Neutral Citation Number: [2021] EWFC 6

Case No: FD14D00158

IN THE FAMILY COURT
SITTING IN THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 19/01/2021

Before :

MR JUSTICE MOSTYN

- -

Between :

TANIA JANE RICHARDSON-RUHAN **App**

- and –

ANDREW JOSEPH RUHAN **1ST Respo**

- and -

ANTHONY STEVENS **2ND Respo**

- and -

GRENDA INVESTMENTS LIMITED **3RD Respo**

- -

- -

The Applicant acted in person and was assisted by her McKenzie Friend Mr Alan Walker

Mr Richard Sear (instructed by **Miles Preston & Co**) appeared for the **1st Respondent**

Mr David Lord QC (instructed by **Richard Slade & Co**) appeared for the **2nd and 3rd Respondents**

Hearing dates: 18-19 January 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children of the 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 Mostyn:

1.
In this judgment I shall refer to the applicant as the wife, to the first respondent as the husband, to the second respondent as Mr Stevens, and to the third respondent as Grenda.

2.
The background to this long-running case can be found in my judgment dated 9 November 2017 [2017] EWHC 2739 (Fam). For the purposes of this judgment it is not necessary for me to set out the many twists and turns in this extraordinary dispute; I need only confine myself to those headline events relevant to the matters before the court at the present time. The facts are well known to the parties.

3.
Those headline events are as follows:

i)
On 17 August 2018 I made an order for interim periodical payments against the husband and in favour of the wife in the sum of £10,000 per month.

ii)
On 8 January 2020 the wife made an application for joinder of Mr Stevens and Grenda. This was granted by me on 4 March 2020.

iii)
On 21 January 2020 the wife made an application that one of my findings made on 9 November 2017 be set aside. This finding recorded that $25 million had been lost by Mr Stevens in a New York property venture. I stated that there was nothing to connect the husband to the development. In reliance on fresh evidence the wife asserts that my finding was incorrect; that the money was the husband's and had not been lost.

iv)
On 4 March 2020 I made a legal services payment order in favour of the wife predicated on the husband's clear agreement to sell the motor yacht Babylon, a luxury vessel beneficially owned by the husband and moored in Dubai. That agreement was recorded in the order. At that point the net proceeds of sale were anticipated to be well in excess of £1 million.

v)
On 30 March 2020 the wife made a further application that my principal finding made on 9 November 2017 (namely that Mr Stevens was in relation to certain identified transactions in question the husband's nominee, and specifically that he was holding the sum of £12 million for the benefit of the husband) should be made binding on Mr Stevens. I shall refer to this issue as 'the Stevens

nomineeship issue' and I shall refer to this application and the application of 21 January 2020 as 'the wife's applications'.

vi)
On 19 May 2020 in response to a plea from the wife, and in the face of resistance by the husband, I made an order for the sale of Babylon. I directed that the husband should have the conduct of the sale and that he should keep the wife's solicitors informed of its progress.

vii)
On 13 July 2020 the husband applied to set aside my entire judgment of 9 November 2017. I shall refer to this application as 'the husband's set-aside application.' On that same day the wife applied for joint conduct of the sale of Babylon.

viii)
On 29 July 2020 I made an order varying an earlier legal services payments order so as to provide that, until the sale of Babylon, the husband was to pay to the wife £16,500 per month for legal fees. Further, on the sale of Babylon he was to pay to the wife for legal fees 55% of the net proceeds capped at £496,000. In addition, for every £1 that he paid to his solicitors in the future he was to pay to the wife for her legal fees £1.25. The wife's application for joint conduct of sale was adjourned to hearing in October on basis that the husband shall provide timeous and regular updating information with documentary evidence in support.

ix)
On 29 July 2020 I further ordered that over 10 days commencing on 18 January 2021 I would determine the wife's two applications and the husband's application. The pre-trial review was fixed for 21 December 2020.

x)
On 12 October 2020 I made an order which recorded the husband's detailed account of the progress of the sale of Babylon and I adjourned wife's application for joint conduct of its sale.

xi)
On 5 November 2020 the husband applied to discharge the legal services payment order. He has also been treated to have applied to discharge the interim periodical payments order and for remission of the arrears thereunder. I shall refer to these applications as 'the husband's variation applications'.

xii)
On 3 December 2020 I made an order removing the wife's solicitors from the record. They were not prepared to carry on working for the wife without payment of a substantial sum of outstanding costs. From that point the wife has acted in person.

xiii)
On 17 December 2020 Mr Alan Walker, a semi-retired accountant, and a friend of the wife or of her family, made an application on her behalf to "defer" both the PTR and the final hearing "following the unilateral withdrawal by JMW solicitors as the legal representative for the [wife]". In a witness statement attached to the application he stated that the wife was far from well. He further stated that the valuable former matrimonial home was being sold and that a new legal team was the process of being engaged.

xiv)

On 21 December 2020 my order made at the PTR that day recorded that the sale of Babylon had not yet been completed. On 14 January 2021 the husband made a witness statement in which he recorded that completion of the sale was imminent and he expected to receive only $170,000.

4.
As mentioned, on 21 December 2021, the PTR was held remotely through Microsoft Teams. I allowed Mr Walker to act as the wife's McKenzie friend. The wife herself did not attend the video hearing. In the circumstances, I exceptionally allowed Mr Walker to address me. He told me that the wife was suffering from mental illness and was being treated by a psychotherapist/psychiatrist. This raised the question of whether the wife had lost capacity to conduct the litigation in which, notwithstanding the assistance of Mr Walker, she was representing herself.

5.
It was pointed out to Mr Walker that if the wife had lost the capacity to conduct the litigation, then under FPR r.15.2 she was required to have a litigation friend to conduct the proceedings on her behalf. Further, under r.15.3 the proceedings had to be stopped until the question had been determined, and, if capacity had been lost, the appointment of the litigation friend had to be made. PD 15B para 1.1 required me to investigate the issue as soon as possible.

6.
Accordingly, I fixed a hearing on 11 January 2021 to determine whether the wife retained capacity to conduct the litigation. I invited Mr Walker to obtain and file a report from a suitably qualified medical professional as to the wife's capacity to conduct the proceedings. Further, Mr Walker was invited to file with the court details of the person whom he proposed be appointed as litigation friend, if the wife had lost capacity.

7.
I further ordered that the hearing on 18 January 2021 would be curtailed and confined to an application ("the stop application") recently advertised by Mr Stevens and Grenda. This would argue that the wife's applications should be stopped summarily on the ground that they had been made either too late or too soon.

8.
Mr Lord QC argues that the wife's applications were too late, and should be summarily stopped, because they sought to join Mr Stevens and Grenda after the 9 November 2017 judgment when they could and should have done so well beforehand. Essentially it is an argument that the wife has been guilty of Henderson abuse - she should have brought her claims against Mr Stevens within the proceedings that led to the judgment of 9 November 2017. She did not and it is now too late for her to do so.

9.
Mr Lord QC says that if he is wrong in his primary argument then the wife's applications are premature because Foxton J in commercial proceedings is likely to be deciding the Stevens nomineeship issue in one of three commercial suits which will be heard this year. Therefore, the court pursuant to its duty to avoid a multiplicity of proceedings under section 49 (2) of the Senior Courts Act 1981, should stand back until Mr Justice Foxton has made his decision. Accordingly, the wife's applications are premature and should be halted.

10.

I further ordered that the husband's variation applications should be heard in the week commencing 18 January 2021.

11.
In a statement made on the wife's behalf on 8 January 2021 Mr Walker described how the wife was seriously unwell suffering from severe stress and depression, sleep deprivation, trauma, panic attacks and potential self-harm. He exhibited a number of documents to verify the wife's condition although, notably, there was none from a psychiatrist or a psychotherapist. However, he stated that the wife had arranged a consultation with a consultant psychiatrist, Dr Gary Bell, to take place on 12 January 2021. The statement did not vouchsafe who would act as litigation friend if the wife had lost capacity. It did state that the services of experienced family law legal advisers as well as counsel had been secured on behalf of the wife.

12.
Although the evidence was in a number of respects incomplete it clearly raised a big question as to the wife's capacity to conduct the case as a litigant in person on 18 January 2021.

13.
On 11 January 2021 I concluded that it was pointless for the court to determine the question of capacity in circumstances where key evidence would be generated the following day at the consultation with Dr Bell. At the hearing Mr Walker did confirm that he would be prepared to be appointed litigation friend for the wife in the event that it was determined that she lacked capacity to conduct the proceedings. He confirmed that he would file the documents required by r.15.5(4). Those documents include a certificate which states that the litigation friend undertakes to pay any costs the protected party may be ordered to pay subject to the right to be repaid from the assets of the protected party. Mr Walker may not have noticed that obligation when he agreed to act as litigation friend.

14.
At the hearing it was agreed that the stop application would not be heard on 18 January 2021 but rather would be heard, if Mr Stevens elected to pursue it, after Easter. Therefore my order provided that the hearing on 18 January 2021 was confined, first, to the question of capacity of the wife, and secondly to the husband's applications for variation. The husband's applications would be listed to be heard on 21 January 2021.

15.
My order provided that the wife's applications and the husband's set-aside application were adjourned generally with liberty to restore. The intention was that they should not be heard until Foxton J had given judgment on the myriad matters before him which potentially include the Stevens nomineeship issue.

16.
This is my judgment on the issue of the wife's capacity to conduct the litigation, and specifically as to her capacity as a litigant in person to represent herself on the husband's variation applications. The hearing took place on Monday, 18 January 2021.

17.
I record, first, that at the commencement of the hearing Mr Walker explained that he had not appreciated that he had to give an undertaking in respect of costs and that in such circumstances he was not content to act as the wife's litigation friend should she be judged to lack capacity. He was not

able to identify anyone else within or outside the wife’s family who might volunteer so to act. Accordingly, it became plain that in the event that I were to judge that the wife had lost capacity to conduct the litigation then the Official Solicitor would have to be invited to act as her litigation friend.

18.
Dr Bell duly saw the wife on 12 January 2021 and his report is dated 13 January 2021. It states:

In terms of her mental wellbeing, she has struggled with symptoms of anxiety and depression for a long period, largely as a result of the above proceedings and particularly in relation to having to represent herself. She has become increasingly distressed, easily overwhelmed, fatigued, panicky and at times desperate. Her mood is one of hopelessness and depression and she lacks any normal sense of pleasure and enjoyment from activities that she would normally enjoy. She is able to function at a very basic level on a daily basis using daily tasks as a distraction from the distress that she feels. Her sleep is currently disturbed by recurrent waking and she feels unrefreshed on waking. Panic attacks occur most days lasting ten to fifteen minutes characterised by shortness of breath ‘freezing' and not knowing what to do or what she is doing at times.

My impression is that Mrs Richardson is suffering from a major depressive episode arising as a direct result of the above Court proceedings, their complexity and her inability of late to pay for legal representation. She saw her General Practitioner shortly before Christmas who started her on antidepressant medication, however she was unable to tolerate this and stopped after a few days. Her condition is of a severity that further pharmacological treatments in addition to continuing with psychotherapy is indicated, however in view of the current time scale with Court proceedings and the fact that most antidepressants take two to four weeks before a therapeutic response can be seen, I felt it was better to delay any further pharmacological strategies until the present hearing is over particularly given that the side effects are common in the early stages of treatment. In terms of the current proceedings, I do not think that Ms Richardson is well enough to represent herself. The toll that this has taken on her is considerable and I can only see her condition worsening particularly given that indecision as well as focus and concentration issues are common depressive symptoms which will make it extremely difficult for her to make rational decisions and also an inability to deal with such complex legal issues that she is not trained in. I would respectfully request that the Court allow for this pending funds being available for appropriate legal representation.”

19.
While this describes a dire state of affairs it can be seen that it does not directly address the test for incapacity set out in sections 2 and 3 of the Mental Capacity Act 2005. Therefore, I directed that Dr Bell should give oral evidence at the hearing.

20.
Sections 2 and 3 of the Mental Capacity Act 2005 provide:

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. …

21.
It is stated in Court of Protection Practice 2020 at 1.340, rightly in my opinion, that the analytical process when determining a question of capacity is in three stages as follows:

(1) Is the person unable to make a decision? If yes:

(2) Is there an impairment or disturbance in the functioning of the person's mind or brain? If yes;

(3) Is the person's inability to make the decision because of the identified impairment or disturbance?

22.
Dr Bell gave oral evidence. He was a very good witness, whose evidence was clear and succinct. He answered the questions that were put to him directly without any embroidery or rhetoric. It was a model of how expert evidence should be given. He was taken to sections 2 and 3 of the Mental Capacity Act 2005 and asked to give his opinion as to the wife’s capacity as defined by the statute. He was asked to consider a number of hypothetical analogues such as making a will, negotiating damages after a personal injury, and buying a house with restrictive covenants and other title issues. He was then asked to consider the husband’s variation applications with which the wife was to be confronted as a litigant in person on 21 January 2021. His evidence was consistent and clear. In each of these

scenarios he was of the view that the wife would have capacity to make the relevant decisions if, and only if, she had the benefit of legal advice and representation. If she did not have legal advice then he did not think that she would be capable of navigating the legal complexities in each scenario. He considered that acting alone she would be disabled by her medical condition from being able to make the necessary decisions.

23.
The classic test for capacity to conduct litigation is found in the decision of the Court of Appeal in Masterman-Lister v Brutton & Co [2002] EWCA Civ 1889, [2003] 1 WLR 1511. At [75] Chadwick LJ held:

"...the test to be applied....is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisors and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law whether substantive or procedure should require the imposition of a ... litigation friend."

24.
This decision was given under the common law regime which predated the enactment of the 2005 Act. However, there is consensus that it describes the correct test, or standard, applicable under the Act.

25.
In this case Mr Walker has confirmed that there is no possibility of completing the engagement of the wife's new legal team in time for her to be represented next Thursday. Therefore, she would be acting in person and on the evidence of Dr Bell would be incapable of making rational decisions or dealing with complex legal issues.

26.
A literal interpretation of the test propounded by Chadwick LJ would suggest that in the absence of legal advice and representation she would be legally incapacitated and the court would be obliged to appoint a litigation friend. Such an interpretation is replete with problems.

27.
First, it creates circular reasoning. If the lack of representation generates incapacity, and that incapacity is addressed by the appointment of a litigation friend, and that litigation friend secures representation, then the incapacity disappears, and the appointment of the litigation friend comes to an end, leading, possibly, to the wife once again being unrepresented.

28.
Second, it means that in relation to the capacity to conduct litigation, that capacity does not have an absolute quantum, but rather varies depending on the presence, or otherwise, of legal advice and representation. If this were so the quantum would further vary, surely, in response to the quality of legal advice, which is very difficult factor to investigate.

29.
Therefore, Mr Sear and Mr Lord QC argue that Chadwick LJ's dictum should not be read literally. Rather, it should be read to mean that **if** the party is capable of understanding with the assistance of proper explanation from legal advisers the issues on which her consent or decision is likely to be

necessary in the course of the proceedings, then she will have the requisite capacity, whether or not she actually receives such assistance.

30.
This reading is brutally pragmatic because it may have the effect, as here, of leaving someone who is actually incapacitated representing herself alone, in what may transpire to be a damaging and traumatic experience. However, that worrying scenario is, as Mr Lord QC rightly says, addressed by granting an adjournment in order for representation to be secured, rather than by the protracted and elaborate procedure of appointing a litigation friend.

31.
The interpretation espoused by Mr Sear and Mr Lord QC is consistent with the judgment of Baroness Hale DPSC in Dunhill v Burgin [2014] UKSC 18, [2014] 1 WLR 933 at [17]:

“Equally, of course, those words [of Chadwick LJ at [75]] could be read in the opposite sense, to refer to the advice which the case required rather than the advice which the case in fact received. In truth, such judicial statements, made in the context of a different issue from that with which we are concerned, are of little assistance. But they serve to reinforce the point that, on the defendant’s argument, the claimant’s capacity would depend on whether she had received good advice, bad advice or no advice at all. If she had received good advice or if she had received no advice at all but brought her claim as a litigant in person, then she would lack the capacity to make the decisions which her claim required of her. But if, as in this case, she received bad advice, she possessed the capacity to make the decisions required of her as a result of that bad advice. This cannot be right.”

32.
Thus, the capacity to conduct proceedings cannot depend on whether the party receives no legal advice, or good legal advice or bad legal advice. If the party would be capable of making the necessary decisions with the benefit of advice then she has capacity whether or not she actually has the benefit of that advice.

33.
This interpretation is also consistent with section 3(2) of the Act, which provides that

“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)” (my emphasis).

34.
The use of the conjunction “if” presenting the conditional clause that follows clearly means that the explanation in question does not actually need to happen in order for capacity to be found. If the draftsman had intended otherwise he would have used “where” or “provided that”. So, the provision may be held to be satisfied even where the person flatly refuses to receive an appropriately simple explanation of the information, provided that there was evidence that had she received it, she would have understood it.

35.
It is true that section 3(2) is only concerned with the ability to understand information relevant to a decision, when under section 3(1) there is more to making a decision than that. However, if the wife is deemed to be able to understand the relevant information if it were presented appropriately to her by

advisers, and therefore by reference to that factor, has capacity, then it is hard to see how the other factors within section 3(1) could lead to a different conclusion.

36.
I therefore conclude that the wife is to be treated as having the capacity to make the necessary decisions to deal with the forthcoming hearing of the husband's variation applications. The three-stage analysis referred to at paragraph 21 above ends at the first stage. I declare, accordingly, that the wife retains capacity to conduct this litigation and specifically to conduct the husband's variation applications due to be heard on Thursday, 21 January 2021.

37.
Should the hearing of the husband's variation applications be adjourned? Both Mr Sear and Mr Lord QC rightly recognise that the material advanced as to the wife's health, and particularly, and most importantly, the report and oral evidence from Dr Bell, form a sound basis for an application to adjourn next Thursday's hearing.

38.
In Levy v Ellis-Carr & Ors [2012] EWHC 63 (Ch) Norris J laid down at [36] the evidential requirements which should be met should a medical reason for an adjournment be advanced: the evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations); should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process; should provide a reasoned prognosis; and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. Levy v Ellis-Carr & Ors was approved by the Court of Appeal in Forrester Ketley v Brent [2012] EWCA Civ 324, and in Simou v Salliss & Ors [2017] EWCA Civ 312.

39.
Mr Sear and Mr Lord QC both accept that these criteria for the grant of an adjournment on medical grounds are met. However, Mr Sear asks for certain consequential orders should the adjournment be granted.

40.
I grant the adjournment. It would be singularly unfair and potentially traumatic and damaging to the wife's core health status were the case to proceed on Thursday. The husband's variation applications will be re-fixed on a date convenient to counsel on the first open date on or after 15 February 2021. This deferral should allow sufficient time to enable the wife's new legal team to read into the case and to prepare for the hearing appropriately.

41.
I therefore turn to Mr Sear's consequential applications.

42.
First, he asks for a stay of the financial remedy proceedings, pending the re-fixed hearing. As explained above, the wife's applications and the husband's set-aside application have been adjourned sine die. I agree that if I were not to award a stay of the interim periodical payments and the legal services payment orders then there is the prospect that the very relief that he seeks on his variation applications would be rendered nugatory. The husband is in arrears under both orders, and is applying for remission of those arrears.

43.
My decision is that there should be a stay on enforcement of any arrears under both orders and that the liability to make payments under those orders from today shall be suspended. The stay and suspension will endure until the re-fixed hearing of the husband's variation applications.

44.
Second, Mr Sear proposes that the proceeds of sale of Babylon, expected to be a mere $170,000, should be deposited in his solicitors' client account and not touched pending the next hearing. I agree with that proposal.

45.
Finally, Mr Sear asks that the wife should give an account of the sale of the matrimonial home. Paragraph 23 of my order of 11 January 2021 required the wife to file a witness statement in reply to that of the husband by tomorrow. I will vary that order to provide that the witness statement should be produced by Friday, 5 February 2021 and that it must inter alia deal with the sale of the former matrimonial home including its sale price, expected date of exchange of contracts, expected date of completion, and expected net proceeds of sale having regard to the payments out of the proceeds which are intended to be made.

46.
In his final address to me Mr Walker gave vent in language of high rhetoric to his opinion of the disgraceful misconduct of the husband. He maintained that the husband's most recent witness statement admitted that he was hopelessly insolvent and that the only reason he had not been made actually bankrupt was because his solicitors were bankrolling this litigation. He went on to say that the order for sale of Babylon (which I reminded him more than once had been explicitly sought by the wife through her then representatives) had to be set aside, even though no application for that relief had ever been made, or even intimated. He said that when the husband was inevitably made bankrupt, his trustee in bankruptcy would be able to avoid the sale of Babylon as a transaction knowingly done at an undervalue.

47.
I made it absolutely clear to Mr Walker that I would not begin to entertain any such arguments in the absence of an application to set aside the order for the sale of Babylon made, I repeat, at the behest of the wife and which has been acted on by all parties ever since.

48.
It was a most regrettable outburst by Mr Walker. I reminded him that I had afforded him considerable indulgence in allowing him to address the court. Para 4(iii) of McKenzie Friends (Civil and Family Courts): Practice Guidance (July 2010) [2010] 2 FLR 962 stipulates that a McKenzie Friend may not address the court. I waived that proscription in the interests of fairness in circumstances where the wife was so unwell and would no doubt have found it difficult to address the court. But it was disappointing that Mr Walker should have taken advantage of that indulgence to have vented his spleen in the way that he did.

49.
For the avoidance of any doubt, I categorically reject any suggestion that the order for the sale of Babylon should be set aside. If the wife wishes to make that application she must do so formally in the prescribed form and support it by evidence. She would have to explain carefully why she now sought to set aside the order that she herself had actively sought, and why it should be dealt with at first instance rather than by way of an appeal.

50.
That is my judgment.