



Neutral Citation Number: [2019] EWCOP 2

Case No: 13120139

IN THE COURT OF PROTECTION

The Combined Courts
Quayside
Newcastle Upon Tyne

Date: 21/02/2019

Before:

THE HONOURABLE MR JUSTICE COBB

Re: A (Capacity: Social Media and Internet Use: Best Interests)

Victoria Butler-Cole and Ben McCormack (instructed by **Legal Services**) for the Local Authority
Parishil Patel QC and Joe O'Brien (instructed by **Simpson Millar** for the Official Solicitor) for A
Neil Allen (instructed by **Kirklees Citizens' Advice and Law Centre** acting *pro bono*) for A's parents

Hearing dates: 21 January 2019

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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THE HONOURABLE MR JUSTICE COBB

This judgment is covered by the terms of an order made pursuant to Practice Direction 4C-Transparency. It may be published on condition that the anonymity of the incapacitated person and members of her family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

The Honourable Mr Justice Cobb:

Introduction

1. The rise and development of the internet and social media networks over recent years has fundamentally reshaped the way we engage with each other, and as a society. Incalculable numbers of digital electronic devices – mobile phones, tablets, and computers – are engaged every second of every day, from all reaches of the globe, for communication, entertainment, education, relaxation, and/or for gathering information. There is an ever-growing number of social media ‘apps’ available for instant messaging and networking; among those most prominently referred to in these proceedings are Facebook, WhatsApp, Snapchat, Facetime, Skype, Instagram, and Twitter, all of which are relatively easy and cheap (even free) to use.
2. The internet and associated social media networks are particularly important for people who have disabilities, and/or social communication problems. They enable ready access to information and recreation, and create communities for those who are otherwise restricted in leaving their homes. The internet and social media networks have generally served over the years to promote social inclusion, rather than exclusion; they offer disabled users opportunities and enhanced autonomy, they provide a means to express social identity, and they enable the learning of new skills, and the development of careers. The importance of creating and maintaining ready access for the disabled to electronic and digital technology is well-recognised, and needs no amplification in this judgment; it is indeed identified as a *right* within the *United Nations Convention on the Rights of Persons with Disability* (‘UNCRPD’).
3. *Article 9* of the *UNCRPD* requires states to take appropriate measures to enable those with disabilities to “live independently and participate fully in all aspects of life...[including] access, on an equal basis with others, ... to information and communications, including information and communications technologies and systems”. There is a requirement on states to eliminate barriers to accessibility for the disabled to “information, communications and other services, including electronic services and emergency services”; *Article 21* (ibid.) provides a complementary provision, for persons with disabilities, to “exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice” by “encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities”. *Article 22* (ibid.) enshrines the right to privacy for the disabled. While the *UNCRPD* remains currently an undomesticated international instrument, and therefore of no *direct* effect (see Lord Bingham in *A v Secretary of State for the Home Department* [2005] UKHL 71; [2006] 2 AC 221 at [27]), it nonetheless provides a useful framework to address the rights of persons with disabilities. By ratifying the *UNCRPD* (as the UK has done) this jurisdiction has undertaken that, wherever possible, its laws will conform to the norms and values which the *UNCRPD* enshrines: *AH v West London MHT* [2011] UKUT 74 (AAC); [16] (See *R(Davey) v Oxfordshire CC & others* [2017] EWCA Civ 1308 at [62], and *Mathieson v SS for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250 at [32]). I am satisfied that I should interpret and apply the domestic

mental capacity legislation in a way which is consistent with the obligations undertaken by the UK under the *UNCRPD*.

4. Advances in cyber and digital technology continue to outrun society's ability to monitor or control it, and, to an extent, the law's ability to keep pace with its development. The internet is, or can be, a dangerous place; it has a dark side, where dehumanising and illegal material (including images, pseudo-images, videos, live-streaming and text) is all too readily accessible. Internet abuse is common-place and is known to take many forms: bullying, harassment, child sexual abuse, sexual grooming, trafficking, trolling and the theft of personal identity among them. These activities thrive when they are left unchecked. Ironically, dating 'apps' and social media sites may feel safe to some because they pose no immediate threat of violence; however, it is well-recognised that the more insidious threats posed by sexual predators, and those who prey on the wider vulnerabilities of the young, the learning disabled, the needy and the incautious, are no less harmful (indeed they are potentially *more* harmful) at least in part because of their pervasive nature.
5. In considering online 'risk' and its relevance for those who may lack capacity, I was referred (per the submissions of the Official Solicitor) to the descriptions of online risk set out in the UK Council for Child Internet Safety's Guidance 'Child Safety Online: A Practical Guide for Providers of Social Media and Interactive Services'. This guide divides the risk into three areas:
 - i) *Content risk*: children receiving mass-distributed content. This may expose them to age-inappropriate material such as pornography, extreme violence, or content involving hate speech and radicalisation.
 - ii) *Conduct risk*: children participating in an interactive situation. This includes bullying, sexting, harassing, being aggressive or stalking; or promoting harmful behaviour such as self-harm, suicide, pro-anorexia, bulimia, illegal drug use or imitating dangerous behaviour. A child's own conduct online can also make them vulnerable - for example, by over-sharing their personal information or by harassing or bullying themselves;
 - iii) *Contact risk*: children being victims of interactive situations. This includes being bullied, harassed or stalked; meeting strangers; threats to privacy, identity and reputation (for example, through embarrassing photos shared without permission, a house location being identified, someone impersonating a user, users sharing information with strangers); and violence, threats and abuse directly aimed at individual users and/or groups of users.
6. The risks to children identified in paragraph [5] above are just as relevant to other vulnerable classes of internet users, including – significantly for present purposes – those with learning disabilities. Online abuse of disabled people has become, and is, an issue of considerable and increasing national and international concern, and justified debate; 'mate crime' — where internet users are befriended online with the intention exploiting them financially, physically or sexually — is a particular issue for adults with learning disabilities, as it is for children and other susceptible classes of internet user. Social media and online dating sites have increased the exposure of vulnerable disabled people to those who might exploit them. The learning disabled and other vulnerable users may readily find themselves the victims of such

behaviours, which cause potentially lasting damage to their health. Those with learning disabilities may find themselves unwittingly initiating social media or internet activity which turns out to be harmful or hurtful to themselves or others; this activity is far less likely to be calculated than impulsive – indeed, many may be unaware of the consequences of their actions, confused, naïve, but perhaps surprisingly digitally savvy.

7. There is acknowledged public uncertainty of the law surrounding online abuse; although criminal offences do cover illegal online activity, it is acknowledged (see the Law Commission Scoping Report: 1 November 2018) that the legislation as a whole requires clarifying, consolidating and/or rationalising in order to be more effective. It is notable in this regard that while it is a crime to incite hatred because of religion or race, it is not presently a crime to incite hatred because of disability. Those who press for a change in the legislation in this regard have a compelling case.
8. This sets a general context in which I consider the case of A below, and in *Re B (Capacity: Social Media: Care and Contact)* [2019] EWCOP 3 (*‘Re B’*), the case of Miss B.

The issues

9. In this hearing I have been invited to make final capacity declarations under *section 15 Mental Capacity Act 2005* (*‘MCA 2005’*), and best interests decisions, in relation to a young man who I shall refer to as A. Specifically, I am required to consider A’s residence, contact (with family and others), his care arrangements, his property and financial affairs, his capacity to consent to sexual relations, and his internet and social media use.
10. I heard brief evidence from Dr. David Milnes, Consultant in the Psychiatry of Learning Disabilities. A attended the hearing, supported by his worker, and I was pleased to see meet him. I have read the extensive filed written reports and statements.
11. I have received helpful oral and written submissions from counsel, Miss Butler-Cole and Mr McCormack for the local authority, Mr. Patel QC and Mr. O’Brien for A, and Mr. Allen for A’s parents. I have had the advantage of additional submissions on the social media issues from Mr. Garlick, and Mr Karim QC and Miss Gardner in the case of *Re B* which I heard one week later. I also had the benefit of reading a useful paper on social media from Ms Sophie Hurst, a barrister, which was prepared for use in the case of *Re B*, but was shared with the advocates in this case. Of the advocates in these proceedings, I would like to single out Mr. Allen for special thanks, having acted for A’s parents (who did not qualify for public funding, but were unable to afford representation) *pro bono*.
12. By the conclusion of the hearing concerning A, there was no material dispute about the outcome, and the advocates had reached a consensus as to the court’s proper approach to the issues. Shortly after the hearing, I approved an agreed order.
13. This judgment is principally dedicated to the issue of social media and internet use, explaining my reasons for approving the order in this regard, and specifically

addressing the question of what the information relevant to the issue of social media or internet use should be in order to assess P's capacity under *section 3 MCA 2005*.

14. This judgment is being handed down simultaneously with the decision in *Re B (Capacity: Social Media: Care and Contact)*.

Background circumstances

15. The case concerns a young man, A. He is 21 years old; he identifies as a gay male. He has a learning disability, with an impairment in adaptive social functioning, and executive functioning; if he were not provided with support, he would not be able to manage his personal and domestic care needs. He has lived in independent supported living for most of the last two years, and receives extensive personal social care support from the well-known national organisation, Dimensions. He receives training from a college, and has several part-time work placements.
16. Court of Protection proceedings were launched in respect of him at the instigation of the relevant local authority in August 2017 at a time when concerns had emerged about his capacity to make decisions about his residence, his care, contact with others (including at that time his parents from whom he had for a period been estranged), and his internet use. There were also issues around his deprivation of liberty. During these protracted proceedings, interim orders have been made in a number of respects, including orders restricting his use of the internet and social media to that which is supervised by his care and support staff.
17. Concerns about A's internet use first arose in early 2016 when he was living at home. His parents discovered that A had used his Facebook account to share, with unknown males, intimate photographs and videos of his genitals. His social worker expressed the view at that time that A's "compulsion to communicate with others online seems to override any concern he may have for his own safety". A has a very low literacy level, and struggles with even 3 or 4 letter words (in a recent 1:1 assessment with Dr. Milnes, he could not read or pronounce the word 'gets' for instance), and used the photographs and videos, accompanied by short, simple but indisputably provocative words, to communicate with other men. A's low level of literacy and poor written communication skill severely impair his ability to navigate the internet safely; it appears that generally, and disturbingly, his internet journey to extreme pornographic sites has been achieved by clicking on a series of suggested links. Dr. Milnes told me:

"It is a chance affair to surf the internet. [A] does not have sufficient understanding as to where it is going. He will click at random. A number [of sites] will have visual material which will enable him to have better understanding."

When unsupervised A is known to search compulsively for pornography and he has, worryingly, developed a considerable interest in sites showing paedophiliac and extreme, even illegal, sexual activity; he cannot read nor understand the warnings regarding content and safety.

18. A was provided with an education package to assist him in understanding safety in intimate relationships; he was referred to MESMAC¹ (a free and confidential service to men who are gay or bisexual, men who have sex with other men and men who are questioning their sexuality). He had sessions of work with a Specialist Sexual Exploitation Worker from the Children's Society. He has attended a special school where students are regularly taught about internet and social media safety. His Dimensions workers are constantly re-inforcing these messages.
19. Some years ago, A confided in his adult support worker that he had been raped twice by an identified male adult. In the course of the joint police and social work investigation it transpired that A had been extensively accessing extreme pornography online some of which was illegal; he had made contact with a large number of men locally, nationally and internationally, some of who were known by the police to be sexual predators and sex offenders and known within their investigations under Operation Sanctuary (a complex investigation in Northumbria launched in 2015 into modern day slavery, trafficking and sexual exploitation). The investigating officer was concerned that if A's behaviour continued as it was, there was a risk that he would not just be a victim but could become a perpetrator of offences concerning internet imagery "due to his lack of understanding around the subject".
20. When these proceedings were issued, it was known that A was continuing to find ways of associating with perpetrators of sexual exploitation online. On one occasion, in May 2017, after his own device had been temporarily withdrawn, A obtained a staff member's mobile telephone, and in a relatively short period of time, accessed over 150 pornography sites which were extreme in nature. In April 2018, A sent a number of unsolicited text messages to the male who had been identified as the alleged perpetrator of the rape upon him (see [19] above). He told Dr. Milnes that he did not know why he had done this, and could not identify any possible problems with doing so. In evaluating this particular conduct, the social worker helpfully drew attention, given the *MCA 2005* test, to the uncertainty about whether A's behaviour revealed a deficit in one of the areas of his functioning, or whether he was merely impulsive, risk-taking, and/or 'unwise':

"Whilst it is clear that [A] has persistently placed himself in vulnerable situations, it is less clear whether he genuinely lacks understanding of the risks, or whether they are risks he decides to take for the gratification he gets. [The principal Clinical Psychologist and Community Nurse] felt it was likely that [A] does not understand the risks to himself or others of accessing inappropriate online material."
21. The view of the principal Clinical Psychologist and Community Nurse ([20] above) prevailed and was confirmed by Dr. Milnes who expressed the view (which on the evidence I accept) that A does not understand the risks and benefits which contact with others presents to him: "his learning disability does result in a lack of understanding which impairs his ability to weigh the costs and benefits of contact" (per Dr. Milnes), although there is a compulsive element to his behaviours.

¹ 'Men who have sex with Men, Action in the Community'

22. The risks to A are obvious – in all three of the categories described at [5] above: ‘content risk’, ‘conduct risk’ and ‘contact risk’. Specifically, A is at risk of sexual exploitation because of what he chooses to post online, and who he speaks to online; he has developed a compulsion to view extreme pornography online, without ability to assess what is or may be illegal; he has no understanding of age, and specifically when a person is a child; he is at risk of entering into intimate relationships online or in reality with minors. Dr. Milnes adds:

“[A]’s ability to weigh the pros and cons of posting explicit images of himself upon social media and accessing illegal material is severely undermined by his learning disability and poor understanding of the broader consequences of such acts upon both himself and others. It is clear that [A] will impulsively seek out pornographic material and this impulsivity is secondary to his learning disability and lack of understanding of the consequences. His lack of understanding and impulsivity impairs his ability to weigh the risks.” (Dr. Milnes).

Statutory framework

23. There is a statutory assumption that A has “capacity unless it is established that he lacks capacity” (*section 1(2) MCA 2005*). I have concentrated on *section 2* and *section 3* of the *MCA 2005* – and specifically, on whether, in relation to the matters under debate, he is unable, “at the material time” (i.e. at this hearing), to make a decision for himself “because of an impairment of, or a disturbance in the functioning of, the mind or brain” (*section 2 MCA 2005*). I need to be satisfied that “practicable steps” have been taken to help A to make the relevant decisions (*section 1(3) MCA 2005*); this is one of the three key parameters of the *MCA 2005*. As the Mental Capacity Code of Practice stresses: “it is important not to assess someone’s understanding before they have been given relevant information about a decision” (para 4.16) and that “it is important to assess people when they are in the best state to make the decision, if possible.” (para 4.46).
24. The evidence has largely been directed to the familiar ‘functionality’ test contained in *section 3*; this requires me to consider whether A can (a) understand the information relevant to each decision, (b) retain that information, (c) use or weigh that information as part of the process of making the decision or (d) communicate his decision (whether by talking, using sign language or any other means). If it is shown on the balance of probabilities that he is unable in any of these respects, then he is regarded as “unable to make a decision for himself”. As is commonly the case, I have been most concerned with the issues of ‘understanding’ ((a) above) and ‘using and weighing’ ((c) above). As foreshadowed in [20], I have had to consider whether A’s conduct reflects an inability to make a decision or whether it is ‘unwise’ decision-making (*section 1(4)*).

Decisions around access to the internet and social media use

25. The first question on which I am asked to rule is whether, in undertaking a capacity assessment, internet and social media use should form a sub-set of a person’s ability to make a decision about either ‘contact’ or ‘care’. Having heard argument in this

case, and in *Re B*, I have reached the clear view that the issue of whether someone has capacity to engage in social media for the purposes of online ‘contact’ is distinct (and should be treated as such) from general consideration of other forms of direct or indirect contact. I am satisfied that wider internet use is different from general issues surrounding care. There is a risk that if social media use and/or internet use were to be swept up in the context of care or contact, it would lead to the inappropriate removal or reduction of personal autonomy in an area which I recognise is extremely important to those with disabilities. As the Court of Appeal made clear in *PC v NC and City of York Council* [2013] EWCA Civ 478 at [35], the court should consider the issues reasonably specifically:

“The determination of capacity under *MCA 2005, Part 1* is decision specific.... all decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of *MCA 2005, ss 1 to 3* which requires the court to have regard to ‘a matter’ requiring ‘a decision’. There is neither need nor justification for the plain words of the statute to be embellished.”

26. It seems to me that there are particular and unique characteristics of social media networking and internet use which distinguish it from other forms of contact and care; as I described above (see [4]), in the online environment there is significant scope for harassment, bullying, exposure to harmful content, sexual grooming, exploitation (in its many forms), encouragement of self-harm, access to dangerous individuals and/or information – all of which may not be so readily apparent if contact was in person. The use of the internet and the use of social media are inextricably linked; the internet is the communication platform on which social media operates. For present purposes, it does not make sense in my judgment to treat them as different things. It would, in my judgment, be impractical and unnecessary to assess capacity separately in relation to using the internet for social communications as to using it for entertainment, education, relaxation, and/or for gathering information.
27. The next question which arises is what is the ‘relevant information’ under *section 3(1)(a) MCA 2005* on which the issue should be assessed? Although counsel in this case prepared an ‘agreed’ formula, I have had the benefit of wider argument on the issue in the two cases. Critical to my assessment of capacity in this regard, and the issue on which focus has been brought in this hearing, is what should be the “information relevant to the decision” which P needs to understand for the purposes of determining capacity to make a decision to use social media for the purposes of developing or maintaining connections with others (within the functionality / ability test). I have been careful not to overload the test with peripheral detail, but to limit it to the “salient” factors (per *LBL v RYJ* [2010] EWHC 2664 (Fam) at [24], and *CC v KK & STCC* [2012] EWCOP 2136 at [69]). In applying that discipline, I am conscious that a determination that a person lacks capacity to access and use the internet imposes a significant restriction upon his or her freedom.
28. It is my judgment, having considered the submissions and proposals of the parties in this case and in *Re B*, that the ‘relevant information’ which P needs to be able to understand, retain, and use and weigh, is as follows:

- i) Information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know, without you knowing or being able to stop it;
- ii) It is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location settings' on some internet and social media sites; [see paragraph below];
- iii) If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended; [see paragraph below];
- iv) Some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly;
- v) Some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm;
- vi) If you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime; [see paragraph below].

29. With regard to the test above, I would like to add the following points to assist in its interpretation and application:

- i) In relation to (ii) in [28] above, I do not envisage that the precise details or mechanisms of the privacy settings need to be understood but P should be capable of understanding that they exist, and be able to decide (with support) whether to apply them;
- ii) In relation to (iii) and (vi) in [28] above, I use the term 'share' in this context as it is used in the 2018 Government Guidance: 'Indecent Images of Children: Guidance for Young people': that is to say, "sending on an email, offering on a file sharing platform, uploading to a site that other people have access to, and possessing with a view to distribute";
- iii) In relation to (iii) and (vi) in [28] above, I have chosen the words 'rude or offensive' – as these words may be easily understood by those with learning disabilities as including not only the insulting and abusive, but also the sexually explicit, indecent or pornographic;
- iv) In relation to (vi) in [28] above, this is not intended to represent a statement of the criminal law, but is designed to reflect the importance, which a capacitous person would understand, of not searching for such material, as it may have criminal content, and/or steering away from such material if accidentally encountered, rather than investigating further and/or disseminating such material. Counsel in this case cited from the Government Guidance on

‘Indecent Images of Children’ (see (ii) above). Whilst the Guidance does not refer to ‘looking at’ illegal images as such, a person should know that entering into this territory is extremely risky and may easily lead a person into a form of offending. This piece of information (in [28](vi)) is obviously more directly relevant to general internet use rather than communications by social media, but it is relevant to social media use as well.

30. I should add that I heard argument on the issue of whether to include in the list of relevant information that internet use may have a psychologically harmful impact on the user. It is widely known that internet-use can be addictive; accessing legal but extreme pornography, radicalisation or sites displaying inter-personal violence, for instance, could cause the viewer to develop distorted views of healthy human relationships, and can be compulsive. Such sites could cause the viewer distress. I take the view that many capacitous internet users do not specifically consider this risk, or if they do, they are indifferent to this risk. I do not therefore regard it as appropriate to include this in the list of information relevant to the decision on a test of capacity under *section 3 MCA 2005*.

A’s capacity to use social media & best interests

31. As is apparent from this judgment, I received helpful evidence from Dr. Milnes. He was of the view that A had only a partial understanding that information and images (including videos) which he shared on the internet or through social media could be shared more widely, including with people he didn’t know. He had a “limited” understanding of privacy settings; he had only a partial understanding that people may be upset or offended by information shared online but was not able to ‘use or weigh’ that information. He had a “poor” understanding of the risks which people might pose on line, and could not understand that people may disguise their identity to take advantage of him (“this was lacking, it *really* was”: “I asked [A] if he thought that a person who was nice on Facebook might not be a good person, after some thought he said ‘yes’. I asked him why a bad person might appear to be nice on Facebook and he said “I don’t know”). In his oral evidence, Dr. Milnes underlined that “[A] is very, very, trusting. He is therefore easy to manipulate on the internet... He has no understanding of ulterior motives”. While A understood that if he looked at or shared extremely rude or offensive images, messages or videos on line he may get into trouble with the police, he felt he was blameless as he was accessing this without meaning to do so; he was not able to ‘use or weigh’ the information that he may in fact be committing an offence in relation to this.
32. I am satisfied that the capacity assessment of A has been undertaken in an appropriate way by an experienced practitioner. It reveals clearly A’s difficulty with flexible adaptive reasoning – that is, while in some respects he can repeat back what he has been told, he is unable to apply it to actual situations. I am equally satisfied that over recent months and years a number of practicable steps (*section 1(3)*) have been taken (and are still being taken) to help A to understand the issues, without success. The brief summary of the relevant and powerful evidence in [31] above are sufficient to reveal the deficits in A’s ability to understand, and/or use or weigh the relevant evidence. This is not just ‘unwise’ behaviour. In the circumstances, I have reached the conclusion (*section 15 MCA 2005*) that he lacks capacity to use the internet or social media.

33. In considering A's best interests, I have had regard to the local authority's draft 'internet access and safety' care plan. This provides for A to use one of the iPads owned by Dimensions for a limited period each day, under a degree of supervision; his phone contract is financially capped, and his mobile device does not have the capability to access the internet. He has agreed that staff may check his mobile phone for messages on a daily basis to support him to deal with unwanted text messages, and to ensure that he is not engaging in inappropriate communications with others; the staff know that he is dextrous and canny in deleting his call and message history. The staff working with A are attuned to ensure a high degree of vigilance around their own digital devices. A is aware of this and has, I believe, accepted it. This plan corresponds entirely with his best interests and I am happy to approve it.

A's capacity & best interests on other matters

34. There is no issue between the parties in this case that A retains capacity to decide on his residence (provided that the care package is the same in any available location) and in relation to consent to sexual relations, but lacks capacity to litigate, in relation to his care and support package and contact, and in the management of his property and finance. The detailed and comprehensive report of Dr. Milnes covers the relevant ground with meticulous care, describing in each area where A has received, or is receiving, practicable help to enable him to make the relevant decisions. No party requires me to set out the evidence or my conclusions in these respects in any greater detail. The local authority's care plans set out with commendable clarity the arrangements for his contact with his parents and others.
35. That is my judgment.