accept that he is able to retain that information, in fact,he has, it seems to me, a very good memory.
>
> 36. I also accept …. that he is able to communicate his decision, he is articulate. The difficulty there is, I agree with Dr Barker about this, is the focus on the question of how he uses and weighs information as part of the process. His delusional disorder is so much part of him that it is bound, in my view and finding, to impact on the way in which he deals with advice given to him in the context of this litigation and gives instructions….".

40. When I enquired of DM on Monday of this week whether there was anything else which he wished me to consider in terms of the merits of his proposed appeal over and above the written material he had already put before the court, he told me that he was extremely troubled about allowing the diagnosis of a "persistent delusional

disorder" to stand unchallenged because of the effect of such a finding on his life. He described it as a "life-limiting" diagnosis which had already had severe consequences on his personal and financial circumstances in terms of his ability to move forward with his life over the course of the past three years during which this litigation has been current. He spoke of the devastating effects on his life and of his wish to seek compensation from DCC because of its role in the destructive effects of the litigation it had launched without cause in 2016.

41. I have already referred to the evidence which was before His Honour Judge Dancey and the findings which he made in the context of that evidence and his evaluation of all the evidence which was put before the court.

42. As I have said, my function in the context of this proposed appeal is to review the decision of the court below. I can only interfere with that decision if I am satisfied that the appeal would have a real prospect of success or if I conclude that there is some other compelling reason for the appeal to be heard.

43. In this context, I turn now to consider the written material which DM has placed before the court.

(i) Grounds of Appeal: 12 January 2018

44. It appears from paragraph 1 of the grounds he has drafted that DM relies on two separate reasons in support of his application. First, he contends that there were no reasonable grounds before the court on 20 December 2017 for believing that he lacked capacity to litigate. Secondly, he asserts that the judge did not understand his submissions as they were formulated and set out in his witness statement dated 14 December 2017.

45. In relation to the first ground, I am entirely satisfied that there was a body of expert medical evidence before the court on which the judge relied in reaching his conclusions in relation to DM's litigation capacity. Dr Barker was, and is, a consultant psychiatrist with some 30 years' experience who has appeared frequently as an expert witness in the Court of Protection (see paragraph 2 of the judgment). In addition to the written and oral evidence from Dr Barker, the judge was referred to the earlier diagnosis of delusional disorder which had been made by DM's own treating psychiatrist, Dr R, between 2013 and 2015. There was a further report by a locum psychiatrist with the community mental health team, Dr S, prepared in November 2016 which confirmed a similar diagnosis. The judge was made aware of two previous detentions of DM for treatment under the Mental Health Act in September 2014 and September 2015.

46. Dr Barker's reports for the court prepared in June and December 2017 confirmed the diagnosis which had been made in November 2013. The specific focus of his first report in terms of subject matter was "capacity to manage property and affairs, litigation capacity and capacity to refuse assistance". During the course of his oral evidence, Dr Barker confirmed that DM's delusional beliefs about a lifelong conspiracy continued and that they were so entrenched that they dominated his thinking and weighed directly on his ability to use and weigh information. Those conclusions were informed in part by the very recent assessment of DM which Dr Barker had carried out on 8 November 2017, some six weeks before His Honour

Judge Dancey made his finding in relation to litigation capacity. None of the experts involved in DM's care or assessment doubted his ability to present as an intelligent and articulate individual. Nonetheless, Dr Barker's expert view remained that he suffered from a persistent delusional disorder of moderate severity as recognised by international professional classification standards (paragraph 4.6). In relation to the specific issue of litigation capacity, Dr Barker confirmed that DM lacked capacity to litigate in these proceedings but that, were the situation to change with regard to his mental health in the future, his capacity could be revisited. That opinion was confirmed during the course of his oral evidence during the hearing on 20 December 2017. That was the most up to date medical evidence available to the court and there was no effective challenge to that expert opinion save from DM who told the judge that he did not accept Dr Barker's diagnosis.

47. In relation to DM's first ground of appeal *(no reasonable grounds for believing he lacked litigation capacity),* I can see no basis on which it could be said that his proposed appeal would have a real prospect of success and I dismiss this ground as a basis for such an appeal.

48. In relation to his second ground *(failure to understand DM's submissions reduced to writing in his witness statement dated 14 December 2017),* I quote briefly from Dr Barker's report prepared in June 2017 since it has some resonance with DM's second ground of appeal. In reviewing the evidence which had informed his report, Dr Barker made reference to a formal capacity assessment which had been carried out by Dr S in November 2016. She had concluded that, as at that date he lacked capacity to use and/or weigh relevant information and had longstanding delusions about people conspiring against him. She recorded the following about a consultation she had with DM on 10 November 2016:

> "[DM]said since 2008 his financial status had changed, nd following his divorce in 2005 his life collapsed. He was put "on a programme of destructions", had to sell his home, pay his wife childrens' *[sic]* benefit, and is now in excess of £100,000 in maintenance arrears. He said everything started the day after he was born, which is the date of the death of John Steinbeck. He believes there are relationships between his daughter and John Steinbeck's death, also his brother and John Kennedy's assassination, and he also has connections with these through matrixes. Someone in the media took these facts, they cascaded into a series of events until he was put at risk, and someone needs to kill the story. He is in the middle of the matrixes and that was the reason he was singled out. Some used the family as "divide and rule". The intention was to make him a non-entity, and that also meant no career. He left his profession once he realised he got into a Catch 22 situation, could no longer trust his employer, and resigned claiming constructive dismissal (2008) …".
>
> "… he did not want to accept a diagnosis of delusional disorder, because this meant writing off his life. He thought there was a trade-off in him agreeing that he was mentally ill and receiving benefits. His speech was difficult to follow at times, with pressure of speech and explaining his delusions. His speech was disjointed sometimes, trying to connect various events in a bizarre manner. He had no insight into his delusions and no insight into how these affect his life. He said he would dispute everything written about him as he does not believe he has

mental health difficulties….. He believes the application will help his persecutors to further harm him."

49. When DM was re-interviewed by Dr Barker on 8 November 2017 for the purposes of reassessment for the forthcoming capacity hearing, he recorded as part of that interview what DM had told him about a report which he (DM) was writing to challenge the diagnosis of persistent delusional disorder. That report (then 120 pages long) was to be the basis for his witness statement, a document which was before His Honour Judge Dancey on 20 December 2017.

50. His Honour Judge Dancey had plainly read and absorbed the content of that witness statement. He quoted from it at some length in his judgment (paragraph 33) as evidence of "a very disturbed delusional state of mind". In paragraph 34 of his judgment, he accepts that his quotation from DM's written evidence is but a random extract but one which "illustrates how self evident it is that DM is, on any reading, suffering from delusional disorder and, in a sense, it does not take Dr Barker to tell me that".

51. I have done my best to distil from DM's witness statement and his grounds of appeal some of the points on which he seeks to rely in support of his case that Dr Barker's diagnosis is wrong; that he has been "scapegoated"; that he is being ridiculed and unfairly treated; and that his right to autonomy is being infringed by the current diagnosis. I am sure that DM will believe that I, too, as an appellate tribunal have failed to understand his points but I select the following as what appear to me to be those he would wish to emphasise in the context of his current application for permission to appeal the judgment of His Honour Judge Dancey:

- he believes that these proceedings are being "scripted" with the intention of achieving a finding of mental incapacity against him;
- he believes that relevant public authorities (such as the police, the security services and the Home Office) have been made aware that he is being "scapegoated" in these proceedings;
- in order to refute allegations of mental capacity he has made reference to the final report of the National Commission on Terrorist Attacks upon the United States ("the 9/11 Commission Report") which, he claims, demonstrates beyond argument that he is not delusional;
- he relies in this context on references to Flight 93, its intended destination and, by implication, a reference to San Francisco being the setting for the "Dirty Harry" film series starring Clint Eastwood;
- he relies on what he refers to as "the John Steinbeck probability statistic" and the persons who have an interest in the "scapegoating" exercise to which I have referred above;
- in this context, he sees a significance in the fact that he purchased a property in Dorset in 1999 as part of a theory in relation to "sets", those four letters being linked in some way with the permutation aspect of the

John Steinbeck probability statistic. In this context, the Thomas Hardy novel and the name "Tess" is implicated;

- he raises a reference to the murder of the television presenter, Jill Dando, and the film "Taxi Driver" in the context of his theory about an "opposites paradigm" which would link his godparents who were based in the US at the time of her murder;

- he refers to the fact that Freddie Mercury was portrayed as a "fantasist"; that Lisa Minelli participated in a tribute concert for the deceased musician; that he sees a link with another film ("The Wild Geese" starring Roger Moore) in which one young actor attended the same school in Hertfordshire as had one his previous flat mates.

- he links a number of these factors with diagonal moves on a chess board and identifies a number of common themes or threads which join these issues together and lead him to a conclusion that he has been "monstrously implicated by association";

- he makes reference to a post card sent to his maternal grandmother in 1993 from New York, the year of the terrorist attack on the World Trade Center;

- he believes he has been wrongly implicated by association with some censure as a result of being in possession of a letter written in 1995 from one of his two godmothers who lived in Ohio, USA. He refers to the fact that the husband of that godmother was at one time an executive director of a group of companies which included Smith & Wesson, the manufacturer of the weapon used in both the Dirty Harry film series and the film "Taxi Driver";

- he believes he may have been wrongly implicated in one of his former work colleagues leaving the law firm which then employed them both as a result of having obtained a copy of the 9/11 Commission report.

52. It would not be proportional or appropriate, in my judgment, to rehearse at any length the contents of DM's witness statement dated 14 December 2017. It reiterates and expands upon these issues, and more. This evidence was before His Honour Judge Dancey. The judge read the statement and quoted from it in his judgment.

53. Whilst I am sure that DM will hold fast to his resolute belief that he does not suffer from any form of delusional disorder and that I, in common with His Honour Judge Dancey, have failed to understand the full import of his grounds of appeal, I have reached the inevitable conclusion that there is nothing in his second ground of appeal which leads me to consider that this ground has any real prospect of success.

54. In the circumstances, I reject both grounds and the material relied on in support as a basis for granting permission to appeal the determination that DM lacks litigation capacity to conduct the current proceedings. I can see no other compelling reason for

the appeal to be heard and there is thus no reason for granting permission pursuant to CPR rule 52.6 (1)(b).

55. In the particular circumstances of this case, I take the view that the proposed appeal is totally without merit and I so certify.

56. In the context of this proposed appeal, I propose to make anonymity orders under CPR rule 39.2(3)(d) and (4) in order to protect the identity of DM. Once this judgment has been circulated to the parties involved in this litigation, consideration may need to be given as to whether further anonymisation is required in relation to (for example) the identity of medical witnesses.

Order accordingly