Neutral Citation Number: EWHC [2015] 1060 (QB)

Case No: QB/2015/0094

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/04/2015

Before :

MR JUSTICE NICOL

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Between :

Evesham and Pershore Housing Association Ltd	**Claimant and Respondent**
- and -	
Timothy Werrett	**Defendant and Appellant**

- -
- -

Jim Shepherd (instructed by **Gloucester Law Centre**) for the **Appellant/Defendant**
Dean Underwood (instructed by **Shakespeares LLP**) for the **Respondent/Claimant**

Hearing dates: 31st March 2015

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Approved Judgment

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

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Mr Justice Nicol

Mr Justice Nicol:

1. This is a rolled-up hearing of an application by the Defendant for permission to appeal with the appeal to follow if permission is granted from a decision of HHJ Harington given on 25th July 2014 in Gloucester County Court.

2. The Defendant is the tenant of the Respondent Housing Association. In the underlying proceedings, the Respondent has sought possession of the flat which they have rented to him and also an injunction against him to restrain what is said to be his anti-social behaviour and harassment of one of their other tenants. The Claim Form was issued on 4th November 2013. The injunction was granted *ex parte* the same day. On 2nd January 2014, by consent the Court granted a final injunction. The Defendant also agreed to a possession order being made but suspended on certain terms. He was alleged to have breached the injunction and the terms of the suspension. He admitted some of the breaches and DJ Singleton found one (but not another) proved. Sentence for breach of the injunction was adjourned. A warrant for possession was issued but the Defendant applied for this to be suspended.

3. Throughout these proceedings, the Defendant was represented by solicitors and counsel. At some point in March, they raised the issue as to whether the Defendant had mental capacity to litigate on his own behalf or whether he was to be regarded as a 'protected party' for the purposes of the Mental Capacity Act 2005 ('the 2005 Act') and Part 21 of the Civil Procedure Rules ('CPR'). Dr Bickerton, is a consultant psychiatrist. He provided a report dated 28th March 2014. He described how the Defendant had been involved in a serious road traffic accident in 1999 at the age of 18 in which he had suffered injuries to his brain. A few days later he was injured in another road accident which required further hospitalisation. In Dr Bickerton's opinion the Defendant continued to suffer significant cognitive deficits as a result of his brain injuries. These would affect his ability to adhere to the injunction and impact adversely on his ability to take part in court proceedings. He understood the allegations made against him and had the ability to decide whether to plead guilty to them, but he 'may/will be unable to defend the proceedings, give evidence and cope with cross examination... his fitness is impaired and he is not fit to plead'. In a form, which appears to have originated from the Official Solicitor, Dr Bickerton certified that the Defendant was 'unable to understand relevant information', and 'was unable to retain that information' and/or was 'unable to use or weigh certain information as part of the process of making the decisions in the conduct of the proceedings'. As I shall explain, each of these is a reference to the alternatives set out in the 2005 Act, at least one of which must be established before a person is considered to lack capacity.

4. In his certificate Dr Bickerton also certified that the Defendant's condition was unlikely to improve so that he would regain capacity. It was part of the long term consequences of the injuries which he had received in 1999.

5. On 8th May 2014 the Official Solicitor wrote to the Defendant's solicitor, gave his opinion that the medical evidence clearly established the Defendant's lack of litigation capacity and agreed to act as the Defendant's litigation friend.

6. A hearing took place before HHJ Harington on 19th May 2014. There does not appear to have been a formal application notice, but the preamble to the order recorded that the purpose of the hearing was to consider 'whether the Defendant is or has been at

any material time a protected party within the meaning of Part 21 of the CPR.' The preamble continues, 'And upon determining that the Defendant has and, at all material times, has had capacity to conduct these proceedings'. It is rather curious that such a determination should be included in the preamble, rather than as a substantive order, but neither party suggested that anything of significance turned on the form of the Court's order. Its meaning was clear. Further procedural directions were then given.

7. For some considerable time the Defendant had been treated by a consultant clinical psychologist, Dr[1] Andrew Champion, specialising in neuropsychology. On 27th June he too completed a certificate which was also on the form prepared by the Official Solicitor. He, too, signified that, in his opinion the Defendant was unable to understand relevant information, was unable to retain that information and was unable to use or weigh certain information as part of the process of making decisions in the conduct of the proceedings. In addition, Dr Champion also thought that the Defendant was unable to communicate his decisions. The Official Solicitor repeated his willingness to act as the Defendant's litigation friend and said that it was his view that Dr Champion's certificate confirmed that the Defendant was a protected party. On 4th July 2014 the Defendant's solicitors issued an application for an order that the Official Solicitor be appointed as the Defendant's litigation friend, a variation of the order of 19th May 2014 to reflect the fact that the Defendant lacks capacity, or, alternatively a variation of the Judge's order on that date to remove the words 'and at all material times has had.'

8. I have a transcript of the Judge's decision on 25th July 2014. In summary, he ruled:

   i) The order which he had made on 19th May 2014 was a final order. It could not be varied under CPR r.3.1(7), but in any case there had been no material change of circumstances since that date (this was not a case where the Defendant's condition had deteriorated between the time that he was seen by Dr Bickerton and Dr Champion's certificate), nor had the facts been misstated on 19th May. All that had happened was that a further expert had produced a report which was only slightly different. He dismissed the application on these grounds alone.

   ii) But in any case he was not persuaded, even if Dr Champion's certificate had been available at the May hearing, that the outcome would have been different. In brief he concluded that, while Dr Champion was saying that the Defendant would have certain difficulties, they were not such as, in the Judge's view, any of the alternative forms of incapacity was established.

9. On the Defendant's behalf, Mr Shepherd argues as follows:

   i) The Judge was wrong to conclude that he had no power to re-examine his previous decision of 19th May as to the Defendant's capacity to litigate. His decision on that occasion had not been a 'final order', and there was the further evidence from Dr Champion which required that decision to be re-considered.

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[1] This is Dr Champion's title, but Mr Shepherd was not able to help me as to whether it is a medical qualification or in consequence of being awarded a Ph.D or similar degree.

ii) The Judge had erred by allowing the Claimant to contest the issue of Defendant's capacity in the way that the Claimant had done. An adversarial approach was inappropriate on such a matter.

iii) If the Judge had any doubts about the sufficiency of the evidence which was led by the Defendant, he should have adjourned the hearing in order to allow Dr Champion (and/or Dr Bickerton) to be called to give oral evidence.

iv) The Judge was wrong to conclude that the Defendant had capacity to litigate.

Mental Capacity Act 2005

10. By CPR 21.2(1) a 'protected party' must have a litigation friend to conduct proceedings on his behalf and by r.21.10(1) no settlement or compromise by or against a protected party shall be valid unless it has been approved by the court. The term a 'protected party' includes a person who lacks capacity to conduct the proceedings – r.21(2)(d) and the expression 'lacks capacity' has the same meaning as in the 2005 Act - *ibid* r.21(2)(c).

11. Section 2 of the 2005 Act defines people who lack capacity. It says:

> '(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 disturbance in the functioning of, the mind or brain.
>
> (2) It does not matter whether the impairment or disturbance is permanent or temporary.
>
> ...
>
> (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...'

12. Section 3 elaborates on what is meant by the inability of a person to make decisions for himself. It says:

> '(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 the information,
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> (c) to use or weigh that information as part of the process of making the decision, or
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> (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 sign 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.'

13. Section 1 of the 2005 Act sets out certain principles which are to apply for the purposes of the Act. They include the following:

'(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.'

Did the Judge have power to re-consider his decision of 19th May that the Defendant was not a protected party?

14. Rule 3.1(7) of the CPR provides that:

'A power of the court under these Rules to make an order includes a power to vary or revoke the order'.

Mr Shepherd argues that this gave the Judge sufficient power to vary or revoke his earlier ruling.

15. Mr Underwood on the Claimant's behalf submits, first, that the Judge was right to treat his decision of 19th May as a final order since it finally determined as between the Claimant and Defendant whether the Defendant was and had always been a person with sufficient capacity to conduct this litigation. As such, the Judge was right that he ought not to revisit it. Mr Underwood refers me to *Roult v North West Strategic Health Authority* [2010] 1 WLR 487 (CA) at [15] and *Kojima v HSBC Bank plc* [2011] 3 All ER 359 (Ch) at [33] – [34] for the proposition that, if there is jurisdiction under r.3.1(7) to vary or revoke a final order, it should only be exercised in exceptional circumstances. Mr Underwood argued that if the Defendant was dissatisfied with the Judge's decision of 19th May he should have appealed *that* decision (and on that appeal, if he wished, sought permission to rely on the additional evidence of Dr Champion), but that was not what the Defendant had done. He was trying to appeal only the decision of 25th July.

16. The White Book (2014 edition) at paragraph 3.1.9.1 says, 'Final orders determine between the parties the issues which are the subject matter of the litigation and which give rise to a cause of action estoppel between those parties.' Hamblen J adopted this definition in *Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV* [2014] EWHC 3777 (Comm) at [108]. In the present case, the issues between the parties are (in summary) whether the Defendant breached the terms of his tenancy agreement, whether he behaved in such a way as to justify the grant of an injunction to prevent harassment and whether he has breached the injunction and terms of the suspended possession order.

17. It may be said that the issue as to Mr Werrett's capacity to litigate does not directly concern any of these issues. Cases such as *Dunhill v Burgin (Nos. 1 and 2)* [2014] 1 WLR 933 (SC) show that the subsequent realisation that a litigant lacks capacity may lead to the overturning of a previous settlement of a claim. In that case, Mrs Dunhill brought a personal injuries claim in 1999 which she settled in 2003 for £12,500 in full and final settlement. In 2009 she sought a declaration that she had lacked capacity and the settlement should be set aside because it had not been approved by the court as r.21.10 required. Her argument was upheld by the Supreme Court. Here (similarly to the 2003 settlement in *Dunhill*) the Defendant consented to the suspended possession order. Importantly, though, in the proceedings which Judge Harington decided on 19th May, he was asked to rule whether the Defendant had *and at all material times had had* capacity to conduct the litigation. If the Defendant had been successful in that application it would have impeached the suspended possession order since that would have been ineffective because (like the 2003 settlement in *Dunhill*) it had been made without the court's approval on behalf of the Defendant as a protected party. On 25th July the Defendant was trying to re-litigate the Judge's final ruling as to whether those earlier stages of the proceedings could be re-opened.

18. Mr Shepherd argued that the Court had elided what should have been a two stage process into one: that it should first have considered whether the Defendant was a protected party and, if that was resolved in the Defendant's favour, gone on to consider whether earlier decisions, such as the suspended possession order, should be effective notwithstanding the absence of a litigation friend to act on his behalf when those earlier stages in the litigation took place. He referred me to r.21.3(3) which says, 'Any step taken before a …protected party has a litigation friend has no effect *unless the court orders otherwise.*' [my emphasis]

19. In my judgment, though, there are three reasons why Judge Harington was right to take the course that he did. First, he had been asked by the Defendant to rule that the Defendant was, or had been at any material time, a protected party. The application thus concerned the past as well as the future. Secondly, that made practical sense. By the time this application was made, the litigation was at a very advanced stage. A suspended possession order had been made. By both the Defendant's admission and the District Judge's holding, its terms had been breached. A final injunction had been granted. It too had been broken (as established by the same combination of judicial holding and admission). The practical purpose of the application by the Defendant was to unwind what had so far happened in the litigation. Thirdly, in terms of the Defendant's incapacity, it only made sense to consider the position retrospectively as well as prospectively. No one was suggesting that his condition had deteriorated since the commencement of proceedings. It was and had remained much the same since the

time of his accidents in 1999. It would be unreal to treat him as lacking capacity in May 2014, but able to litigate on his own behalf in January, February, March and April 2014.

20. Mr Shepherd argued that a decision as to a party's capacity to litigate could not be a final decision because that would preclude the possibility of the issue being revisited if the party's condition should deteriorate. However, that submission does not assist him in the context of the present proceedings. First, it needs to be re-emphasised, that it is not the Defendant's case that his condition deteriorated between 19th May and 25th July. There is no evidence to that effect. Secondly, in the hypothetical situation which Mr Shepherd postulates, the court would not be asked to re-open its decision as to the *past* capacity of that party to litigate but, exclusively, whether for the future he should be treated as requiring a litigation friend.

21. If, as I find, the Judge's decision on 19th May was a final order, he would only have had power pursuant to r.3.1(7) to vary or revoke it in exceptional circumstances. The Judge considered whether there had been a material change of circumstance or whether any facts had been misstated at the time of the 19th May decision. He was applying the guidance in *Tibbles v SIG plc (trading as Asphaltic Roofing Supplies)* [2012] 1 WLR 2591 (CA). But that was generous to the Defendant. *Tibbles* concerned a case management or interlocutory decision. It distinguished *Roult* and *Kojima* precisely because they had concerned final decisions - see *Tibbles* at [38].

22. There is very little help in the authorities on when r.3.1(7) may be invoked to vary or revoke a final decision, but if he cannot succeed on the *Tibbles* criteria he surely cannot succeed when a more exacting test has to be applied. I consider that the Judge was right to conclude that the Defendant could not satisfy either of the *Tibbles* tests. There was no evidence of a change in his condition between May and July (In this respect the present case is different from *In Re F (A Child) (Return Order: Power to Revoke)* [2014] 1 WLR 4375 (Fam Div) where there had been a sea change in the mother's mental state since the order which she sought to vary – see [3]-[4]. The case also concerned a child, although I recognise that Mostyn J did not consider that to be a necessary feature see [22]). Nor, in the present case had anything been misstated in the May hearing. The Judge was right to say that all that had happened was that a further expert report had been produced. But if the Defendant wished to submit this made all the difference, the proper course was to appeal the May decision and try to establish that the well known criteria for the admission of fresh evidence on appeal were satisfied.

23. Accordingly, I conclude that Judge Harington was right to say that he did not have power under r.3.1(7) to vary or revoke his order of 19th May.

Was the Judge right to conclude that the Defendant's application in any case did not succeed on its merits?

24. I shall deal first with the two preliminary matters raised by Mr Shepherd.

25. He argued first that the Judge was wrong to allow the Claimant actively to oppose his application. In *Folks v Faizey* [2006] EWCA Civ 381 a judge had given case management directions for the trial of a preliminary issue as to whether the claimant required the services of a litigation friend. Expert evidence on behalf of the Claimant

suggested he was not capable of managing his own affairs (the test under the Mental Health Act 1983 which was then the governing statute). The Defendant's expert evidence suggested that he did. The Court of Appeal set aside the order for the trial of a preliminary issue. It noted that the Claimant consented to the appointment of the litigation friend and there was evidence to support the appointment. The application was made *bona fide* and the defendant would suffer no prejudice by the order sought. Consequently, the preliminary issue was unnecessary satellite litigation.

26. Mr Shepherd also observed that it would have been open to the Official Solicitor to become the Defendant's litigation friend without a court order by following the procedure in r.21.5.

27. Once again, though, it seems to me to be important to focus on what this application was really about. The application notice sought to remove from Judge Harington's order of 19th May the words 'and at all material times has had [capacity to litigate]'. While this was only part of the relief which was requested, given the advanced stage of the litigation, it was the part which really mattered. If this part of the relief was granted then it would (at least potentially) lead to a reopening of the earlier stages in the litigation including the making of the suspended possession order and the admissions and findings of breaches of that order and the injunction. Plainly the Claimant had a legitimate interest in arguing why this part of the relief should not be granted. Because there was no evidence that the Defendant's mental state had changed since the litigation began, the Claimant likewise had a legitimate reason to oppose the other forms of relief which the Defendant was also seeking.

28. Mr Shepherd's reliance on r.21.5 does not assist him. If that procedure had been adopted, without more, the previous steps in the litigation would have been unaffected.

29. All of this is quite different from *Folks v Faizey* where the absence of prejudice to the Defendant from the appointment of a litigation friend was critical to the Court's decision - see Pill LJ at [19], Keene LJ at [25] and Wilson LJ at [29].

30. Mr Shepherd's second preliminary point was that the Judge should have adjourned the hearing of the application when it became clear that the Claimant took issue with Dr Champion's certificate. The certificate (devised by the Official Solicitor) invited the person completing it to go through each of the alternatives in s.3(1) of the 2005 Act, to state whether the litigant lacked that particular ability and then, in the accompanying box, to give their reasons. Dr Champion had signified that, in his opinion, the Defendant lacked each of the four abilities in s.3(1)(a)-(d). The Claimant's argument was that the reasons that he gave in each case did not substantiate his conclusions. Mr Shepherd argued that this was to call into question Dr Champion's evidence that those conclusions were justified and, in fairness, the challenge should have been put to Dr Champion in cross examination. However, at a case management hearing before DJ Singleton on 2nd July 2014 it was recorded that the Claimant did not require Dr Champion to attend the hearing of the Defendant's application.

31. The problem with this argument is that the Defendant, who was represented at the hearing before Judge Harington on 25th July, did not ask for the hearing to be adjourned so that Dr Champion could be called for cross examination. Mr Shepherd's

case has to be that the Judge erred because he did not take the initiative and, of his own motion, adjourn the hearing. I reject that argument. In an adversarial process where both parties are represented the Judge is entitled to rely on the parties to request an adjournment if they consider that is necessary for the fair disposal of the matter.

32. In finding that the Defendant did have capacity the Judge said this,

> '20. First I find that the evidence is that, albeit it is not as easy for [the Defendant] as it is for others, he is able to understand the information. The view of Dr Champion is that it is more difficult for him, but there is no suggestion that he cannot understand it. Secondly, that as to whether he is unable to retain the information, whilst he may not be able to retain it for very long, I find also that that has not been established. Thirdly, to use or weigh the information as part of the process of making the decision. In fact the decisions have already been made in this case, but again whilst it is established that he has more difficulty than others to weigh the information as part of the process of making a decision, I find that it has not been established that he has been unable to do that. So far as communicating his decision is concerned, I do not think that that arises in this case, although I accept Mr King's [counsel who then represented the Defendant] point that it is not very easy to get instructions from him. Then subsection 2 continues, "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)."
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> 21. Section 3(3) provides that "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." That, it seems to me, rather undermines Mr King's arguments about the Defendant being unable to put a time or a date or a period during which a particular incident took place. Section 3(4) says that information relevant to a decision "includes information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision."
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> 22. It seems to me, therefore, that Dr Champion does not establish that the Defendant lacks capacity. As Mr Underwood says in his skeleton argument, section 3 provides that a person is unable to make a decision for himself only in the circumstances to which I have referred and it does not seem to me that Dr. Champion goes as far as saying that. As to the arguments put forward by Mr King in relation to his attention difficulties, reduced processing speed, reduced sustained attention, his getting tired very easily and reduced information processing and post-brain injury fatigue. It is, as I have said, something that makes it very difficult for the Defendant, I accept that. And in giving this ruling it does not mean that I do not have sympathy for him so far as that is concerned. But on what I have heard and read I conclude that Dr Champion, as with Dr Bickerton, does not establish in his certificate that the Defendant lacks capacity. So on that ground as well the application, dated 4th July, is dismissed.'

33. Mr Shepherd argued that the Judge had not sufficiently appreciated that Dr Champion had stated in terms (by ticking each of the boxes on the Official Solicitor's form) that the Defendant lacked capacity in each of the four alternative ways set out in s.3(1) of the 2005 Act. Dr Champion had set out his reasons in each case. Furthermore, to satisfy any one of the alternatives, it was not necessary to show complete incapacity. That had been the case under the Mental Health Act 1983 – see *Masterman-Lister v Brutton and Co* [2003] 1 WLR 1511 (CA) at [18] – and remained the case under the 2005 Act. Dr Champion was a qualified psychologist and, as such, was in a good position to give an expert opinion on whether the Defendant lacked the abilities referred to in the 2005 Act – see *G v E* [2011] 3 WLR 652 (CA) at [60] – [61]. Dr Bickerton, the psychiatrist, had also certified that the Defendant lacked the first three abilities in s.3(1). Furthermore, the Court had the correspondence from the Official Solicitor who on two occasions had supported the applications that he be appointed as the Defendant's litigation friend. Against all this evidence, the Claimant had adduced no expert evidence to show the Defendant did have capacity.

34. The Defendant can only succeed if I consider that the Judge was wrong to reach the conclusion that he did – CPR r.52.11(3)(a). There was no oral evidence before Judge Harington. When he said in [22] of his judgment that he based his decision on what he had heard, he was referring to oral submissions from the parties. This is not a case, therefore, where the first instance judge had a particular advantage over me in making his assessment.

35. The Judge said at [20] that 'The view of Dr Champion is that it is more difficult for him [to understand information], but there is no suggestion that he cannot understand it.' It could be argued that this was to overlook the box which Dr Champion ticked and which said 'he or she is unable to understand the following relevant information…' However, in my view, the Judge was entitled to treat this bald statement together with the elaboration in the box which immediately followed it. From this, it was apparent, as the Judge said, that the Defendant 'struggled' to take in information and could not concentrate for any lengthy period of time. However, as the Judge also noted, the statute directs that a person is not to be treated as lacking capacity unless all practicable steps have been taken to enable him to make a decision without success. The Judge was also able to take into account the certificate of Dr Bickerton who had said,

> '[The Defendant] has very limited simple understanding of the issues and is likely to become emotionally overwhelmed and volatile due to his brain injury.'

A little earlier in his certificate, Dr Bickerton had said,

> 'Mr Werrett understands the allegations made against him and has the ability to decide whether to plead guilty or not but he may/will be unable to defend the proceedings, give evidence and cope with cross-examination; partly because of his intellectual difficulties, but also partly due to his great difficulty in managing his own emotions when under cross examination. He is likely to have the ability to instruct his solicitor in simple terms. I do, however, believe he would have difficulty in following the court proceedings without getting emotionally overwhelmed as he did in the recent court case. Likewise giving evidence in his own defence could be problematic for him and he is likely to be emotionally

overwhelmed, which I think would be unhelpful to the court. I therefore conclude that his fitness is impaired and he does not have the mental capacity to plead.'

Taken overall, I do not think therefore that the Judge either misstated or misunderstood the evidence. Certainly, I do not think that his characterisation of Dr Champion's evidence made his decision that the Defendant did have capacity wrong.

36. Nor do I think that the Judge fell into the error of considering that the statute required total incapacity. In addition to the certificates of Dr Bickerton and Dr Champion, the Judge was able to see what the Defendant had been able to do (no doubt with the assistance of his lawyers). He had, for instance, provided two witness statements responding to the allegations made against him (I exclude from consideration the third statement which the Defendant made on 14th August 2014 since that was after the decision of Judge Harington which the Defendant is seeking to appeal).

37. The Judge was well aware of the Official Solicitor's views and his wish to be appointed as a litigation friend for the Defendant. He could not fail to be aware as well of the absence of expert evidence on the part of the Claimant. However, entirely properly, the Judge regarded it as his task to assess the evidence and decide whether it displaced the presumption in s.1(2) of the 2005 Act that the Defendant had capacity. On the material which was before him, I am not persuaded that he was wrong to conclude that it did not.

38. Like the Judge, I have sympathy for the Defendant's condition and the difficulties it creates for him. If there comes a time when the Defendant needs to give evidence, proper allowance will need to be made for that. When the adjourned hearing takes place to determine the appropriate penalty for his contempt of court, the Judge will have to weigh to what extent his condition affects his culpability and how, if at all, that should be reflected in any sanction which is imposed. However, these are all measures which can be adopted consistent with the conclusion of Judge Harington that it has not been shown that the Defendant is a protected party.

Conclusion

39. For all of these reasons I do not consider that an appeal would have real prospect of success or that there is some other compelling reason why permission to appeal should be granted. Accordingly, the application for permission to appeal is refused.