

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Case No: COP 13030942

Royal Courts of Justice  
Strand  
London WC2A 2LL

Tuesday, 3 December 2024

BEFORE:

**THE PRESIDENT OF THE FAMILY DIVISION**  
**SIR ANDREW McFARLANE**

Neutral Citation Number: [2024] EWCOP 80 (T3)

BETWEEN:

(1) EG  
(2) JM

Applicants

- and -

**P (by his litigation friend**  
**THE OFFICIAL SOLICITOR)**

Respondent

**MS COLLINSON** appeared on behalf of the Applicant  
**MS GARDNER** appeared on behalf of the Respondent, by his litigation friend, the Official  
Solicitor

**JUDGMENT**

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(Official Shorthand Writers to the Court)

1. SIR ANDREW McFARLANE P: These are proceedings in the Court of Protection relating to an individual young man who is now in his 20s who tragically suffered very serious injuries in a road traffic accident when he was just under 3 years of age over 20 years ago. Fortunately, despite the gravity of those injuries and no doubt because of the care he has received and because of his own resilience and ability to develop himself as best he can, he lives a largely autonomous life in the community. He is however subject to deputyship orders under the Court of Protection so that the very substantial fund awarded to him in compensation for his injuries can be managed by the deputies with them paying allowances to him and funding him in other ways as he moves forward in his life in the community.
2. To give a snapshot of matters, as a young man, he has been able to form a close relationship with a partner, live with her until a relatively short time ago, and between them they are the father and mother of a child. In order to achieve that state of affairs, arrangements had to be made for the ownership of the property in which they lived and a cohabitation agreement was drawn up. At that time, the question of his capacity to engage in the process of agreeing to the cohabitation agreement and signing it was assessed by a psychologist, Dr Abi Cheeseman, four years ago. Her conclusion was that he did have capacity and it is easy to understand why that was her conclusion given the answers that he gave to her, which had a degree of insight into the consequences of making the agreement or not making the agreement which showed that he readily understood matters. Indeed, as I read from the papers I have read and as I am told by counsel on behalf of the deputies Ms Collinson, much of his life is conducted with him simply getting on with it and managing the finances that he is awarded on a regular basis and a lump sum he is given to manage himself once a year. So, in terms of his capacity, whilst he may not have the capacity to be the custodian of a very large sum of money that is held in fund for him -- that indeed would require a sophisticated degree of understanding which sadly has been compromised by the injury he suffered when he was so young -- in terms of ordinary life, he gets on with that unencumbered. He is not subject to any welfare deputyship or so far any orders in respect of his welfare in the Court of Protection.
3. What, then, brings him before the court today? It is a serious matter, but it can be put in simple and straightforward terms. Somehow, for some reason, it is apparent that he

became involved in criminality. Thus it was over a year ago that the police raided a number of premises including those owned or occupied by him. They seized some money that was found in premises owned by him, but more significantly, a substantial quantity of class A and class B drugs were seized and as I understand it, it is accepted that he was in part responsible for that consignment of drugs.

4. The fact that the police have been involved in these matters and the fact that, as he was, he was arrested at the time was known to his property and affairs deputies, but they did not understand that there were any further ramifications other than the potential criminal proceedings that related to him at that time. That state of awareness changed six weeks or so ago when P (as I shall refer to him) approached one of the deputies in the team that look after his affairs and P told that individual that he, P, was being pressed for payment by the original drug dealers in a sum of £17,000 for his "share" of the drugs that had been confiscated and seized by the police. P does not have the financial resources to pay anything like that sum, although apparently he has made some contributions towards it. P is very frightened. He fears continued pressure from this organised crime gang and it is clear to him that they require paying and he is clear that he needs to and wants to pay them the sum that is due.
5. That of course has raised very substantial and understandable professional concerns for the deputies. They have commissioned opinion from three separate counsel, one junior counsel and two leading counsel, two of them in relation to criminal matters and a third in relation to their professional regulatory position as to solicitors and deputies. It is necessary just to summarise some of that material.
6. In relation to criminal matters, and I am reading from the opinion of leading criminal counsel, Jonathan Sandiford KC dated 30 November, he agrees with the previous opinion given by junior counsel that if the deputies, on the basis that P lacks capacity, were to pay the Drug Debt, as it is referred, they would be potentially liable for a number of criminal offences, in particular an offence under section 328 of the Proceeds of Crime Act 2002 and of conspiracy to commit that crime. The opinion goes on to give further details of the different sorts of mechanisms that might be in play were the deputies to make the payment, but the short point is that in relation to each such mechanism, it is likely that the deputies will have become drawn into engaging in

payment of what will be seen under the 2002 Act as the proceeds of crime, although obviously, at the moment, the money is not such: it sits in a bank account managed by the deputies on P's behalf.

7. If P does not lack capacity, then it is accepted before this court and I accept that he is entitled to ask for whatever sum of money he desires for the particular function for which he has capacity and that the deputies would not be in the position of placing themselves in jeopardy of criminal prosecution were they to abide by his instructions; indeed, they would have to abide by his instructions because, with respect to the sum, it is his money and he would have capacity. So, the issue of capacity is an important one.
8. So far as regulation is concerned, counsel Mr Gregory Treverton-Jones KC has been instructed and in his advice he is very plain that the deputies as solicitors would be placing themselves in jeopardy under the Solicitors Regulations. He stresses at paragraph 5 of his opinion that the responsibilities as solicitors do not relate solely to acting as solicitors in a narrow sense but would encompass their actions as deputies. He says:

"I have no doubt that solicitors must abide by their professional obligations under the SRA Principles and Code of Conduct when acting as deputies."

He then goes on to quote some of the relevant provisions and makes the obvious point that solicitors cannot accept instructions that involve them in criminality. He is therefore clear that the deputies are simply not professionally in a position to make the payments if they are going to satisfy the Drug Debt.

9. The position before the court today has been clarified from that which appeared on the position statements that were lodged prior to the hearing. The hearing has come on at short notice and has been flagged up as being urgent because of the need to address this pressing issue and I accept that that was a proper course for the deputies to take. Initially, on paper, the case seemed to be looking to the court to make a best interests decision and in doing so to give guidance to deputies in general as to their position were they to find themselves in a position such as this where it is plain that a payment that they were being asked to make would be directly involved in the course of

criminal conduct. But the case as it is presented now by Ms Collinson who acts on the instruction of the deputies is that the issue really turns on the assessment of capacity, it being accepted that if P lacks capacity to make this particular decision, despite the degree of autonomy that he has over much of the rest of his life, then the court could not, as a matter of law, go on to sanction the payment of the money to satisfy the Drug Debt. That is because of the clear approach taken by the Court of Appeal in the case of *Secretary of State for Justice v A Local Authority & Ors* [2021] EWCA Civ 1527. I need not repeat the detail of that case in this judgment but the principle was firmly established there. It is accepted before this court by Ms Collinson and also by Ms Gardner on behalf of the Official Solicitor that the court simply could not be in a position of condoning or endorsing the payment, to use the words used a short time ago by Ms Collinson.

10. And so matters turn on the assessment of capacity. There have been assessments of capacity previously with respect to P, obviously in the nature of the circumstances I have described; that is the case. In particular, a psychologist assessed P in August 2020. The psychologist was Dr Abi Cheeseman, a chartered clinical psychologist, and she, as I have indicated, assessed his capacity to join in to the cohabitation agreement. Her assessment is proportionate to the task that she was set; it is not a long report and it is clear that it was not a full and in-depth assessment but insofar as it goes, it produced sufficient clear evidence of capacity as I have already summarised.
11. For these proceedings, the court has the benefit of a much more thorough assessment (I mean that purely descriptively rather than any criticism of Dr Cheeseman) by Dr Hill. Dr Geoff Hill is a consultant clinical psychologist in neuropsychology and he has conducted a report over the course of the last month. The report indicates that he spent a considerable amount of time with P addressing the issue of capacity from a range of angles and by adopting the well-known formulation for addressing capacity within the context of the Mental Capacity Act. I turn directly to his conclusions. Part of the assessment was for Dr Hill to conduct an initial appraisal of P's understanding of these matters without offering him any support and then to revisit the topics with some reasonable support and assistance from the doctor. The following conclusions are drawn:

"10.9. Despite being supported as far as possible, P could not identify any upsides or pros of not settling the debt and did not recall and draw upon the relevant consequences with no reference to, for example, him experiencing reduced risk of prosecution or saving money.

"10.10. Similarly, P appeared to find it difficult to identify any downsides or cons of not settling the debt. He would say, 'Who knows? It's a mystery. There are many things that could happen.'"

12. Moving on, after a range of scenarios were put to P, at paragraph 10.12 the opinion is expressed:

"P demonstrated he could understand the decision at hand and, with support and prompting to consider each consequence in isolation, demonstrated at least a rudimentary understanding of each consequence of going ahead or not going ahead with the decision he wanted to make (settling the debt). P appeared to demonstrate greater understanding and appreciation of the short-term consequences of the decision but less understanding of the potential long-term consequences of proceeding (eg potential prosecution) which may reflect the executive difficulties with impulsivity and planning. ...

"10.14. Although P consistently recalled and communicated the reason for wanting to go ahead with the decision and settle the debt (eg immediate positive impact on personal stress levels) the decision-making did not demonstrate the sufficient bringing to mind of the other important consequences in my opinion (eg his and his family's safety) despite the support to assist his memory and executive function."

13. The report goes on in similar terms. Then, under the heading, "Functional test of mental capacity", Dr Hill asks a number of questions.

"Was P able to understand information relevant to the decision in question? Yes.

"Was P able to retain and hold the information in mind long enough to use this as part of the reasoning decision-making process? No.

"Was P able to demonstrate a process of reasoning, eg weighing up the pros and cons appropriate to the decision in question? No.

"Was P able to communicate his decision? Yes."

14. Under each of those headings with the single answer yes or no, more detail is given of the doctor's opinion. Then, under the heading "Opinion and Conclusion", matters are drawn to a head and I quote these in full:

"P is facing a very complex specific financial decision in the context of difficulties with executive functioning that have previously been found to have caused a loss of capacity in many other assessed decisions within the management of property and financial affairs. Notably and as mental capacity is decision- and time-specific, it was a possibility that P could have simultaneously lacked the mental capacity within a broad range of financial decisions (eg management of his financial portfolio) and had capacity to make a valid decision in the current specific decision under assessment. On balance, despite a reduced tolerance of the assessment, P did appear to engage adequately. On all views, I therefore deem it to be a valid representation of his cognitive ability and mental capacity at the time of assessment.

"At the material time, P demonstrated adequate understanding of the relevant information and could communicate his decision-making process as well. However, even with support, his ability to effectively recall and hold in mind the salient information (eg the consequences of proceeding with the decision) and weighing up the available options and consequences was inadequate and compromised by reduced executive function in my opinion. Notably, in line with the Mental Capacity Code of Practice, P was not required to recall, hold in mind or reason with all peripheral details in his decision-making. However, it was important that P could understand, bring and hold in mind and reason with the salient information of which I noted numerous (audio gap) in the current complex decision. In my opinion, P at the material time, on the balance of probabilities, lacked the requisite mental capacity to make a valid independent decision in relation to paying the debt."

15. Earlier, Dr Hill had advised in conclusion that the incapacity insofar as he has identified it was a direct result of the disability in function of mind and brain resulting of the original injury. That is the expert evidence that is before the court.
16. At an earlier stage of this hearing, Ms Collinson submitted that the court should call the expert to give evidence and also hear from P himself as to his view of his capacity, despite the singularity of the evidence (there only being one expert psychologist who has given an opinion on this issue before the court and P having the view that he does have the ability to make this decision.

17. In the proceedings, P is represented by his litigation friend, the Official Solicitor, who acts today by the presence of counsel Ms Gardner. After the request for the court to hear directly from P was crystallised by Ms Collinson, time was given for Ms Gardner to explain matters to P and to take account of his wishes and feelings. She then told the court that P did not want to go through the process that Ms Collinson had described: he did not want to give an account directly to the court, he did not want to come back on another day and the proceedings as a whole were causing him stress; he wanted them resolved. On that basis, Ms Collinson withdrew the suggestion that there was benefit in adjourning matters to a further day for P to be called. She stressed that P believes that he has capacity and I readily accept that. I respect the difficulties that P is in in these proceedings and I understand how keenly he feels the need to have these matters resolved as he would wish with the payment of the sum of money.
18. Drawing matters together, I am entirely satisfied that the evidence of Dr Hill in a thorough and very impressive account of his assessment establishes that P lacks capacity to make the particular sophisticated and difficult decision whether the sum of money should be paid in settlement of the Drug Debt.
19. We then move on to consider what flows from that. Ordinarily, in a welfare setting, the court would move on to evaluate P's best interests and decide whether or not the particular step in P's affairs should or should not be taken. But as I have indicated, it is common ground that there is no prospect of a court sanctioning a payment of this nature in these circumstances. The court would effectively itself be engaging, albeit at arm's length, in serious criminality and that is not a step that is to be contemplated. So, the Official Solicitor urges the court to dismiss the application that has been made by the deputies.
20. I do not take that course. The deputies have found themselves to be in an acutely difficult professional circumstance. They know P well; they plainly have formed a positive relationship working with him now for a substantial length of time. They have considered their professional position carefully and they have brought the matter to court; they deserve the protection of the court in this potentially sensitive matter by the court taking a relevant decision. I therefore do not dismiss the application; I simply refuse to declare that this payment should be made. The decision I have made is that



the payment to P for this sum of money to be made available to him to satisfy the Drug Debt should not be made.

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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