Neutral Citation Number: [2019] EWCOP 14

Case No: COP1330348T / FD18F00073

COURT OF PROTECTION

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2019

Before :

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between :

TB	**Applicant**
- and -	
KB	**First Respondent**
- and -	
LH	**Second Respondent**

- -
- -

Mr Richard Dew (instructed by **Anthony Gold**) for the **Applicant**
The First Respondent appeared In Person
Michael Glaser QC (instructed by **on a Direct Access basis**) for the **Second Respondent**

Hearing dates: 3 and 4 April 2019

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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.

....

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 incapacitated person 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.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned with an application under the Mental Capacity Act 2005 and an application under the inherent jurisdiction of the High Court in respect of KB (hereafter referred to in this judgment, in light of my decision as to capacity, as P). The applications are comprised of the following:

    i) A declaration pursuant to s 15 of the Mental Capacity Act 2005 that P lacks capacity to conduct this litigation;

    ii) A determination pursuant to s 22 of the Mental Capacity Act 2005 with respect to the validity of the lasting powers of attorney (LPA) executed by P in favour of the second respondent in September 2017 and a determination pursuant to s 22 of the Mental Capacity Act 2005 as to whether the prior LPA executed by P in favour of RL and Mr NY in 2014 has been revoked;

    iii) In the alternative, pursuant to s 22 of the Mental Capacity Act 2005 a determination revoking the LPAs executed by P in favour of the second respondent in September 2017;

    iv) A declaration pursuant to s 15 of the Mental Capacity Act 2005 that P lacks capacity to manage his property and affairs;

    v) An order pursuant to s 16 of the Mental Capacity Act 2005 appointing a Deputy to manage P's property and affairs;

    vi) Orders pursuant to the inherent jurisdiction of the High Court with respect to vulnerable adults prohibiting the second respondent from acting to harm or prejudice P's best interests.

2. The applications are brought by the son of P, TB. He is represented before the court by Mr Richard Dew of counsel. P is the first respondent to the applications. Prior to this hearing P stopped giving instructions to his solicitors and they appeared by counsel at the beginning of the first day to make an application for permission to come off the record. In circumstances where P indicated that he had indeed failed to provide his solicitors with instructions and had no intention of doing so moving forward, I granted that application. The second respondent to the applications is LH. She is described in the papers variously as P's housekeeper, P's carer or P's friend. She is a Croatian national. P and LH spend a considerable amount of time in Croatia, where LH and P have business interests and where she cares for her elderly mother, her father having passed away last year. LH is represented on a direct access basis by Mr Michael Glaser, Queen's Counsel.

3. This hearing was listed to determine the question of whether P has capacity to conduct this litigation. I take Mr Dew's point that it is not *entirely* clear to someone not present at the last hearing that my last order thus limited the issues for determination today. Within this context, at the outset of this hearing Mr Dew sought to persuade me that I should determine *all* of the capacity issues before the court, even were I to decide that P did not have capacity to litigate these proceedings. This submission was

advanced on the basis that, relying on COPR r 1.2 and COPR PD 1 A, were the court to determine that P lacked capacity to conduct proceedings, it was not necessary in this case to appoint the Official Solicitor or other appropriate person as a litigation friend for P having regard to the nature of substantive issues to be determined in this case (the Official Solicitor having already, on 2 April 2019, declined an invitation issued by Newton J on 6 March 2019 to so act for reasons that I will come to later in this judgment). By contrast, Mr Glaser on behalf of LH submitted that the court should adjourn the *entirety* of the issues given the absence at this hearing of certain witnesses relied on by the applicant that, he submitted, went to the issue of capacity to conduct proceedings. P, to whom I made clear that, as a litigant in person in respect of whom no decision as to capacity had yet been made, was entitled to address the court, asked me to conclude the proceedings as quickly as possible. He did not however, engage in detail with the arguments for and against proceeding *in toto* or adjourning *in toto*.

4. Having considered the competing submissions, I decided to proceed in the manner I had originally intended, namely to determine only the issue of P's capacity to conduct these proceedings. With respect to the substantive questions beyond this preliminary issue, I was satisfied that not all the witnesses from whom the court would be required to hear to determine those substantive questions were before the court. In those circumstances, whether P had capacity or not, the court was not in a position to proceed fairly to determine those substantive questions in their entirety. In addition, for reasons I set out below, I was not satisfied that were the court to determine that P lacked capacity to conduct proceedings it followed that he did not require the appointment of a litigation friend. Against this, I was equally satisfied that, in circumstances where the evidence provided by the absent witnesses was primarily relevant to P's capacity historically and, in line with the decision of Baker J (as he then was) in *PH v A Local Authority* [2011] EWHC 1704 (COP) at [16], that the expert evidence in this case was of very considerable importance when determining the issue of P's capacity to conduct proceedings at *this* point in time, it was not necessary for the court to hear from those absent witnesses in order to determine that narrow preliminary issue of capacity to conduct proceedings.

5. In the circumstances, the sole issue before me for determination is whether P currently has capacity to conduct these proceedings. In determining this issue I have had the benefit of reading the two lever arch files of documentary evidence comprising the trial bundle and of hearing oral evidence from the applicant, from a witness familiar with the nature and extent of P's business affairs, Mr NP, from LH and from the expert witnesses, Dr Barker and Professor Kapur. I have also been greatly assisted by Skeleton Arguments provided by Mr Dew and Mr Glazer, as well as having the benefit of their considered oral closing submissions. As noted above, during the course of the hearing I gave P regular opportunities to put questions to witnesses through me and to make any comments he wished by way of closing submissions. P limited himself to asking me to "do justice in the case" and asking me to "be quick about" delivering my judgment. During the course of closing submissions, I also gave him the opportunity to address me on the question of whether he has capacity to conduct these proceedings. In response, I received a refreshingly pithy submission. Namely, "yes".

SUMMARY OF BACKGROUND

6. The background to this matter can be stated relatively shortly for the purposes of this judgment. At this stage, it would not be appropriate for the court to make findings on any disputed factual matters save insofar as is necessary to inform the decision of the court with regard to P's capacity to conduct litigation.

7. P was born in 1943 and is currently 75 years of age. P was educated at Eton and obtained a degree in Politics, Philosophy and Economics from Oxford. He thereafter worked as a senior sales executive and then as an accountant in the family business. He retired aged sixty-five to pursue his own property interests. P was married before divorcing in 2010. He has two children, the applicant, who is twenty-seven years old and a daughter aged twenty-five. During the divorce proceedings, the High Court judge charged with determining the same criticised the management by P (and his ex-wife) of his family inheritance.

8. P has had longstanding difficulties with alcohol consumption, which he dates to the breakdown of his marriage but which his family contend subsisted prior to that time and were responsible for the same. A number of statements before the court detail the consequences of P's alcohol use, which include public urination, inappropriate and anti-social behaviour and consequential bans from a number of national institutions. P also has a number of medical issues. He suffers from back problems, suffered a minor cardiac event a number of years ago and has been diagnosed with prostrate cancer, with secondaries in his lungs and bones. He has a permanent urinary catheter in place. He has limited mobility and uses a stick or a wheelchair.

9. P inherited the majority of his assets. As a result of the divorce P was required to sell his family estate in England. Notwithstanding the financial consequences of his divorce, P retains a number of business interests and financial assets, which interests, and assets are relatively complex in nature and were summarised as follows in the statement and oral evidence of NP:

   i) A castle and estate in the Scottish Highlands valued at approximately £5.5M (with the possibility that a windfarm will be built on part of the estate);

   ii) A farmhouse in northern England valued at approximately £450,000;

   iii) A flat in London valued at approximately £650,000;

   iv) A building development company with assets including a commercial premises in London;

   v) Income from Lloyds of London, which income fluctuates;

   vi) A stocks and shares account with a portfolio valuation of approximately £1M;

   vii) A debenture at the Royal Albert Hall valued at £80,000, from which P receives income of £10,000 per annum in lieu of ticket allocation;

   viii) Business interests in Croatia which currently remain unspecified;

   ix) Chattels, including paintings, guns and classic cars of currently unspecified value.

10. The papers suggest that, following his divorce, P has been largely estranged from his family for a number of years, with contact between P and the applicant being sporadic in nature. Within this context, both the applicant and LH appear to agree that she met P in 2011. LH describes herself as a friend of P who has helped him in "various ways through all these years" and especially with his alcohol addiction. I pause to observe that when giving evidence, LH became most animated and passionate when describing her efforts with respect to the latter, citing in her statement her belief "in God Jesus Christ as saviour and helper" as a key factor in her success in this regard. She summarises her position as follows:

> "I have helped [P] through all these conditions and helped him constantly when no one else did. All I have done for [P] is care for him. It is not a job, it is dedicating your life for the benefit of others as I did not even have a day off when my father died at the end of October 2018. He is not always easy to be with but I care for him deeply".

11. The applicant, and the witnesses he relies on in support of his application take a different view of the role of LH in P's life. Within the context of the foregoing history, in 2011 a general power of attorney was granted to Mr NP. On 16 July 2014 P executed an LPA in favour of Mr RL and Mr NY as joint and several attorneys in the management of his property and financial affairs. Registration took place on 5 November 2014. On 12 September 2017 P executed an LPA in favour of LH as sole attorney in the management of his property and financial affairs. On the same date P executed an LPA appointing LH as sole attorney in the management of his health and welfare. Registration took place on 11 November and 12 November 2017 respectively. On 7 November 2017 the Office of the Public Guardian (OPG) received a deed of revocation dated 12 September 2017 indicating that P wished to revoke the LPA of 16 July 2014 made in favour of Mr RL and Mr NY. The 2014 LPA was duly revoked on 21 November 2017. In June 2018, P's sister raised concerns with the OPG regarding P's actions.

12. Within this context, the applicant contends in broad terms that, having regard to s 22(3)(b) of the 2005 Act, LH does not have the requisite qualifications, skills or other abilities to manage P's affairs in his best interests, that LH has not sought to exercise her power of attorney to manage P's affairs in his best interests, likely leading P's affairs to worsen by neglect, and that LH is motivated by self-interest in circumstances where she and her family have received some £200,000 from P. Further, both the witness statement of the applicant, and the witness statements in support of his application under the 2015 Act, imply a belief that, having regard to s 22(3)(a) of the 2005 Act, P has been unduly influenced by LH to execute LPAs in her favour. Finally, the applicant contends that P may not, in any event, have had the relevant capacity when he executed the LPAs in September 2017 in favour of LH and revoked the 2014 LPA in favour of Mr RL and Mr NY. Within the foregoing context, the applications detailed in Paragraph 1 of this judgment were issued by the applicant on 30 August 2018.

EXPERT EVIDENCE

13. As I have noted above, the court has had the benefit of receiving expert evidence from Dr Andrew Barker, Consultant in Old Age Psychiatry and Professor Narinder Kapur, Consultant Neuropsychologist. Whilst the reports of Dr Barker and Professor Kapur

range across all of the issues with which the court is seised pursuant to the applicant's applications, for the purposes of this judgment I shall concentrate on their respective opinions on P's present capacity to conduct litigation.

14. Before turning to those expert opinions, it is important to note the following entries in the medical records of P, as summarised by Dr Barker, regarding P's neurological state historically:

   i) On 11 June 2012 a discharge summary from a private mental health hospital noted that P's cognitive state was fair, although there was evidence of some short-term memory loss. He was diagnosed with alcohol dependence syndrome.

   ii) In early 2016 P was assessed by a consultant psychiatrist, Dr M. A letter from Dr M to P's general practitioner dated 29 April 2016 records as follows under 'Opinion':

   > "Although we had but a short session today, it was quite enough to established that there remained very significant cognitive problems, despite a very adequate period of sobriety. The marked deficits in short term memory, with preservation of long-term memory, and the exaggeration of pre-existing personality traits and a consistent degree of unawareness of his problem are consistent with a dementing illness, possibly alcohol related."

   An MRI scan and a full dementia work-up was recommended by Dr M, to be undertaken by a Dr E. On 20 June 2018, when corresponding with another doctor, Dr M stated that at the time of his assessment of P in April 2016 he would not have been able to agree that he had capacity, although I note that this opinion is not further particularised by reference to subject matter.

   iii) On 31 May 2016 Dr E informed Dr M that some of P's memory issues were significant but that P did not accept that his short-term memory was really quite a problem. Dr E agreed that an MRI scan was merited.

   iv) On 25 July 2016 a letter from Dr E detailed the results of the MRI scan, which showed mild cerebral atrophy with minimal small vessel disease but no other issues of abnormal features. From information elsewhere in P's medical records as summarised by Dr Barker, Dr E appears to have made a diagnosis of mild cognitive impairment mainly affecting P's short-term memory, with that degree of cognitive impairment consequent upon his excess alcohol intake over the years but with no evidence of an Alzheimer's type of dementing illness.

15. Within this context, it is also important to note that against these matters, Mr Glaser points to evidence that in December 2017 RL did not consider P had any mental capacity issues, that in February 2018 P was considered to have capacity to execute a general power of attorney (Mr Glaser accepting there are obvious differences between a GPA and an LPA) and that in 2018 Police officers in both Croatia and the United Kingdom considered that P had capacity.

16. In his first report dated 15 October 2018, Dr Barker characterises this as a difficult case. He identified evidence of impairment in P's executive function, most likely to result from his previous excessive alcohol intake and considered P's cognitive impairment to be relatively mild. In the circumstances, Dr Barker considered that a neuropsychological assessment would assist in clarifying the range and extent of P's cognitive difficulties, with an addendum report to be completed by Dr Barker once that neuropsychological opinion was available. Within this context, on the issue of capacity to conduct proceedings, Dr Barker provided a provisional conclusion that P's capacity in that regard would depend on the matter under litigation. Given his difficulties with executive function and having regard to the nature of the legal matters in issue, Dr Barker expressed concern regarding P's ability to understand, use and weigh relevant information. Dr Barker did consider that P *may* have capacity to revoke the current LPAs and execute another *if* he had full information and independent advice and a contemporaneous assessment of capacity.

17. Professor Kapur undertook a jointly instructed neuropsychological evaluation of P, the results of which are detailed in his report dated 11 February 2019. In particular, Professor Kapur identified two neurological deficits during the course of his testing. First, Professor Kapur identified what he considered to be clear evidence that P has significant executive function impairment which could impact on his capacity to deal with the proceedings. Second, Professor Kapur identified clear memory deficits in P which are likely to significantly compromise P's ability to comprehend complex material and retain information. On the basis of his assessment, Professor Kapur concludes that P shows evidence of significant neuropsychological impairment, stating as follows in this context:

> "The nature of this cognitive impairment would be informed by future investigations, such as further brain scanning and related studies, but it would seem likely that [P] suffers from a primary degenerative dementia, with greater left than right hemisphere involvement. This could be a frontotemporal dementia, or perhaps a dysexecutive variant of Alzheimer's Disease. His past history of alcohol abuse is probably an additional contributory factor to his cognitive impairment. In my opinion, his condition probably represents a dual pathology – neurodegeneration and alcohol related cognitive dysfunction – rather than being subsumed under a single diagnostic category, such as 'alcohol related dementia'. In my view, the history of ischaemic heart disease, the possibility of a cerebrovascular component needs to be borne in mind, though I note an MRI scan in 2016 is reported as showing minimal small vessel disease. In individuals with a history of alcohol abuse, the possibility of Wernicke-Korsakoff syndrome also needs to be considered, but the asymmetric nature of [P's] cognitive impairment and other features of his clinical history make this a less likely diagnosis. If it is true that [P] has significantly cut down his alcohol intake in recent years, and that his level of alcohol consumption in the weeks prior to my assessment was modest, then it is unlikely that there were acute effects of alcohol consumption on his performance during my test sessions. However, if recent alcohol intake has been significant, this complicates interpretation of his neuropsychological test performance."

18. Whilst not strictly an issue for him to express an opinion upon, Professor Kapur goes on his report to provide his considered view as to P's capacity, including his capacity to conduct proceedings. With respect to P's capacity to conduct proceedings, Professor Kapur concluded as follows:

> "In view of his major cognitive impairments, it is my opinion that [P] does not have capacity to conduct proceedings. [P] shows evidence of working memory deficits that could affect his comprehension of complex materials. He shows evidence of anterograde ('short-term') memory deficits which would affect his ability to retain information in complex proceedings. He shows evidence of executive dysfunction which would affect his ability to weigh up and reason about information in complex proceedings. For simple proceedings, and with advice and support, he does retain some capacity, but this would be limited to that context."

19. Having identified the need for an expert neuropsychological opinion, and within the context of having seen P and assessed him, after considering Professor Kapur's report Dr Barker reached a clear conclusion on the balance of probabilities as to P's capacity to conduct proceedings. In this regard, Dr Baker concludes as follows in his addendum report dated 26 March 2019:

> "In my opinion [P] lacks the necessary mental capacity to conduct these proceedings. He would be unable to retain and use / weigh relevant information for decisions that would be required during proceedings due to an impairment of mind."

Dr Barker expanded on this conclusion opinion during the course of his oral evidence when cross-examined by Mr Glaser. I deal with these matters further below when discussing my conclusions.

20. Finally, Dr Barker also noted that on 19 September 2018 P was evaluated by a psychiatrist in Croatia, a Dr Marcinko. That examination concluded that P "is fully capable of entering into contracts and he has full testamentary capacity. He has a sound disposing mind". However, when cross-examined, LH admitted that a decision had been taken not to provide Dr Marcinko with *any* of P's medical or neurological history, including the fact that P had had difficulties with alcohol and the observations made by Dr M and Dr E during the course of 2016 regarding cognitive issues.

LAW

21. Law applicable to the court's determination of the question of whether P lacks capacity to conduct proceedings is well settled. First, the following provisions of the Mental Capacity Act 2005 are relevant to my decision:

> **1 The principles**
> (1) The following principles apply for the purposes of this Act.
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(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,

(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.

22. Within this statutory context, a number of cardinal principles can be identified to which the court must have regard when deciding, on the balance of probabilities, whether a person lacks capacity in respect of the relevant decision or decisions, in this

case capacity to conduct this litigation, for the purposes of the 2005 Act (see *PH v A Local Authority* [2011] EWHC 1704 (COP) at [16]):

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

ii) Determination of capacity under Part I of the Mental Capacity Act 2005 is always 'decision specific' having regard to the clear structure provided by sections 1 to 3 of the Act (see *PC v City of York Council* [2014] 2 WLR 1 at [35]). Thus capacity is required to be assessed in relation to the specific decision at the time the decision needs to be made and not to a person's capacity to make decisions generally. The requirement is 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 (see *Masterman-Lister v Brutton & Co* [2003] 1 WLR 1511 at [27]). Where the question is one of capacity to conduct proceedings, the subject matter of the decision is the claim or cause of action which the claimant *in fact* has, rather than the claim as formulated by his or her lawyers (see *Dunhill v Burgin (Nos 1 and 2)* [2014] 1 WLR 933 at [18]).

iii) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success (Mental Capacity Act 2005 s 1(3)).

iv) A person is not to be treated as unable to make a decision merely because he or she makes a decision that is unwise (Mental Capacity Act 2005 s 1(4) and see *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP) at [7]).

v) The outcome of the decision made is not relevant to the question of whether the person taking the decision has capacity for the purposes of the Mental Capacity Act 2005 (see *R v Cooper* [2009] 1 WLR 1786 at [13] and *York City Council v C* [2014] 2 WLR 1 at [53] and [54]).

vi) A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain (the so called 'diagnostic test'). It does not matter whether the impairment or disturbance in the functioning of the mind or brain is permanent or temporary (Mental Capacity Act 2005 s 2(2)). The question for the court is not whether the person's ability to take the decision is *impaired* by the impairment of, or disturbance in the functioning of, the mind or brain but rather whether the person is rendered *unable* to make the decision by reason thereof (see *Re SB (A Patient: Capacity to Consent to Termination)* [2013] EWHC 1417 (COP) at [38]).

vii) A person is "unable to make a decision for himself" if he is unable (a) to understand the information relevant to decision, (b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision whether by talking, using sign language or any other means (the so called 'functional test'). In *PCT v P, AH and The Local Authority* [2009] COPLR Con Vol 956 at [35] Hedley J described the ability to use and weigh information as "the capacity actually to engage in the decision-making process itself and to be able to see the various parts of the argument and to relate one to another". An inability to undertake any one of these four aspects of the decision-making process will be sufficient for a finding of incapacity provided the inability is because of an impairment of, or a disturbance in the functioning of, the mind or brain (see *RT and LT v A Local Authority* [2010] EWHC 1920 (Fam) at [40]). The information relevant to the decision includes information about the reasonably foreseeable consequences of deciding one way or another (Mental Capacity Act 2005 s 3(4)(a)).

viii) For a person to be found to lack capacity there must be a causal connection between the 'functional test', being unable to make a decision by reason of one or more of the functional elements set out in s 3(1) of the Act, and the 'diagnostic test', 'impairment of, or a disturbance in the functioning of, the mind or brain' required by s 2(1) of the Act (see *York City Council v C* [2014] 2 WLR 1 at [58] and [59]).

ix) Whilst the evidence of psychiatrists is likely to be determinative of the issue of whether there is an impairment of the mind for the purposes of s 2(1), the decision as to capacity is a judgment for the court to make (see *Re SB* [2013] EWHC 1417 (COP)).

23. The court must bear in mind at all times that, at this stage of the proceedings, "the matter" for the purposes of s 2(1) of the 2005 Act is the conduct of this litigation. Within this context, Paragraph 4.33 of the Mental Capacity Act 2005 Code of Practice makes clear that the definition of capacity contained in the Act is in line with, and does not replace, the pre-existing common law tests for capacity. In the circumstances, in addition to the principles articulated by the 2005 Act it is important, second, to consider the authorities with respect to capacity to conduct litigation.

24. Leading authority on capacity to conduct litigation is *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162 (cited with approval by the Supreme Court in *Dunhill v Burgin (Nos 1 and 2)* [2014] 1 WLR 933). At [75] and [79], Chadwick LJ stated as follows with respect to the test for capacity to conduct litigation, explaining that the test:

> "...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)."

In *Masterman-Lister v Brutton & Co* Kennedy LJ noted at [26] the following mental abilities that will be required to have "the capacity to understand that which he needs to understand", namely:

> "... the ability to recognise a problem, obtain and receive, understand 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."

25. Finally, during the course of submissions there was some consideration of the impact of P's decision to cease providing instructions to his solicitors and to seek to conduct these proceedings as a litigant in person. In this regard, I note the following passage of the judgment of Boreham J in *White v Fell* (unreported) 12 November 1987, quoted by Kennedy LJ in *Mastermann-Lister v Brutton & Co* at [18]:

> "I have no doubt that the plaintiff is quite incapable of managing unaided a large sum of money such as the sort of sum that would be appropriate compensation for her injuries. Few people have the capacity to manage all their affairs unaided... It may be that she would have chosen, and would choose now, not to take advice, but that is not the question. The question is: is she capable of doing so? To have that capacity she requires first the insight and understanding of the fact that she has a problem in respect of which she needs advice... Secondly, having identified the problem, it will be necessary for her to seek an appropriate adviser and to instruct him with sufficient clarity to enable him to understand the problem and advise her appropriately... Finally, she needs sufficient mental capacity to understand and to make decisions based upon, or otherwise give effect to, such advice as she may receive."

Thus where a litigant in person does not, in their own right, have capacity to conduct proceedings, the question remains whether they have the capacity to instruct others to conduct those proceedings on their behalf. This is consistent with the principle that an individual who, by themself, lacks capacity on the subject matter in issue should be facilitated to make a capacitous decision on that subject matter by the taking of all practicable steps to help them to do so. Where a litigant in person lacks capacity to conduct proceedings absent advice and assistance and lacks capacity to instruct advisers, he or she will lack capacity to conduct proceedings. A question remains as to the position where a litigant in person lacks capacity to conduct proceedings in his or her own right but has capacity to instruct advisers to conduct those proceedings and *chooses* not to do so. However, for the reasons set out below, that is not the situation in this case and it is not therefore necessary for me to consider that point.

DISCUSSION

26. I must judge P's capacity to conduct proceedings at the present time and the presumption that he has such capacity can be rebutted *only* if there is sufficiently cogent evidence that he lacks capacity to do so. To answer the question in the negative it must be proved to my satisfaction that P is not 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. Having considered carefully

the lay and expert evidence before the court, the careful submissions made by Mr Dew and Mr Glaser and the limited comments made by P, I am satisfied that the evidence establishes on the balance of probabilities that P does not have capacity to conduct this litigation. My reasons for so deciding are as follows.

27. As noted above, capacity is required to be assessed in relation to the specific decision or decisions at the time the decision or decisions have to be made and not to a person's capacity to make decisions generally. The requirement is to consider the question of capacity in relation to the *particular* transaction, its nature and its complexity. Within this context and having regard to nature of the applications summarised in the Paragraph [1] of this judgment, I am not able to accept Mr Glaser's submission that the need to focus on the litigation under consideration rather than the whole of P's affairs (per *Masterman-Lister v Brutton & Co* at [18]) means that the subject matter comprising these proceedings can be characterised as and are straightforward.

28. First, the nature of the disputes that have resulted in these proceedings gives rise to complexity. For example, in considering the issue of the LPAs executed in favour of LH in September 2017, an evaluation of the extent to which LH may be behaving in a way that is not in P's best interests for the purposes of s 22(3)(b) will necessarily require an examination of the task she is required to undertake and, hence, an examination of the relatively complex financial affairs of P and her qualification to manage the same in P's best interests. Within this context, essential elements of the subject matter on which decisions by P will be required during the course of these proceedings are complex in nature.

29. In addition, the nature of the *dispute* is not the only component of the relevant subject matter required to be considered in the context of determining whether a litigant has capacity to conduct proceedings. More fundamentally, the nature of legal proceedings themselves, and in particular the specific demands they make on litigants, also fall to be considered. I accept Dr Barker's characterisation of legal proceedings as not being simply a question of providing instruction to a lawyer and then sitting back and observing the litigation, but rather a dynamic transactional process, both prior to and in court, with information to be recalled, instructions to be given, advice to be received and decisions to be taken, potentially on a number of occasions over the span of the proceedings as they develop. Once again, within this context, and as Kennedy LJ noted in *Masterman-Lister v Brutton & Co* at [26], in order to have capacity to conduct proceedings P must have:

> "... the ability to recognise a problem, obtain and receive, understand 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."

Once again, as Boreham J stated in *White v Fell* (unreported) 12 November 1987, quoted by Kennedy LJ in *Mastermann-Lister v Brutton & Co* at [18], the character of legal proceedings means that in respect of capacity to conduct proceedings:

> "To have that capacity she requires first the insight and understanding of the fact that she has a problem in respect of which she needs advice... Secondly, having identified the problem, it will be necessary for her to seek

an appropriate adviser and to instruct him with sufficient clarity to enable him to understand the problem and advise her appropriately... Finally, she needs sufficient mental capacity to understand and to make decisions based upon, or otherwise give effect to, such advice as she may receive."

30. Thus, by way of example in this context, the question of whether P had capacity to execute the LPAs in favour of LH in September 2017 will necessarily involve an understanding by P that the nature and extent of the issues that have the potential to affect the validity of those LPAs, the recollection by P of his state of mind at the time and of the actions he did or did not take, together with other relevant information from that period, the reception and consideration by P of advice from his lawyers consequent on the information recalled by P and sufficient retention and understanding by P of that advice to enable him take considered decisions based on the advice he has received.

31. Within this specific context, the evidence of Dr Barker and Professor Kapur is in my judgment of very considerable importance in evaluating the question of whether P has capacity to conduct these proceedings (see *PH v A Local Authority* [2011] EWHC 1704 (COP) at [16]).

32. Dealing first with the evidence of Professor Kapur, I have of course had regard to the fact that, on behalf of LH, Mr Glaser levelled a number of criticisms at Professor Kapur's report, which criticisms Mr Glaser submits mean that the court should not place reliance on that expert evidence. However, Professor Kapur in my judgment met each of these criticisms satisfactorily. In particular:

    i) Mr Glaser suggested to Professor Kapur that he had placed significant weight on the witness statements he had read and summarised in his report in circumstances where those statements were the subject of challenges that were yet to be determined. It is the case that Professor Kapur stated that he relied on the observations of behaviour detailed in witness statements, the information provided by P in the structured interview and the neuropsychological testing equally. However, Professor Kapur was also clear in his answer to questions put by the court that what underpinned his conclusion that P suffered from "major cognitive impairments" (which conclusion was in turn the keystone of his opinion that P lacked capacity to conduct proceedings) was the results of the neuropsychological testing and the memory and executive functioning impairments it revealed. In my judgment, on the narrow question of capacity to conduct proceedings, it is the current assessment of P's functioning provided by the neuropsychological testing and the structured interview that is the key information provided by Professor Kapur's expert opinion, rather than his views on the more historical information provided in the witness statements sent to the Professor.

    ii) Mr Glaser further put to Professor Kapur that in conducting the neuropsychological testing of P he had failed to take sufficient account of the impact on P of medical conditions (including his back pain) and his levels of fatigue. However, in response, Professor Kapur made clear that the tests he had deployed were selected for their validity and reliability and were deployed taking account of the time of day, the mood of the subject, levels of pain and levels of fatigue. Further, Professor Kapur made clear that if it appeared that

the test performance had been affected by such factors then that would be considered in his report. However, Professor Kapur was equally clear that there was no suggestion of such a global effect arising out of mood, pain, discomfort or fatigue in circumstances where P had done well on some tests and poorly on others. Professor Kapur further made clear that, having regard to P's indication that he was in pain, the test sessions were broken up with breaks and conducted over two days.

iii) Mr Glaser suggested to Professor Kapur that he had also failed properly to take account of the potential effect of the medications being taken by P when conducting the testing and evaluating the results of the same. However, once again, Professor Kapur made clear that it was possible to see in the test results that this was not an issue. Professor Kapur made clear that had P's medication had an effect it would have been seen in the speed of processing results, which results for P were normal or only mildly impaired. Further, if the medication affected memory Professor Kapur was clear that such an effect would have been seen "across the board". However, Professor Kapur noted that P performed badly in some memory tests but well in others. Within this context, Professor Kapur considered that the absence of a witnessed global effect ruled out medication having had an adverse impact on the results.

iv) Finally, Mr Glaser suggested to Professor Kapur that he had not taken a sufficient history from LH in circumstances where she was the person who spent most time with P and, in the circumstances, was the person best able to comment on his recent presentation and decision making. However, Professor Kapur made clear that the extent of the history he took from LH was in response to her assertion (consistent with the position set out in her witness statement to this court) that she did not consider that P had any major memory difficulties and that memory lapses were contributed to by pain, fatigue and mood. Within this context, Professor Kapur made clear in his oral evidence that in circumstances where LH contended there were limited issues in this regard, the length of history he took was necessarily dictated by those assertions of relative normality.

33. Within the foregoing context, I am satisfied that the report of Professor Kapur provided a sound foundation for Dr Barker to revisit his preliminary, cautious conclusions as to P's capacity to conduct proceedings.

34. As I have noted above, having considered the results of the neuropsychological assessment he himself requested, Dr Barker is clear that P lacks capacity to conduct these proceedings. I of course have had regard to the fact that Mr Glaser put to Dr Barker that in circumstances where Dr Barker continued to consider it *possible* that P has capacity to revoke and LPA and execute another if he had full information and independent advice and a contemporaneous assessment of capacity, it follows that P has capacity to conduct proceedings concerning the execution and revocation of LPAs, and pursued that submission in closing. Dr Barker however, considered that this reasoning was erroneous in circumstances where the subject matters being compared were different.

35. Within this context, Dr Barker made clear to the court that there is a difference for P between the task of deciding *now* whether to take single decisions, with the benefit of

advice and contemporaneous assessment as to capacity, and the task of engaging in litigation on the issues arising out of the applications before the court, which will require the recollection by P of relevant information from the periods in issue, the reception and consideration by P of advice from his lawyers consequent on the information recalled by P and sufficient retention and understanding by P of that advice to enable him decisions based on the advice he has received. I accept that evidence. Further, I note once again that Dr Baker was clear only that it is *possible* that P has capacity to revoke and LPA and execute another if he had full information and independent advice and a contemporaneous assessment of capacity.

36. Within the foregoing context, and in circumstances where, as Dr Barker noted and I have outlined above, legal proceedings are not a "one off" decision but rather a process of decision making that requires the ongoing ability to recall information in the context of an evolving situation and the ability to use and weigh that information in the context in which it is needed in the proceedings, I am satisfied that I must attach significant weight to Dr Barker's view that the defects identified in P's memory and executive function mean that he would *not* be able to retrieve relevant information and would not be able to use and weigh relevant information in that context. Dr Barker made clear to the court that these are features that are typical of disorders of short-term memory and executive function clearly identified in the neuropsychological testing by Professor Kapur, stating in cross examination that:

> "People with executive functioning deficits and deficits in their short-term memory may be okay, but they may have difficulty in electing the right bits of information and using them in the right context. There are glaringly obvious occasions when [P] has not been able to bring to mind information that it is important to know in the moment to make the relevant decision."

37. During the course of his cross-examination of Professor Kapur, Mr Glaser explored with that expert witness the steps that could be taken to assist P to overcome the neuropsychological difficulties identified with a view to helping him make capacitous decisions on the matters in issue. Professor Kapur was clear that whilst a limited number of compensatory strategies could be deployed to address the deficits in P's memory identified by the neuropsychological testing, in the case of the executive functioning difficulties identified, there was far less by way of compensatory strategies that could be deployed.

38. In the circumstances, and notwithstanding the careful efforts of Mr Glaser, I am satisfied that the expert evidence in this case provides a sound basis for the court to conclude that P is not able to understand, with the assistance of such proper explanation from legal advisors, the issues on which his consent or decision is likely to be necessary in the course of these proceedings, as the result of an inability to retain information, by his short-term memory issues, and an inability to use or weigh that information as part of the process of making the decision, by reason of deficits in his executive function. Further, I am satisfied that the expert evidence in this case provides a sound basis for concluding that that situation results from an impairment of, or a disturbance in the functioning of, P's brain. I am also satisfied that my conclusions in this regard are reinforced by other aspects of the information before the court beyond the expert evidence.

39. LH gave evidence and was cross-examined. It is not appropriate at this stage for me to make findings arising out of her evidence, but I do note a number of matters. Whilst LH appears to have sought to play down any suggestion that P has cognitive difficulties, and apparently took the decision not to reveal medical his history to Dr Markovic in September last year, it is clear from her statement that there are occasions when his mental clarity is diminished, LH contends by reason of paid, tiredness or medication, and that he has "good days and bad days". Further, and within this context, it was reasonable to expect that, in the days leading up to this hearing and as they travelled from Croatia, LH and P would have discussed this hearing and the proceedings more widely. LH conceded in evidence that they had done so. LH was clear in questions asked by the court that whilst P had understood some matters during the course of those discussions he had not understood others, LH being of the view that P had understood "some things but not everything".

40. During the course of the hearing P presented as agreeable and charming, at one stage enquiring after the short adjournment whether I "had had a good lunch" (in an ebullient tone that left me with the strong suspicion that P's idea of the judicial luncheon is a long way from the modern reality) and, as I have noted, at one point telling me that the best way I could make him more comfortable in the courtroom was "to be quick about" delivering my judgment. Beyond this, and whilst in no way determinative, my exchanges in court with P left me with doubts about his understanding of the proceedings. He made no real contribution on the question of an adjournment in light of the absence of certain witnesses. It is, of course, not reasonable to expect a litigant in person to articulate in detail the legal merits of an adjournment such as ensuring an Art 6 compliant hearing, or to deploy exhaustive arguments as to the lack of relevance of particular witnesses to the issue in hand in an effort to avoid one. I also consider that P's case appeared broadly co-terminus with that of LH and that Mr Glaser made extensive submissions. However, I was nonetheless left with the distinct impression that P's lack of contribution was borne out of a paucity of understanding. The same impression was given by his lack of engagement in the process of questioning witnesses who were stating things with which, on the face of it, he plainly disagreed, notwithstanding the offer of having those questions put through me. Again, whilst I take into account that Mr Glaser asked many questions that were also supportive of P's stated position and that the court environment can be an intimidating one, and whilst in no way determinative of my decision, this situation reinforced for me the observations of the experts that I have set out above and had the effect of adding colour to those expert opinions.

41. Finally, Mr Dew also sought during the course of the hearing to pray in aid other, historical matters set out in the witness evidence before the court to assist in demonstrating that, at this point in time, P lacks capacity to conduct proceedings. In the same manner, Mr Glaser sought to rely on certain seemingly rational and reasonable decisions made by P historically to demonstrate the opposite. However, as I noted at points during the hearing, and whilst material of this nature may in some cases serve to inform the court's decision as to capacity to conduct litigation, given the point at which these matters arise in the chronology, the fact that the question before the court is P's *current* capacity to conduct proceedings and the central importance of the recent expert medical assessments, I am satisfied that it is not necessary to deal with those submissions at this point. This is particularly so in circumstances where the conduct to which they refer may be relevant (or at least more

relevant) to the determination of the retrospective question of his capacity to validly execute LPAs in September 2017 (see *D v R (Deputy of S) v S* [2010] EWHC 2045 (COP) at [40]), which issue remains live before the court and is for another day.

CONCLUSION

42. P is a man who has exhibited, historically at least, strong opinions and a robust ego and whose decision making is said to date to have ranged across excessive drinking, seemingly prodigious levels of public urination, censure in the matrimonial courts for his profligacy and poor financial management, long bans from esteemed national institutions and the slow dilapidation of his inheritance. Having regard to the totality of the evidence before the court, and to the manner in which he presented himself before me, it is tempting to describe P as the archetypal eccentric, although to do so would be to overly romanticise alleged conduct that has, on the face of it, caused a great deal of worry, concern and hurt to others.

43. As I have noted, whilst, on behalf of P's son, Mr Dew prays in aid some of these matters to assist in demonstrating that, at this point in time, P lacks litigation capacity for the purpose of these current proceedings, and whilst Mr Glaser relies on certain seemingly rational and reasonable decisions made by P to move the scales in the opposite direction, once again those are submissions I am satisfied fall to be considered on another day. For the reasons I have given, I am satisfied that the magnetic evidence in this case regarding the question of whether P has litigation capacity at this point is the expert assessment undertaken in this case, considered in light of those other aspects of the evidence that illuminate P's understanding of these proceedings that I have set out above. The decision of the court at this point is confined to one of whether, as at this point, P lacks capacity to conduct proceedings. Having regard to that analysis, I am clear that P does lack that capacity.

44. This leaves the question of P's participation in these proceedings. P is a party to the application under the High Court's inherent jurisdiction with respect to vulnerable adults. However, in circumstances where I am satisfied that P lacks capacity, the appropriate jurisdiction for determining the substantive issues in this case is now exclusively that provided by the Mental Capacity Act 2005 (the High Court's inherent jurisdiction in relation to vulnerable adults being applicable only to adults who *have* capacity but may be incapacitated by external forces from reaching a decision and are vulnerable *per* the decision in *A Local Authority v DL, RL and ML* [2011] 1 FLR 957). As far as I can see, P has not yet been made a party to the proceedings under the 2005 Act in the Court of Protection.

45. Within this context, in the proceedings in the Court of Protection, and having determined that P lacks capacity the court is now required to consider the manner in which P should participate in those proceedings. That decision is governed by the following provisions:

    i) COPR r 9.13.(2) provides that the court may order a person to be joined as a party if the court considers that it is desirable to do so for the purpose of dealing with the application.

    ii) COPR r 9.13(4) provide that unless the court orders otherwise, P shall not be named as a respondent to any proceedings.

iii) Within the context of COPR r 9.13, COPR r 1.2(2) requires the court to *consider* whether to join P as a party, whether to appoint an accredited legal representative to represent P in the proceedings (this option is not currently available), whether to appoint a representative to provide the court with information on the matters in s 4(6) of the 2005 Act, whether to provide P with the opportunity to address the court directly or indirectly or whether to make no direction or another direction commensurate with meeting the overriding objective in COPR r 1.1.

iv) In determining which of the foregoing options for P's participation to adopt, COPR r 1.2(1) requires the court to consider the nature and extent of the information before the court, the issues raised in the case, whether the matter is contentious and whether P has been notified of the proceedings and what, if anything, P has said or done in response to such notification.

v) Within the foregoing context, COPR PD1A paragraphs 3 and 4 provide that, when applying the provisions of COPR r 1.2, whilst cases relating to non-contentious matters concerning property and affairs, where there is a need to preserve P's resources and that experience has shown can be dealt with on paper may not require P to be joined or represented, cases involving a range of issues relating to both property and affairs and personal welfare do or may call for a higher level of participation by or on behalf of P at one or more stages of the case.

vi) Where the option chosen is to join P as a party to the proceedings, pursuant to COPR r 1.2(4) P's joinder as a party only takes effect on the appointment of a litigation friend.

46. Having regard to the foregoing principles, in this case I accept that the court already has extensive documentary evidence and information to inform its decision on the matters in dispute before it. Further, the court already has the benefit of two expert opinions with respect to those issues. Against this however, the issues in dispute between the parties regarding P's property, affairs and welfare are complex in nature, in particular the question of the retrospective assessment of P's capacity to execute the LPAs created in September 2017 which arguably now forms the central issue in this case. Both Dr Barker and Professor Kapur identity the difficulties in this exercise, Professor Kapur observing that:

> "Any retrospective capacity assessment is problematical, and all the more so in this case where there is a history of heavy alcohol consumption and also the possible early stages of degenerative dementia".

47. Further, and within this context, this matter is plainly contentious. Having regard to the matters set out in the papers before the court, it amounts to a dispute between P's putative carer and his son as to the proper administration of his property, affairs and welfare in circumstances where both his putative carer and his son have potentially vested interests in the outcome. It is a very long way from a non-contentious matter capable of being dealt with on the papers. In order to resolve the matters of dispute concerning P's finances and personal affairs the court will be required to hear evidence from a number of witnesses, including the expert witnesses, and argument. Finally, in this case P has been notified of the proceedings and has made clear his

views in respect of the issues that fall to be determined by the court, namely that his choice with respect to the person he wishes to manage his property, affairs and welfare should be honoured in circumstances where he had capacity to make that decision at the time he made it. Within the context of the terms of COPR PD1A, this is plainly a case involving a range of issues relating to both property and affairs and personal welfare.

48. Within the foregoing procedural and factual context, I confess myself to be somewhat puzzled by the contents of the letter from the Official Solicitor dated 2 April 2019 declining Newton J's invitation to act as P's litigation friend. The letter states "On reviewing the papers, the Official Solicitor will decline the court's invitation to act as [P's] litigation friend as it is not clear what value he can bring to the proceedings (particularly at this late stage)". The letter further observes that, in the assessment of the Official Solicitor, "The issues are not legally complex".

49. Having regard to the matters set out above, the answer to the question of what value the Official Solicitor can bring to the proceedings as a litigation friend for P might perhaps be thought to be plain on the face of the papers. Namely, to identify and advance, independently and objectively by the fair and competent conduct of proceedings, the best interests of an elderly protected party who is caught up in a contentious dispute between his putative carer and his son as to the proper administration of his financial and personal affairs and, in circumstances where both his putative carer and his son have potentially vested interest in the outcome, where he has no one to identify, articulate and champion his best interests before the court (or to put it in the language of the role of Solicitor to the Suitors, the precursor to the Official Solicitor of the High Court of Chancery, has no 'natural protector'). The Official Solicitor's assessment of the issues as "not legally complex" is also somewhat difficult to understand in the circumstances that I have articulated during the course of this judgment and in the context of the inherent complexity of retrospective assessments of capacity.

50. In the context of these proceedings and having regard to the provisions of COPR r 1.2 and PD1A, I am satisfied that the appropriate manner of securing P's participation in these proceedings is to join him as a party to the same. Pursuant to COPR r 1.2(4) P's joinder as a party will only take effect on the appointment of a litigation friend. In circumstances where it would not appear that there is another suitable and willing person to act as a litigation friend, and where security for costs does not appear to be an issue in this case having regard to P's resources, I intend to repeat the invitation to the Official Solicitor originally made by Newton J on 6 March 2019 to act as litigation friend to P in this case. A copy of this judgment will be provided to the Official Solicitor together with a copy of my order. The proceedings under the inherent jurisdiction of the High Court will be stayed. I will invite counsel to draft an order accordingly.

51. That is my judgment.