Neutral Citation Number: [2021] EWHC 998 (QB)

Case No: F00LN484
Appeal refs: BM00103A & BM00111A

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre

Date: 29/04/2021

Before :

MR JUSTICE SOOLE

- -

Between :

THOMAS EDWARD SAUL GREETHAM	**Claimant**
- and -	
ANDREW CHARLES GREETHAM	**Defendant**

- -
- -

Dr Sandy Joseph (instructed by direct access) for **Alfred Richard Greetham**
Mr James Stuart (instructed by Adie Pepperdine Ltd) for the **Claimant**

Hearing dates: 30 March 2021

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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.

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MR JUSTICE SOOLE

Mr Justice Soole:

1. These are contested applications dated 21 December 2020 and 21 January 2021 by (Alfred) Richard Greetham each for an order pursuant to CPR 21 appointing him as litigation friend for his brother the Defendant Andrew Greetham in this matter. The Claimant Thomas Greetham is the son of the Defendant. For convenience I shall, as the parties did in Court, refer to them respectively as Richard, Andrew and Thomas. Their respective ages are 58, 70 and 43. Richard appeared by Counsel Dr Sandy Joseph; Thomas by Mr James Stuart.

2. The focus of the hearing on 30 March was the application dated 21 January 2021. The essential issues are whether Andrew lacks capacity to conduct litigation, and is therefore a protected party; and if so whether Richard's application satisfies the conditions of CPR 21.4(3) as applied by 21.6(5).

3. The action concerns a partnership dispute between Thomas and Andrew over the family farming business. The proceedings were in turn linked to matrimonial proceedings between Andrew and his wife Shirley Mary Greetham; as any final order for ancillary relief in those proceedings was in part dependent on resolution of the partnership dispute. It is necessary to consider the procedural history in some considerable detail.

4. By Order in the matrimonial proceedings dated 6 June 2019, Thomas was joined as a party to enable the court to determine what assets belong to the partnership and the extent of Andrew's interest in those assets.

5. By letter to Thomas's solicitors dated 1 July 2019 Andrew's then solicitors (Chattertons) on his behalf served formal notice of the dissolution of the partnership with immediate effect. The letter conceded that the partnership assets should be split equally; and stated that their client believed that it would not be possible for the parties to agree on the valuation of the partnership assets, and in consequence required all the assets to be sold forthwith and the net proceeds to be divided equally.

6. By Andrew's Points of Claim dated 3 July 2019, he duly accepted that the partnership assets should be divided equally between them; and identified the partnership assets as comprising High House Farm, Catlins Farm (which includes Caton House and a bungalow), certain land at Heckinton Fen, cattle, straw and fodder and farm machinery. He sought directions for a sale of the partnership assets, payment of partnership debts and the preparation of the final dissolution accounts. The statement of truth was signed on his behalf by a partner in Chattertons.

7. By his Response dated 31 July 2019 Thomas contended that over the years various assurances had been made to him by Andrew, in particular about High House Farm, upon which he and his wife (Clare Greetham) had relied to their detriment. Subject to that important qualification, there was no dispute as to the identity of the partnership assets or the principle of equal division.

8. In his Reply dated 18 November 2019, drafted by Counsel instructed by new solicitors (Pert & Malim), and personally verified as to its truth, Andrew disputed the contentions in Thomas' response; restated his position that the partnership assets should be divided equally; and continued : *'Accordingly, the simple position is that if* [Andrew] *and* [Thomas] *cannot reach an agreement on the distribution of the assets then the assets*

should be sold on the open market and [Andrew] *will seek such an Order from the Court in the event that such agreement is not reached'.*

9. By further particulars dated 29 November 2019 drafted by new Counsel (Mr Stuart), Thomas made clear that the references to assurances were in support of his claim that, within the dissolution and winding up of the partnership, High House should be transferred to him as a distribution *in specie*, but its full value credited in the equal distribution of the partnership assets. If so, his wife would abandon her claim for any beneficial interest in the property as against the partnership.

10. The trial of the partnership action was fixed for 17 February 2020, with each party to be represented by solicitors and Counsel. The present papers include a signed authority from Andrew to his solicitors (Pert & Malim) dated January 2020 in respect of instructions received from his partner Christina Myland : *'I…authorise you to accept my instructions from Miss Myland. I also confirm that all instructions received by Pert & Malim from Miss Myland to date have been given by me'.*

11. On 5 February 2020 a mediation took place between the parties and their legal advisers, but was unsuccessful. Andrew attended with his partner and was represented by his solicitors and Counsel (Mr John Small).

12. In the week before the trial, Pert & Malim applied to come off the record, following a dispute over fees. In that week the Judge (HHJ Rogers) received an informal application by email made on Andrew's behalf by Christina Myland for the hearing to be vacated on grounds of his mental ill-health.

13. The Judge made arrangements for a telephone hearing on Friday 14 February and the parties were duly notified. Neither Andrew nor anyone on his behalf attended. His partner was at a late stage of pregnancy and gave birth to their son in March 2020. In her very recent statement (29.3.21) she explains that she had been very unwell during her pregnancy and also exhibits a report dated 12.3.20 from a Mental Health Social Worker in the Veterans Mental Health Complex Treatment Service which records her diagnosis and associated symptoms of PTSD resulting from her army service. She states that with Andrew *'not of sound mind and lacking incapacity. It would simply have been too much to deal with the hearing on my own'.*

14. The material which had been put by her before the Judge included a letter dated 8 January 2020 from a general practitioner Dr Sami which stated that Andrew *'…was diagnosed with depression and memory problems in March 2019 and is currently being treated with antidepressants. He is currently going through lots of stress and struggling to cope, due to ongoing issues with his divorce and family related problems. He is currently expecting a baby with his partner.'*

15. There were two further letters from Dr Banju of the same GP practice, each dated 7 February and addressed 'to whom it may concern'. The first made reference to his ongoing depression and stress and its effect on concentration. It continued *'…it has also caused him to make decisions which should not have been made. His mood and interest is low, and I feel he may still be unable to make sound judgment and give concise instructions. I would appreciate your consideration of his current mental state in matters requiring him to make any decision. He has been referred to a mental counselling team for further management in view of this.'*

16. The second letter from Dr Banju stated *'This letter is to inform you that Mr Greetham was admitted to hospital overnight on 6 February as he was poorly. He was discharged today and is still recovering. Due to not knowing how long his recovery will take, he will not be able to attend the court session.'*

17. The application to vacate was refused. HHJ Rogers' subsequent substantive judgment of 17 February records : *"Various explanations of a medical nature were tendered, suggesting either that he was unfit on a temporary basis to attend trial or conceivably, had so deteriorated in his mental state that he may be incapacitous. For reasons set out in the judgment that I delivered during that short telephone hearing, I was not persuaded that there was any sufficient evidence as to those matters. Plainly he had had some medical treatment quite recently but its extent or any diagnosis was not clear and I determined that this hearing should proceed. I should say he did not attend nor was he represented during that telephone hearing but am quite satisfied he was aware of it."* The trial duly proceeded.

18. In his judgment which followed the hearing, HHJ Rogers recorded the agreement between the parties as to the dissolution of the partnership and that it was a '50/50 arrangement'; and noted the undisputed list of partnership assets including High House Farm and Catlins Farm. In the exercise of his discretion he held that High House Farm, the herd of cattle and other farming equipment and material should be distributed *in specie* to Thomas. As to Catlins Farm, which included the home of Andrew and Christina Myland at Caton House, the Judge noted that it *'might in other circumstances have been allocated to Andrew but he is not here. He cannot it seems to me justify that and probably would not be able to manage it financially and therefore a sale of that is required.'* He ordered the sale of Catlins Farm with vacant possession (save in respect of the tenanted bungalow) and made various other orders including Andrew to pay £67,200 received as rental income from the bungalow since 2012; all necessary further accounts and enquiries to be carried out by a District Judge; and subsequent overall distribution of the net assets (taking account of the *in specie* distributions to Thomas) in equal shares.

19. Eight days later (25 February 2020) Andrew applied in person to set aside the judgment. The application and his supporting witness statement were signed by Andrew. The witness statement referred to the withdrawal of his solicitor following a dispute over fees; the informal application to adjourn the trial *'due to a number of long-standing acute medical conditions'*; and that he had not been informed nor was aware that the trial had proceeded in his absence. The statement also alleged that Thomas had acted fraudulently in various ways. The application was made under CPR 13, but was appropriately treated by the Court as an application under CPR 39.3.

20. At the hearing a further and lengthy witness statement of Andrew dated 4 March 2020 was put before the Judge. This included statements that Catlins Farm 'was never part of the Partnership' (para.10); that he now owned two-thirds of High House Farm (para.22); and referred to the evidence concerning his alleged mental incapacity (para.52).

21. The application was heard by HHJ Rogers on 5 March 2020. Andrew was represented by Counsel Ms Lara McDonnell. The judgment given on that day records that the Judge was told that Andrew was receiving assistance from his partner; but also was acting effectively with the assistance of an 'intermediary'. In turn, Ms McDonnell was

'instructed via that intermediary on a direct access basis'. The Judge took the intermediary not to be a formal intermediary but *'simply a general description of a go between'*. I was told without challenge that, despite requests, the identity of that person has never been provided. The judgment also records Ms McDonnell's confirmation that she was *'entirely satisfied that she is receiving proper and up-to-date instructions'*.

22. The Judge was provided with a further letter from a medical practitioner dated 3 March 2020. This read *'Due to Andrew's deteriorating health condition, I feel he is unable to make representations in person on 5 March. He has been on medication since March 2019 with regards to his mental state. To date, due to ongoing stress, Mr Greetham's depression has worsened, which has caused him to struggle with his concentration, and therefore he is unfit to give instructions to the counsel due to lack of coherent sound judgment.'* The judge observed that this comment needed to be read in the context of Counsel's confirmation about her instructions.

23. CPR 39.3 provides that where a party does not attend a trial and the Court gives a judgment or order against him, the party who fails to attend may apply for the judgment to be set aside; and that the court may grant the application only if three conditions are satisfied, namely that the applicant *'(a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him; (b) had a good reason for not attending the trial; and (c) has a reasonable prospect of success at the trial'* : 39.3(5).

24. There was no dispute that Andrew had acted promptly. As to condition (b), having considered the medical evidence, the Judge concluded that he did not have a good reason for not attending the trial on 17 February. In particular he stated : *'To the extent that he now says he was unaware of the trial date, as he does say in terms, that is patent nonsense. Not only was the trial date fixed many weeks before, but… how could he have made an application through his partner the very working day before the trial to adjourn it if he had no idea of what the trial date was? There is every reason to suppose that this medical position was genuine, was relied upon and used as a vehicle in a manipulative attempt to postpone the trial, because that would serve his very good purpose, not only in creating further difficulty in terms of the farming business, but also delaying the obviously overdue financial settlement that there should be as a result of the divorce proceedings.'*

25. As to condition (c), the Judge concluded that he had no reasonable prospect of success at trial. In particular, he noted that Andrew was now seeking to resile from his pleaded case that both High House Farm and Catlins Farm were partnership assets. He concluded that the application was 'utterly hopeless'.

26. In one of his witness statements (23.3.21) for the present application, Richard states that his involvement in the case began after the trial on 17 February 2020 and that (as appears from their face) he commissioned reports from Mr Peterkin Ofori (13.3.20 and 5.8.20) as to Andrew's mental capacity in different respects. His Counsel Dr Sandy Joseph told me that Richard had been the 'driving force' in the litigation since March 2020.

27. Mr Ofori's qualifications include a postgraduate diploma (Legal Practice) LLB and Diploma of Higher Education (Mental Health) Certificate in Mental Capacity and Best Interest Assessment. He was called to the Bar in 2016. He has been practising as a

Mental Capacity Assessor since 2007 and as a Specialist Mood, Anxiety and Personality Disorders Community Psychiatric Nurse. He was instructed by Richard to consider the question *'Would Mr Andrew Greetham have had the mental capacity to litigate a possession claim in the County Court on 17/02/2020?'* His report of 13.3.20 listed his sources of information as GP records from Swineshead Medical Group and 4 letters from different GPs of that practice dated 15.7.19, 8.1.20 (Dr Sanni), 7.2.20 (Dr Olabanjo) and 3.3.20 (Dr Alam); together with his own assessment of Andrew made on 12.3.20. Thus Mr Ofori was not provided with any of the papers in this litigation.

28. Mr Ofori records a history of depression and memory problems; and considers relevant authorities on the test for litigation capacity (Masterman-Lister v. Brutton & Co [2003] 1 WLR 1511; Bailey v. Warren [2006] EWCA Civ 51; Dunhill v. Burgin [2014] UKSC 18). He concludes that Andrew did not understand how the proceedings would be funded; and would have been unable to understand the context of the litigation or make decisions or assist the Court in making decisions relating to the conduct of the proceedings.

29. On or about 24 March 2020, Andrew lodged an appeal against the Order made on 17 February 2020. The Appellant's Notice was signed by him and attached a detailed skeleton argument with the words "Appellant in person" at the foot. It referred to the unsuccessful application to set aside the judgment; sought an extension of time for appealing; and applied to adduce further evidence including the report of Mr Ofori. Under the heading 'substantive appeal' it stated: *"The nub of the Appellant's appeal is that he did not have the mental capacity to conduct the trial or indeed the case in hand as is evidenced by the capacity report referred by Mr Peterkin Ofori"* (para.22).

30. On 29 April 2020, I made a boxwork order which noted that the time for filing an appeal bundle had expired; made an unless order for that purpose (which was complied with); refused the application for a stay of execution on a without notice basis; and added : *'Furthermore, those advising and assisting the Appellant will need to consider whether it is necessary to seek the appointment of a litigation friend'*.

31. By letter dated 5 May 2020 Andrew wrote to the court a 4-page typewritten letter headed "application for stay of execution". This referred to my Order of 29.4.20 and set out detailed reasons as to why a stay should be granted pending the appeal. Amongst a range of points relating to the substance of the appeal, the letter states that '*any enforcement action has the potential to significantly impact upon the appeal as well as my mental wellbeing'* and refers to events since 17 February including *'a detailed medical assessment setting out issues with my capacity at the time of the trial'*.

32. On 15 May 2020 an application was made by Richard for appointment as Andrew's litigation friend, based on Mr Ofori's report. Richard's subsequent witness statement of 21 September 2020 states *'An application was made for me to become his litigant in person on 15 May 2020 but this was not processed and so the application has been resubmitted'* (para.8). I was told by Dr Joseph that there had been a 'misallocation of fees' by the Court. Thus, one way or another, the application did not proceed to a hearing.

33. On 16 July 2020, the application for a stay of execution was heard on notice by Martin Spencer J. Andrew was represented by Counsel Mr Timothy Becker (instructed by direct access) and Thomas again by Mr James Stuart. In his judgment the Judge noted

that the application of 15 May 2020 was yet to be heard. Having considered Mr Ofori's report and its conclusions, he observed: *'I confess that when I read that report I was, to put it mildly, surprised, because by the time I read that report I had also read the appeal documents in relation to the appeal from the order of 17 February, that appeal being dated 23 April 2020, more than a month after Mr Ofori's report. The appeal was brought by Mr Andrew Greetham acting in person and was supported by an intricate skeleton argument signed by Mr Greetham. In addition, I have seen his application for a stay dated 5 May 2020 by letter to the court which, again, is an articulate and detailed letter setting out a full argument as to why, in his view, there should be a stay, signed by Mr Greetham. It seems to me impossible that somebody who lacks capacity, as described by Mr Ofori, would have been able to draft those documents. I do not, of course, know the precise circumstances in which those documents were drafted but if they were, in fact, drafted by someone else on Mr Greetham's behalf, and he was simply asked to sign the document, then that raises all kinds of issues because he was being asked to sign a document which someone would have known he had no capacity to sign, if Mr Ofori's report was correct, but there is nothing in any of those documents to indicate that, and I am entitled to take those documents at face value, it seems to me."*

34. As to the substance of the appeal, Mr Becker, who had been briefed at short notice, had concluded that, in the light of the failed application under CPR 39.3 and authority (Tennero Ltd v. Arnold [2017] 1 WLR 1025), the appeal against the order of 17 February was an abuse of process. The Judge refused his application to amend the Appellant's Notice so as to make it an appeal against the Order of 5 March 2020; and in consequence dismissed the appeal.

35. On 5 August 2020 Mr Ofori prepared a further report on the issue of capacity, again on the instructions of Richard. This stated that he had been asked to report on Andrew's capacity *'to make a gift or enter into any form of contract, as well as to comment on whether there was evidence of coercion and undue influence.'* For this purpose he was asked to review certain medical records and police records. The medical records were principally GP records and letters, including those previously noted; also a letter from a neurology clinic (9.12.19) and from United Lincolnshire Hospital (7.2.20). The latter was summarised by Mr Ofori as *'Report that Mr Greetham has a possible diagnosis of dementia with chest pain'*. The police records were of at least three alleged assaults by Thomas on Andrew between 2015 and 2019. Mr Ofori concluded that Andrew was a vulnerable adult in his relationship with Thomas; that he did not have capacity to make any contract decisions before or after the diagnosis of depression by his GP in March 2019; and that any gift made by him to his son between 2015 and 2020 would not have been made on a full free and informed basis.

36. Mr Ofori's information about the partnership dispute is recorded in these terms: *'The context of the case as I understood from Richard Greetham is that Mr Andrew Greetham and his son Thomas Greetham both owned T Greetham and Son farm at 66.66% and 33.33% respectively. However, there has been a long-standing family feud that has existed since at least 2015, which had the police involved because of violence perpetrated by Thomas against his father Andrew Greetham. The partnership has apparently come to an end and has resulted in Mr Andrew Greetham losing all his estate, including his shares in the partnership. I have not had sight of the documentations relating to the partnership agreement, and how it was lost.'*

37. By letter over his name and dated 10 September 2020, Andrew sent to Thomas' solicitors an Appellant's Notice including grounds of appeal drafted by Counsel (again by direct access) against the Order of 5 March 2020. The Notice included an application to adduce fresh evidence, including Mr Ofori's report of 5.8.20; and an application to extend time which includes Andrew's evidence : *'The preparation of this second appeal has not been easy. I have had to find still more funds to retain my directly instructed counsel. It is my brother, Richard Greetham, who now liaises with an intermediary I used to help me prepare the paperwork for the last appeal and he liaises with counsel. Things are complicated by the fact that I do not have mental capacity to run a case or appeal…'* For one reason or another, it appears that this appeal was not lodged until 1 October 2020.

38. In the meantime Andrew had not complied with any of his various obligations under the Order of 17 February 2020. Accordingly, by application dated 11 September 2020, Thomas' solicitors applied for an enforcement order.

39. On 21 September 2020 Richard applied in the Family Court proceedings to adjourn the Final Hearing as between Andrew and Shirley which was due to commence on 24 September; and likewise in the partnership action to adjourn the enforcement application listed for 25 September. On 23 September HHJ Rogers dismissed both applications; and adjourned the issue of costs to 25 September.

40. On 25 September in the matrimonial proceedings HHJ Rogers made a final ancillary relief order between Andrew and Shirley. Dr Joseph appeared for Andrew. The Order recited the agreement of the parties (Andrew and Shirley) that the terms set out in the order were accepted in full and final satisfaction of all claims for income, capital, each other's pensions, the contents of Catlins Farm and personal belongings; and against each other's estate upon death. The Order, with effect from decree absolute, provided that Andrew should pay Shirley £50,000 by 23 October and £350,000 upon sale of Catlins Farm. Further, in the event that Catlins Farm was transferred to Andrew *in specie* in the partnership proceedings or Thomas elected not to enforce the order for its sale, then Catlins Farm would be sold forthwith on the open market at a price to be determined by Shirley.

41. On the same date, the Judge ordered Richard and Andrew to pay Shirley her costs of the unsuccessful application to adjourn, summarily assessed at £2339.40.

42. On the same date, the Judge granted Thomas' application for an enforcement order against Andrew, backed by a penal notice. Dr Joseph appeared for Andrew; Richard did not attend the hearing. The Order required Andrew (and anyone occupying by his licence or consent) to vacate Catlins Farm and Caton House; to vacate his animals from the land at Heckinton Fen; to deliver up the partnership equipment and machinery; to execute a Transfer of High House Farm; and to pay over the rental income from the bungalow, in each case within 14 days.

43. Andrew was ordered to pay Thomas' costs of the enforcement application in the sum of £7,500. Andrew and Richard were ordered to pay Thomas' costs of the adjournment application jointly and severally in the sum of £4,000; with permission for Richard to apply to vary or revoke that order against him.

44. On 2 October 2020, Martin Spencer J refused Andrew's application for a stay of execution pending consideration of the appeal against the CPR 39.3 order on 5 March 2020. His reasons noted that in his judgment of 16 July 2020 he had indicated that any such application should be dealt with by the Judge who was considering any application for permission to appeal that Order. Accordingly the application was premature.

45. Also on 2 October, Andrew lodged an appeal against the enforcement order of 25 September. His covering letter of that date stated that *'I am assisted in the making of this application by my intended Litigation friend'*. The Grounds of appeal were drafted by Counsel (Dr Joseph) and included reference to his mental state and also an application by Richard to set aside the non-party costs order made against him.

46. By Order dated 8 October 2020, Foster J refused on the papers Andrew's applications to appeal the Orders of 5 March 2020 (or for an extension of time for that purpose) and 25 September 2020 or for a stay of execution. Her reasons described the applications as "further delaying tactics".

47. On 19 October 2020, Thomas' solicitors issued a contempt application under CPR 81 in the face of Andrew's failure to comply with any part of the enforcement order of 25 September 2020. The hearing was listed for 3 December 2020.

48. On 30 November 2020 Andrew issued an application 'to purge my contempt of court and to vacate the hearing on Thursday 3rd December 2020 due to ill health'. The evidence in the application form, verified by his statement of truth, identified three reasons for his inability to vacate Catlins Farm. First, because of the terminal illness of his partner's aunt who was a tenant in the house and having regard to the moratorium on evictions. This was supported by appropriate medical evidence. Secondly, because his own health had deteriorated and it would be impossible for him to attend the hearing. This was supported by a letter dated 30.11.20 from Dr Alam of his GP practice which stated that he had been seen by one of his colleagues regarding his memory and cognitive impairment on 29 September; had been referred to the memory clinic and was awaiting an appointment; and was known to suffer with anxiety and depression which also affected his sleep. He was currently on Mirtazapine for the depression. Dr Alam continued "I feel if he was evicted it would have a detrimental impact on his mental health. Obviously with the current pandemic it would further compound his problem". Andrew's application continued that he had been arranging to raise the necessary funds to purchase Catlins Farm and attached details of those funds in the sum of £300,000. The order of 17 February for the sale of Catlins Farm had included the proviso 'unless both parties expressly agree otherwise in writing on or before 31st May 2020'.

49. These applications were heard by HHJ Rogers on 3 December 2020 in a video hearing. Dr Joseph again appeared for Andrew. By this time Andrew had executed the Transfer of High House Farm, but was still in breach of the other Orders.

50. HHJ Rogers' judgment begins *'This is yet another instalment in this appalling litigation'*. He records that Andrew was not on the call; and that Dr Joseph *'says that he is unwell, and those are her instructions today. However, she assures me that she is fully instructed and, of course, I accept that…'*

51. The Judge pointed out that the application to purge contempt was premature. The application to adjourn was focused by Dr Joseph on the issue of penalty. The judge accordingly considered first the issue of breach.

52. On behalf of Andrew it was admitted that he was in breach of the orders to vacate Catlins Farm and the land at Heckinton Fen; to pay the rental income; and (in part) as to delivery up of farm equipment and machinery. Given the late execution of the transfer of High House Farm, that part of the application was not pursued. On the basis of the 'overwhelming' evidence and the admissions made, the Judge concluded that there were substantial and continuing breaches in these respects.

53. He then considered the application to adjourn consideration of sanction. In the light of the very clear medical evidence concerning the terminal illness of the aunt of Andrew's partner, he granted an adjournment until 5 January 2021.

54. In the course of his judgment, HHJ Rogers said the following on the issue of Andrew's capacity : *"36. Before moving to my ultimate conclusion, I say this, that tantalisingly but, in my judgment, unhelpfully, Dr Joseph floated yet again the position of her client's mental health. I say yet again because it has been the spectre throughout each and every occasion that I have dealt with it and certainly in the appeal before My Lord, Spencer J similarly that was so. I am not sure if it featured before Foster J, although she in fact dealt with it and dismissed it. 37. When counsel submits that it would have been helpful had Mr Richard Greetham been the litigation friend, accepting as it appears to be that he has some element of driving force behind the formality, that is a dangerous begging of the question of incapacity. As we have said so often and I would have thought the point were beyond doubt by now, a litigation friend is only appointed if there is a finding of incapacity in accordance with the Mental Capacity Act and within the Civil Procedure Rules. 38. I am satisfied that Mr Andrew Greetham, notwithstanding his difficulties, and some are documented and, indeed the doctor's note also touches upon it, has some mental health or personality difficulties. It is insufficient at this stage, and has been throughout this litigation, to displace the presumption of capacity. And I am fortified in this case by the fact that there has been an application made to purge contempt and to adjourn the proceedings in Mr Andrew Greetham's name. It is perfectly cogent and well argued. But, above all, is the fact that he appears today by learned counsel, who accepts instructions and does so and puts them forward. She would be professionally embarrassed and in an impossible position if he lacked capacity to present the case in the way that she does. And I accept her position in relation to that. So, that is not part of my thinking today."*

55. On 21 December 2020 two procedural steps were taken by Richard. First, he issued an Appellant's Notice in Andrew's name but signed by himself against the decisions of Foster J dated 8 October 2020. This was presented as an appeal to the Court of Appeal and included an application for him to be appointed as litigation friend for Andrew. On the issue of capacity, he referred to reports of Ms Louise Thornton which he had commissioned. To the question "have you lodged this notice with the court in time?", the 'yes' box was ticked.

56. This appeal to the Court of Appeal was misconceived. The appropriate course would have been for Andrew to renew the applications for extensions of time and for permission to appeal to the High Court by application filed within 7 days after service of the notice that permission had been refused : CPR 52.4(2) and (6).

57. Secondly, he issued the first of the two Part 21 applications which are before me. This seeks *'An order to be appointed as Litigation friend pursuant CPR r.21.2(1), without a Court order.'*

58. On 31 December 2020 Andrew sent an email to the Queen's Bench Judges Listing Office requesting an urgent oral hearing to be listed for 5 January 2021. This attached the papers relating to the purported appeal to the Court of Appeal. Andrew Baker J considered the application as duty judge on 4 January. In the absence of any explanation as to why an urgent hearing was required in the High Court on the following day, he refused the application.

59. On 5 January 2021, the adjourned hearing in respect of sanction for Andrew's contempt of court took place before HHJ Rogers. Dr Joseph again appeared for Andrew, who attended for part of the hearing. His partner's aunt had sadly died before Christmas. Dr Joseph applied for a further adjournment. HHJ Rogers' judgment records that this application was made on three grounds. First, that there was an outstanding appeal or application which needed to be determined before the case could proceed. Secondly, that there had been substantial financial changes of circumstances so that at least in part compliance could be fulfilled and Andrew should be given that opportunity. Thirdly, that in the heightened state of the pandemic and the requirement for people to stay at home, it would be wrong to proceed to an order which involved committal to prison.

60. The judge refused the application to adjourn. In the light of the references in the application to the Court of Appeal concerning Andrew's capacity, he returned to this topic in his judgment: *"In the hearing of 3 December, again the issue of litigation capacity was raised and, as has always been asserted, it is argued that it would have been preferable for Andrew Greetham's brother, Richard, to be his litigation friend. I am very concerned that the terminology throughout has been used loosely and not in its proper technical sense, because a litigation friend only comes into play when one is required to step into the shoes of the litigant if that litigant is incapacitous. Any litigant may have informal support, whether in or outside, but the role of the litigation friend, as laid down by the rules and in the authorities, is a very particular and important one and it is not simply a case of either Andrew saying, "I want Richard to be my litigation friend" or Richard saying, "I want to be the litigation friend." Both the legal and procedural requirements have to be met and hitherto they have, in my judgment never been met. I am well aware that Mr Richard Greetham has taken a proactive and I am sure helpful role in trying to move the matter forward sensibly on behalf of his brother, but he has not been in a position to control the litigation nor, less, to make the key substantive decisions which are required. Because I am so perturbed by how this occurred, I well remember, and Dr Joseph in her skeleton makes specific reference to it, asking in terms when she gave me absolutely categorical assurance that concessions and admissions of breach were being made, that they were being made on instructions and that she did not regard her client as lacking in capacity. And she assured me that the instructions had been given and taken on the basis of a litigant/counsel relationship in the normal way and that it was not asserted that he lacked capacity. Had it been, of course, her professional position would have been wholly untenable, but she has never submitted that it is.'* [13]. He continued later: *"Dr Joseph has tenaciously sought to say that I have wholly failed to engage with the issue of capacity. What she means is I have consistently refused to accept her arguments on capacity, but I have undoubtedly engaged with them. And I say that not from hubris but from the fact that both Spencer*

J and Foster J have also considered that and Foster J has refused permission to appeal, including in relation to that' [20].

61. Having then heard submissions on sanction, and noting the continued failure to comply with the various orders, the Judge imposed a custodial term of 42 days; and for that purpose ordered that he surrender himself to the custody of the Court by no later than 4 pm on 15 January, i.e. 10 days later.

62. At a hearing on 15 January 2021, at which Andrew was again represented by Dr Joseph, HHJ Rogers struck out as an abuse of process his application to vary the Order of 5 January.

63. Andrew was committed to prison; and duly served one-half of his sentence before his release.

64. In the meantime on 21 January 2021, Richard issued this present application to be appointed as litigation friend for Andrew. The application notice also includes applications for an extension of time for an oral hearing to renew the applications which were refused by Foster J on 8 October 2020; to adduce new evidence for that purpose; and for a stay of execution.

65. By boxwork Order dated 8 February 2021 HHJ Kelly noted Richard's two applications for appointment as litigation friend (21.12.20 and 21.1.21); and that he had no standing to make the further applications contained in the latter notice unless and until appointed as litigation friend. HHJ Kelly ordered the two applications to be heard before a High Court Judge.

66. As already noted, the hearing on 30 March was focused on the application of 21 January 2021, advanced by Dr Joseph as Counsel for Richard. Dr Joseph told me that when acting for Andrew on the various occasions in 2020 and 2021 she had been instructed by him indirectly through Richard as the intended litigation friend. Richard, Andrew and Christina Myland all attended the hearing.

67. At an early point in Dr Joseph's submissions, I asked what the position was about compliance with the Court's Orders of 17 February 2020 and the subsequent enforcement order 25 September 2020 and was told that there had been no further compliance.

68. It is agreed that the application for appointment as litigation friend is made pursuant to CPR 21.6. This application is made by the person who wishes to be the litigation friend (21.6(2)(a)). By 21.6(5) the Court may not appoint a litigation friend under this rule unless it is satisfied that the person to be appointed satisfies the conditions in rule 21.4(3).

69. Those three conditions are that he : *'(a) can fairly and competently conduct proceedings on behalf of the child or protected party; (b) has no interest adverse to that of the child or protected party; and (c) where the child or protected party is a claimant, undertakes to pay any costs which the child or protected party may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the child or protected party.'*

70. By the terms of the application notice, Richard consents to act as litigation friend for Andrew; states his belief that Andrew is a protected party; and states that he is able to conduct proceedings on his behalf competently and fairly and has no interests adverse to him. As to condition (c), the undertaking set out in the application form is deleted further to the side note 'delete if you are acting for the defendant'.

71. It is agreed between Counsel that the issues for determination are (i) whether Andrew lacks capacity to conduct litigation and is accordingly a protected party; if so (ii) whether Richard satisfies the conditions in CPR 21.4(3).

Capacity

72. By CPR 21.1(2)(d) a 'protected party' means a party, or an intended party, who lacks capacity to conduct the proceedings. By CPR 21(2)(c) 'lacks capacity' means lacks capacity within the meaning of the Mental Capacity Act 2005.

73. The material provisions of the 2005 Act include:

s.1(2) *'A person must be assumed to have capacity unless it is established that he lacks capacity.'*

s. 2(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.'*

s.2(2) *'It does not matter whether the impairment or disturbance is permanent or temporary'.*

s.2(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.'*

s.3(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, (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).'*

74. In Dunhill v. Burgin (Nos. 1 and 2) [2014] UKSC 18; [2014] 1 WLR 933, a pre-2005 Act case, the Supreme Court reaffirmed the general principle that capacity is 'issue specific'. Thus *'The general approach of the common law, now confirmed in the Mental Capacity Act 2005, is that capacity is to be judged in relation to the decision or activity in question and not globally'* : per Baroness Hale of Richmond at [13]. In the present case the question is whether Andrew has the litigation capacity to conduct these proceedings.

75. In Masterman-Lister v Brutton & Co [2003] 1 WLR 1511 Chadwick LJ observed in respect of the previous rules (RSC O.80 r.3(2)) that *'The rule making body plainly contemplated, and intended, that the question whether a party was required to act through a next friend or guardian ad litem (as the case might be) should, in the ordinary*

case, be determined by the party himself or by those caring for him; perhaps with the advice of a solicitor but without the need for enquiry by the court.' : [66]. These observations were reaffirmed in Folks v. Faizey [2006] EWCA Civ 381 at [18] and [24]. However thse observations were qualified by the words *'in the ordinary case'*; and in Folks Keene LJ acknowledged that there may be cases where the other party to the litigation may have a legitimate interest in disputing the need for and appropriateness of the appointment of a litigation friend : [25].

76. Richard's application of 21 January 2021 is supported by his witness statement and skeleton argument each dated 25 January 2021. These include complaints to the effect that the issue of Andrew's capacity has been raised on a number of occasions before the Court but has been wrongly brushed aside. As to evidence in support of lack of capacity, he refers first to a road traffic accident on Andrew's 21st birthday (29 October 1971) in which he suffered a head injury. This is supported by a medical note on that date which includes *'Involved in R.T.A. - Driver. Does not remember what happened. Conscious. Laceration right side of forehead, right middle finger. Pupils equal and reacting.'* He also exhibits the authority signed by Andrew to his solicitors in respect of instructions received from Christina Myland; states that this authority was requested by his solicitors (Pert & Malim) before the trial on 17 February 2020; and contends that this *'... demonstrates further, that those acting for* [Andrew] *were unable to take instructions from him due to his want of capacity.'*

77. He then exhibits three reports (30.11.20, 10.12.20 and 10.12.20) from Ms Louise Thornton of Nellie Supports Independent Social Work Practice. Ms Thornton has a degree in Social Work from the University of Lincoln and is registered as a Social Worker with Social Work England. She is an accredited Montreal Cognitive Assessor and Lichtenberg Financial Vulnerability Assessor; and has worked in adult social care since 2002, including the provision of hundreds of assessments for capacity pursuant to the 2005 Act.

78. The first report (30.11.20) is based on GP records from the Swineshead practice; Mr Ofori's report of 5.8.20; disclosure by the police of an incident between him and Thomas in June 2014; and her Montreal Cognitive Assessment and Financial Decision Tracker each dated 3.11.20. Her sources of information thus do not include any of the papers in this litigation.

79. The report is not concerned with capacity to litigate but whether Andrew had 'sufficient mental capacity to agree to a contract or make a gift retrospectively'. The alleged gift in question is described as *'In 2018 – 2019 after a court case in 2018 Mr Andrew Greetham was advised by his then solicitor to sign over 50% of his assets to his son Thomas'*.

80. The narrative of the report refers to the road traffic accident in October 1971 from which *'the client believes that this impacted on his personality, and from this time, he had issues with memory and recall.'* It continues with reference to bereavements and grief following the death of his brother Roger in 2006 and of his father in 2007; a stress-related incident in 2011-12 which involved 6 weeks off work; and symptoms of low mood, poor concentration, inability to sleep and general stress. It then refers to the incident in 2014 in which he was allegedly assaulted by Thomas; opines that this led him to be a *'considerably vulnerable adult'* in fear of his son and refers to other alleged incidents involving Thomas in November 2015, December 2017 and August 2019.

81. The report then records his score on the Montreal cognitive assessment as 9/30 *'which identifies that he has extreme deficits in his cognitive abilities'.* The identified bands of assessment are : 26+ no impairment; 18-25 mild cognitive impairment; 10-17 moderate cognitive impairment; 0-10 severe cognitive impairment.

82. The conclusion of the report is that he did not have sufficient capacity to make a decision concerning the alleged gift of property in 2018.

83. The second and third reports (each dated 10.12.20) respectively consider whether Andrew has sufficient capacity to litigate and whether he had sufficient mental capacity to litigate between 2011 and 2020. The identified evidence relied on by Ms Thornton is as in the first report, with the addition of that report and the medical note of the 1971 road traffic accident. Thus again, Ms Thornton has had no sight of the litigation papers.

84. The second report concludes that Andrew does have an impairment or disturbance in the functioning of his mind or brain. In support of this judgment it states that he lives with a diagnosis of depression and memory issues; that *'this has been queried as dementia on 07/02/20 from ULHT'*; and refers to his own account of the effect of the road traffic accident in 1971; to the relationship problems with his son; and to the Montreal score of 9/30.

85. The report then considers his capacity in respect of 'the decision to be made', which it defines as 'whether Mr Andrew Greetham has sufficient capacity to litigate'. For this purpose it considers the four questions derived from s.3(1)(a)-(d) of the 2005 Act, namely whether he is able to (i) understand the information relevant to the decision (ii) retain that information in his mind long enough to make an effective decision (iii) use or weigh up that information as part of the process of making the decision, and (iv) communicate his decision, whether by talking, using sign language or any other means. Ms Thornton answers the first three questions 'no'. The fourth question is also answered 'no', but in answer to the next question on the form 'Please provide details' responds: *'Mr Andrew Greetham can communicate verbally in English; there was no evidence of hearing impairments, and Mr Greetham communicated directly with the assessor throughout the assessment'.*

86. The report concludes that *'Upon the scale of probability, Mr Greetham lacks sufficient mental capacity to conduct proceedings'.*

87. The third report identifies the 'decision to be made' by Andrew as whether *'On the balance of probabilities would Mr Andrew Greetham have had sufficient mental capacity to litigate between 2011-2020'.* The report is based on the same information as the second report. For similar reasons it concludes that *'It is extremely unlikely on the balance of probabilities that Mr Andrew Greetham would have had the capacity to litigate throughout several court cases involving his son Thomas and himself.'*

88. By his witness statement of 25.1.21 (supplemented without leave by his further witness statements dated 23.3.21 and 29.3.21 and Christine Myland's witness statement dated 29.3.21, each of which despite their lateness I have read) Richard seeks to support the application on the basis that Thomas has in various ways acted fraudulently in his dealings with partnership property. He also continues to seek to go behind the pleaded agreement of the parties as to the identity of the partnership assets, in particular as to Catlins Farm, and as to the principle of 50/50 distribution. By a letter over Andrew's

name dated 31 March 2021, i.e. after the hearing, I was sent further informal representations focussing on the allegations of fraud.

89. In his detailed statement in opposition dated 24 March 2021, Thomas in particular takes issue with the contention of incapacity; disputes the allegations of fraud and violence; and indeed makes counter-allegations against Andrew in both respects. By reference to his witness statements and documents supplied to the Court for the trial on 17 February 2020, he accepts that he opened a separate bank account in his name to receive certain payments due to the partnership and says that this was to protect the partnership funds from abuse by Andrew. These are all matters to be dealt with in the course of the accounts and enquiries which HHJ Rogers ordered. He states that the costs orders made and quantified against Andrew on and since 17 February 2020 total £89,648, of which £25,000 relates to the order on account of costs made on 17 February. I was told without challenge that none of this has been paid; but that Richard has paid the costs order made against him on 25 September. In the meantime Thomas' business and family life are severely hampered by Andrew's continuing defiance of his outstanding obligations under the enforcement order of 25 September 2020. In the event of a finding of incapacity, he also disputes that Richard is a suitable person to act as a litigation friend.

90. Dr Joseph submits that the evidence, in particular emphasising the reports of Ms Thornton, establishes that Andrew does not have the requisite capacity to conduct this litigation; and that he is therefore a protected party within the meaning of CPR 21.

Conclusion on capacity

91. For the reasons essentially advanced by Mr Stuart, and applying the balance of probabilities, I am quite unpersuaded that the presumption of capacity is displaced.

92. My principal reason for this conclusion lies in the wholesale failure to provide Ms Thornton (and previously Mr Ofori) with any significant information about this litigation, its issues and the history of its conduct. The stark disparity between that detail and the information provided speaks for itself.

93. In consequence Ms Thornton's reports (and in particular the second and third reports concerning capacity to litigate) have been prepared without knowledge of e.g., the fact and content of the instructions given by Andrew and accepted by two successive firms of solicitors and by Counsel between 2019 and the week before the hearing of 17 February 2020; the agreement between the parties as to the identity of the partnership assets and the principle of equal division; the termination of the second solicitors' retainer before that hearing because of a dispute over fees; Andrew's application in person to set aside the order of 17 February; his representation by Counsel (Ms McDonnell) at the hearing on 5 March and her confirmation to the Court of satisfaction with her instructions; the successive further appeals, applications and letters to the Court in Andrew's name and signed by him; the instructions to Counsel to draft Andrew's appeal against the Order of 5 March 2020; his representation by Counsel (Dr Joseph) at the successive hearings between September 2020 and January 2021 (the latter postdating Ms Thornton's reports); and within those hearings the settlement of the matrimonial proceedings, the admissions of breaches of the enforcement order and Counsel's various statements as to satisfaction with her instructions and his capacity. Furthermore, insofar as Ms Thornton or Mr Ofori have taken into account instructions

given to them about the partnership dispute and advice received (see e.g. paragraphs 36 and 79 above), this has likewise been in ignorance of all this relevant information.

94. Of course, the fact that successive solicitors and Counsel have been satisfied as to Andrew's litigation capacity is not determinative of that issue. No more is it determinative that detailed letters, applications and appeals have been submitted to the Court over Andrew's name and signature. However these are all matters of obvious relevance which any useful assessment of litigation capacity needs to take into account. Thus if, e.g., it is the case that Richard and/or the unidentified intermediary drafted the various documents submitted and signed by Andrew and have been the source of instructions to Counsel, then the assessment needs to consider the basis on which they felt able to draft and give instructions on his behalf; and if necessary to seek further evidence and explanation for that purpose.

95. I have of course taken particular account of the various references to medical notes and records in the reports of Ms Thornton and Mr Ofori; to the result of the Montreal Cognitive Assessment carried out by Ms Thornton; and to the conclusions expressed by each of them on the issue of litigation capacity. However these are quite insufficient in the absence of the full information necessary for any proper assessment. In my judgment the reports of Ms Thornton (and Mr Ofori) provide no useful assistance for the Court on the issue of litigation capacity.

96. As to the medical position I also note that Ms Thornton has no medical qualification; and that the emphasis placed in her reports on the suggested continuing effect of the 1971 road traffic accident is little more than assertion.

97. For similar reasons, the non-expert evidence provides no useful support for a finding of litigation incapacity.

98. Thus Richard's various assertions of his brother's litigation incapacity can be given no useful weight in circumstances where, by his own account and as reaffirmed in Dr Joseph's submissions, he has been the driving force in the conduct of proceedings on behalf of Andrew since shortly after the 17 February 2020 hearing. At the very least there would need to be some coherent explanation as to how he reconciles his conduct of the proceedings throughout this period with his contention that Andrew has at all times lacked the necessary capacity.

99. The evidence of Christina Myland takes the matter no further; nor does Andrew's January 2020 written authority to his partner demonstrate that he lacks the capacity to litigate or otherwise provide useful support for that contention.

100. As to the various and disputed allegations of fraud and misappropriation of funds to which much of the supporting evidence has been directed, this provides no useful assistance on the issue of capacity. Further, as Mr Stuart submitted, if and to the extent that Andrew wishes to pursue these allegations he can do so within the framework of the order for accounts and enquiries in respect of partnership dealings and transactions.

101. Accordingly, and having reviewed and considered all the evidence individually and collectively, I am not persuaded on the balance of probabilities that the presumption of capacity in respect of the conduct of this litigation has been displaced. It follows that on the basis of current evidence Andrew is not a protected party.

102. That is sufficient to dispose of the application. However, in the alternative to that conclusion on capacity, I also consider whether Richard has satisfied the conditions for his appointment as litigation friend : CPR 21.4(3)(a)-(c).

CPR 21.4(3)

103. Condition (a) is that the applicant *'can fairly and competently conduct proceedings on behalf of the child or protected party'.* Dr Joseph submits that Richard satisfies this condition.

104. For the reasons essentially advanced by Mr Stuart, I do not agree.

105. First, the history of Richard's conduct of litigation on behalf of Andrew since the 17 February 2020 Order does not demonstrate an ability to conduct proceedings competently. On the contrary the period since that date has involved a succession of unmeritorious applications and appeals which have duly failed, with the consequence that Andrew has incurred further repeated costs orders. Excluding the orders made on 17 February, these total £64,648.

106. Secondly, the implication from all the evidence is that Richard is doing nothing to encourage his brother to complete compliance with the orders made against him on 17 February 2020 and reinforced by the order of 25 September 2020. When I raised the matter of compliance with Dr Joseph, I was given no reassurance on the point. Thus I was not told e.g. that Richard had been endeavouring unsuccessfully to persuade his brother to comply. It would be central to the duty of a litigation friend to do all that he can to encourage immediate compliance. Nothing I have heard suggests that Richard as litigation friend presently intends to give any such encouragement.

107. Thirdly, Richard's failure to provide Ms Thornton (and previously Mr Ofori) with highly relevant information about the history and conduct of this litigation for the purpose of the preparation of their reports is, in my judgment, a further pointer against his suitability for the fair and competent conduct of litigation.

108. Fourthly, the adverse effect of Richard's appointment would be visited not only on Andrew but also on Thomas, who has been faced with continuing costly and unmeritorious applications. No part of his costs orders against Andrew had been met. In any event, costs orders rarely provide a full indemnity for the successful party; and the burden of this continuing litigation on his family and business life is evidently very substantial.

109. I accept Mr Stuart's contention that, even if incapacity were established, Richard Greetham fails to meet the condition which would require him to conduct proceedings on behalf of Andrew fairly and competently. In my judgment he would be most unsuitable as litigation friend.

110. There is no dispute that condition (b) is satisfied.

111. As to condition (c), in his Certificate of Suitability of litigation friend dated 21 January 2021, Richard has deleted the undertaking in respect of the payment of costs. This is on the basis, as condition (c) and the sidenote to the certificate indicate, that this is deleted where acting for a defendant. In this case the ultimate form of the partnership

proceedings has placed Thomas as claimant and Andrew as defendant: see e.g. the Order of 17.2.20. However if the intention to bring fresh and wide-ranging claims of fraud, i.e. in substance acting as claimant, in my judgment it would have been necessary for an undertaking in costs to be given.

Conclusion

112. Richard Greetham's application dated 21 January 2021 for his appointment as litigation friend must be dismissed. It follows that the further applications brought by him within that application document must also be dismissed.

113. His earlier application dated 21 December 2020 is a curious hybrid in that it seeks *'An order to be appointed as a Litigation friend pursuant CPR r.21.2(1), without a Court Order'*. This confuses the procedure for the Court to appoint a litigation friend (CPR 21.6) with the procedure for becoming a litigation friend without a court order (CPR 21.5). Given my conclusion on capacity there is no basis to deploy the latter procedure. The application must also be dismissed.