Neutral Citation Number: [2019] EWCA Civ 913

Case No: B4/2019/0679
B4/2019/0680

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
Cobb J
[2019] EWCOP 3

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2019

Before :

THE MASTER OF THE ROLLS
LADY JUSTICE KING
and
LORD JUSTICE LEGGATT

- -

Between :

B (by her litigation friend, the Official Solicitor)
- and -
A LOCAL AUTHORITY

- -
- -

Sam Karim QC and **Francesca Gardner** (instructed by **MJC Law**) for **B**
David Lock QC and **Simon Garlick** (instructed by **Legal and Democratic Services**) for **the Local Authority**

Hearing dates : 14 & 15 May 2019

- -

Approved Judgment

Sir Terence Etherton MR, Lady Justice King and Lord Justice Leggatt :

Introduction

1. This is an appeal and a cross appeal from the order dated 12 March 2019 of Cobb J, sitting in the Court of Protection, in which he made various declarations as to the mental capacity of B. There is an appeal by B against those parts of the order in which he made interim declarations under section 48 of the Mental Capacity Act 2005 ("the MCA") in relation to B's capacity to make decisions to use social media for the purpose of developing or maintaining connections with others and to consent to sexual relations.

2. There is a cross-appeal by the respondent Local Authority ("the Local Authority"), which is responsible for B's care, from that part of Cobb J's order in which he made a declaration that B had capacity to decide where she resides.

3. B does not have capacity to litigate. These appeals are being conducted on her behalf by the Official Solicitor ("the OS"), B's litigation friend.

4. The important questions on these appeals are as to the factors relevant to making the determinations of capacity which are under challenge and as to the approach to assessment of capacity when the absence of capacity to make a particular decision would conflict with a conclusion that there is capacity to make some other decision.

Legislative framework

Mental Capacity Act 2005

5. The MCA sets out the legal framework for making determinations about mental capacity. It is complemented by a Code of Practice (issued by the Lord Chancellor under section 42 of the MCA) that gives guidance on the application of the MCA.

6. Section 1 sets out the general principles of the MCA. It provides, among other things, that a person is presumed to have capacity unless it is established that he or she lacks capacity (section 1(2)); that he or she is not to be treated as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success (section 1(3)); and that he or she is not to be treated as lacking capacity merely because his or her decision is unwise (section 1(4)).

7. Sections 2 and 3 together define the circumstances in which a person lacks capacity. Section 2(1) provides that:

> "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."

Accordingly, questions of capacity arise if and only if a person suffers from some impairment in the functioning of the mind or brain as a consequence of which they are unable to make a decision. Capacity determinations are specific to particular matters

that arise for decision at the time a determination is required to be made about a person's capacity.

8. Section 2(4) requires that questions as to lack of capacity are to be resolved on the balance of probabilities. The effect of this, read with section 1(2), is that the burden is on whoever alleges that a person lacks capacity to prove to that civil standard that the person does not have capacity in relation to the matter at issue.

9. Section 3(1) provides that a person is unable to make a decision in relation to some matter if he or she is unable to understand, retain or use or weigh the information relevant to that decision, or is unable to communicate the decision. Section 3(2) provides that the information relevant to the decision is required to be presented to the person in a way that is appropriate to his or her circumstances. Section 3(3) provides that the fact that the person may be able to retain the information for a short time only does not prevent a finding of capacity.

10. What is the relevant information will depend on the particular decision to be made, but includes the reasonably foreseeable consequences of the decision or failure to make a decision (section 3(4)).

11. Where decisions are taken for a person lacking mental capacity by someone else, those decisions must be in the person's best interests. Section 4 of the MCA requires that all relevant circumstances be taken into account, and prescribes certain mandatory relevant considerations not in issue on these appeals.

12. Section 15 empowers the court to make declarations as to whether a person has capacity to make a particular decision.

13. Section 48 empowers the court to make interim orders and directions in relation to a matter if there is reason to believe a person lacks capacity in relation to that matter.

Factual background

14. B is a woman of 31 years of age, who has learning difficulties, epilepsy and considerable social care needs. B struggles to maintain her personal care and hygiene. She currently lives with her parents. She has occasional overnight respite care and some community support.

15. B is assessed as requiring support to maintain her safety when communicating with others. When she receives information which she does not want to hear, she often becomes dismissive and verbally aggressive.

16. B is a frequent user of social media, principally using WhatsApp, Facebook and Snapchat to communicate with others. Her use of social media has caused repeated concern to her adult social care workers. B has been known to send intimate photographs of herself and to communicate personal information to male strangers. She is known to search the internet for a boyfriend and once she has made a link with a potential partner she views them as a "friend" and will quickly tell them that she loves them and wants to meet them. She routinely has "sex chats" with males.

17. It was through this behaviour that B met Mr C, a man in his seventies who has been convicted of multiple sexual offences and is subject to a Sexual Harm Prevention

Order. Mr C is aware of B's learning disability and has described her as a functioning 10-year-old. He has said that he wishes to marry her. Although B has been advised of the risks posed by Mr C, she refuses to believe that he has a history of offending. She remains in regular contact with him and on at least one occasion has stayed overnight with him at his home. B has communicated her strong desire to live with Mr C and has indicated that she wishes to have his baby.

18. On 2 July 2018 the Local Authority applied for declarations that B lacks capacity to litigate, to consent to sexual relations and to make decisions as to her contact with others. In October 2018, at the Local Authority's instigation, Cobb J imposed an interim injunction on Mr C prohibiting him from having any contact with B. At a hearing on 1 March 2019 Mr C was found to have breached the order and was sentenced to three periods of 28 days' imprisonment to run concurrently, suspended for 12 months.

Judgment below

19. In his full and careful judgment of 21 February 2019 Cobb J made declarations in relation to B's capacity to make decisions about, among other things, her residence, care, contact with others, sexual relations, and social media usage. He referred himself to the relevant provisions of the MCA and observed (at [20]) that the "strict decision-specific approach" required by the MCA produced anomalous results insofar as B could be assessed as having capacity in relation to one matter but not having capacity in relation to another closely related matter. Notwithstanding that result, he held that that was the law he had to apply in this case.

Capacity to decide on residence

20. Cobb J set out (at [26]) the following relevant information that B would need to be able to understand, retain and use or weigh in order to make a decision as to residence given by Theis J in LBX v K, L, M [2013] EWHC 3230 (Fam) (at [43]):

> "i) what the two options are, including information about what they are, what sort of property they are and what sort of facilities they have;
>
> ii) in broad terms, what sort of area the properties are in (and any specific known risks beyond the usual risks faced by people living in an area if any such specific risks exist);
>
> iii) the difference between living somewhere and visiting it;
>
> iv) what activities P would be able to do if he lived in each place;
>
> v) whether and how he would be able to see his family and friends if he lived in each place;
>
> vi) in relation to the proposed placement, that he would need to pay money to live there, which would be dealt with by his appointee, that he would need to pay bills, which would be dealt with by his appointee, and that there is an agreement that

> he has to comply with the relevant lists of "do"s and "don't"s, otherwise he will not be able to remain living at the placement;
>
> vii) who he would be living with at each placement;
>
> viii) what sort of care he would receive in each placement in broad terms, in other words, that he would receive similar support in the proposed placement to the support he currently receives, and any differences if he were to live at home; and
>
> ix) the risk that his father might not want to see him if P chooses to live in the new placement."

21. Cobb J held that B did have capacity to make decisions in relation to residence. He was most troubled by the application of criteria (vii) and (viii) to B, but held (at [27] and [28]) that she was able to understand who she would be living with and "in broad terms the care she would receive if she lived with Mr C", even though she had "not fully thought through the implications of a move". Although acknowledging the artificiality of doing so, he held further that the obvious risks posed to B by Mr C were more appropriately dealt with in a determination about her capacity to make decisions in relation to contact, rather than in relation to residence. He took the same approach in relation to care.

Capacity to make decisions about care

22. As to care, Cobb J again referred (at [29]) to Theis J's judgment in LBX for the following information relevant to decisions about care:

> "i) what areas she needs support with;
>
> ii) what sort of support she needs;
>
> iii) who will be providing her with support;
>
> iv) what would happen if she did not have any support or she refused it and,
>
> v) carers might not always treat her properly and that she can complain if she is not happy about her care."

23. He held (at [30] - [31]) that B lacked capacity because

> "… [she could not explain] why having a support worker was important to her to access the community; she could not recognise the importance of structure and routine in her day; she cannot identify the type or amount of support she needs in the home (personal hygiene, managing her medication, or cooking meals), or in managing her own behaviours; she denied the need for, or benefit of, her respite care home … She does not understand her own care needs on a day-to-day basis."

24. He held further that education would not assist B in understanding her care needs. He therefore made a declaration under section 15 that she does not have the capacity to make decisions about her care.

Capacity to make decisions about contact

25. Cobb J specified the following as relevant information for decisions as to contact identified in LBX:

> "i) Who they are, and in broad terms the nature of her relationship with them;
>
> ii) What sort of contact she could have with each of them, including different locations, differing durations and differing arrangements regarding the presence of a support worker;
>
> iii) The positive and negative aspects of having contact with each person. Theis J added "This will necessarily and inevitably be influenced by [P]'s evaluations. His evaluations will only be irrelevant if they are based on demonstrably false beliefs. For example, if he believed that a person had assaulted him when they had not. But [P]'s present evaluation of the positive and negative aspects of contact will not be the only relevant information. His past pleasant experience of contact with his father will also be relevant and he may need to be reminded of them as part of the assessment of capacity";
>
> iv) What might be the impact of deciding to have or not to have contact of a particular sort with a particular person;
>
> v) Family are in a different category; what a family relationship is."

26. Cobb J concluded (at [33]) that B lacked capacity to make decisions about contact because she refused to use and weigh the fact of Mr C's convictions in her decision-making, because she was unable to explain how she might distinguish between good and bad persons online, and because she firmly denied having contacted men online despite the fact she was known to have done so. He held further that no amount of "practicable help" was likely to enable B to develop capacitous decision-making in respect of contact, and he therefore made a declaration as to incapacity under section 15.

Capacity to decide to use social media

27. Cobb J referred to the relevant information for capacity to use social media as set out in his own judgment in Re A [2019] EWCOP 2, which he had heard the week prior to B's case. Re A concerned the use of social media by a young man with a learning disability and impairments in adaptive social functioning. Like B, Mr A had been sharing intimate photographs of himself with men he met online but, unlike B, he had also shown considerable interest in accessing extreme pornography and paedophilic pornography. Quoting his judgment in Re A, Cobb J set out (at [39]) the following list

of relevant information for assessing capacity to make a decision to use social media and the internet to communicate with other people:

> "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;
>
> 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;
>
> 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."

28. This list was formulated in response to the unique risks posed by social media and the internet – in particular, the risks of accessing certain kinds of extreme material ("content risk"); the risks of internet users participating in harmful activities ("conduct risk"); and the risk of users having contact with persons who might do them harm ("contact risk") (see [5] and [26] of Re A). Various points were made in Re A (at [29]) by way of elaboration and explanation of some of the matters in the list.

29. Applying those criteria to B, the Judge found that she did not understand who was a stranger on Facebook, and could not contemplate that people might lie online and might be capable of doing her harm. He concluded (at [40]) that she did not currently have capacity to decide to use social media for the purposes of developing or maintaining connections with others. He considered that attempts in the form of practicable help should be offered to enable her to acquire capacity. He therefore made an interim declaration under section 48.

Capacity to consent to sexual relations

30. Cobb J, having referred to relevant case law, said (at [43]) that the information relevant to making decisions in this area included the following:

> "i) the sexual nature and character of the act of sexual intercourse, the mechanics of the act;
>
> ii) the reasonably foreseeable consequences of sexual intercourse, namely pregnancy;
>
> iii) the opportunity to say no; i.e. to choose whether or not to engage in it and the capacity to decide whether to give or withhold consent to sexual intercourse;
>
> iv) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections;
>
> v) that the risks of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom."

31. Cobb J found that B had an adequate understanding in relation to criteria (i)-(iii). In relation to (iv) and (v), however, he considered that B's understanding of the risk of acquiring a sexually transmitted infection was fundamentally flawed because she regarded that risk as a matter of hygiene that could be avoided so long as her partner did not have a "dirty penis". He referred (at [45]) to her statement to a social worker that, as Mr C had a shower in his house "and he had a clean dick and showered every day", the risk would not arise. The Judge held that B therefore lacked understanding in relation to the last two pieces of relevant information.

32. There was evidence before the Judge that B's understanding of the risk of sexually transmitted infections had changed between different capacity assessments, and that she had had capacity on some previous occasions. He therefore made an interim order under section 48, and directed that B be provided with further education in relation to those risks, and reassessed once that assistance had been provided.

Grounds of appeal

33. The OS's grounds of appeal do not comply with CPR 52CPD para. 5, the requirements of which were recently emphasised by Hickinbottom LJ in Harverye v Secretary of State for the Home Department [2018] EWCA Civ 2848 at [56]-[57]. They do not identify as concisely as possible in a separate document the respects in which the judgment of Cobb J was wrong, and they include the reasons why the decision was wrong rather than confining those to the skeleton argument. So far as we have been able to identify the OS's grounds of appeal, they are as follows:

    Grounds 1 and 2: Cobb J erred in his formulation of the relevant information which B needs to be able to understand, retain and use or weigh for the purposes of making the decision to use social media and the internet by importing limbs (iii) (offence to others by sharing media) and (vi) (potential to commit crimes by sharing media) from the case of Re A when they were irrelevant to B's case. In so doing, he failed to strike an appropriate balance between protecting incapacitous individuals, and protecting their personal autonomy.

Ground 3: Cobb J erred in his formulation of the relevant information which B needs to understand, retain and weigh in order to have the capacity to consent to sexual relations by importing limbs (iii) (right to say no) and (v) (prevention of sexually transmitted infections by use of a condom).

34. The Local Authority cross-appeals on six grounds:

Ground 1: Cobb J reached a decision that B had capacity to make her own decisions about residence without following the steps required in the statutorily mandated decision making process; in particular, by failing to address the questions of whether B had the ability to understand, retain and use or weigh the relevant information, and by failing to address whether B was engaging with support offered to her to outline the risks of living with Mr C.

Ground 2: Cobb J failed to identify all of the foreseeable consequences of B going to live with Mr C.

Ground 3: Cobb J wrongly treated the question as to whether B had capacity to make decisions about (a) care services; (b) who she should have contact with; (c) her access to social media; and (d) sexual relations with Mr C or others as not being relevant information in relation to the decision about residence in this case.

Ground 4: Cobb J wrongly treated the list of relevant information identified in LBX as being an exclusive list of factors and thus failed to take account of other information which he ought to have treated as relevant.

Ground 5: Cobb J erred in holding that B understood, in broad terms, the care she would receive when living with Mr C. This conclusion was contrary to the evidence before the Judge, and he gave no reasons for departing from it.

Ground 6: Cobb J reached contradictory conclusions in relations to B's capacity to make decisions about residence and her capacity to make decisions in relation to care, contact, social media and sexual relations.

Discussion

35. Cases, like the present, which concern whether or not a person has the mental capacity to make the decision which the person would like to make involve two broad principles of social policy which, depending on the facts, may not always be easy to reconcile. On the one hand, there is a recognition of the right of every individual to dignity and self-determination and, on the other hand, there is a need to protect individuals and safeguard their interests where their individual qualities or situation place them in a particularly vulnerable situation: comp. A.M.V v Finland (23.3.2017) ECrtHR Application No.53251/13.

36. The MCA ss.1, 2 and 3 make clear that the determination of capacity under the MCA Part 1 is to be determined by reference to a particular decision. The determination of capacity is "decision-specific": York City Council v C [2013] EWCA Civ 478, [2014] 2 WLR 1, at [35], endorsed in IM v LM [2014] EWCA Civ 37 at [51]. In determining capacity, all decisions, whatever their nature, fall to be evaluated within the clear structure of the MCA ss.1 to 3. Those provisions reflect the "functional" approach

(an assessment of whether an individual is able, at the time when a particular decision has to be made, to understand its nature and effects) recommended by the Law Commission in its final report on Mental Capacity (Law Com No. 231), and the rejection of an "outcome" approach (which focuses on whether an individual's final decision is inconsistent with conventional values or is one with which the assessor disagrees).

37. As has frequently been said, in applying those provisions the court must always be careful not to discriminate against persons suffering from a mental disability by imposing too high a test of capacity: see, for example, PH v A Local Authority [2011] EWHC 1704 (Fam) at [16xi].

Capacity to decide to use social media

38. Mr Sam Karim QC, for the OS, referred us to a number of texts which emphasise the importance of access to the Internet, for example as enabling a person to enjoy freedom of expression and as an instrument for managing a person's identity, lifestyle and social relations. He submitted that Articles 8 and 10 of the European Convention on Human Rights were clearly engaged as well as the 32nd UN Resolution of 27 June 2016 on the promotion, protection and enjoyment of human rights on the Internet.

39. We have set out at [27] above the list of relevant information formulated by Cobb J for determining capacity to make a decision to use social media for the purposes of developing or maintaining connections with others. The OS objects generally to the importation to B's case of precisely the same list of information as Cobb J considered relevant in Re A even though the facts of the two cases are very different. Mr Karim emphasised that, unlike B, A searched compulsively for pornography and had developed a considerable interest in sites showing paedophiliac and other extreme, even illegal, sexual activity; and there was evidence of a risk that he would not just be a victim but could become a perpetrator of offences concerning Internet imagery. There was no evidence of any such conduct or inclination on the part of B.

40. Mr Karim submitted that, for those reasons, the information in (iii) and (vi) of the list in [28] of Cobb J's judgment in A, which Cobb J quoted in [37] of his judgment in the present case, are irrelevant to B. For convenience, we set them out here again as follows:

> "(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;"
>
> "(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;"

41. Cobb J elaborated on those parts (iii) and (vi) in [29] of his judgment in A, quoted in [37] of his judgment in the present case, as follows:

> "(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."

42. Mr Karim submitted to us, as he had before Cobb J, that it would be simpler and clearer to distil the relevant information for a decision about the use of social media into the following three limbs: (1) that information (in all its forms, whether a text, picture message or video, including all personal information) may be seen by the world at large if shared on a public account; (2) that, once the information is shared online, it is no longer in your control; and (3) that there is a possibility that a connection online may not be the same person as they identify themselves and could cause you harm.

43. The fundamental problem with this ground of appeal is that, as Mr Karim confirmed in his oral submissions, the OS does not challenge Cobb J's finding that B lacks capacity in relation to her desired use of social media. There is, therefore, no appeal by the OS from anything in Cobb J's order in relation to B's use of social media. The OS's objection is to Cobb J's reasoning and not to his order. It is a basic principle, however, that an appeal is against an order and not merely the reasoning of the judge in support of his or her order to which no objection is made.

44. In the circumstances, we consider that we should confine our observations on this part of the OS's appeal to the following short points. We see no particular advantage in Mr Karim's tripartite formulation of the relevant information over Cobb J's guideline. Whether the list or guideline of relevant information is shorter or longer, it is to be treated and applied as no more than guidance to be adapted to the facts of the particular case. Mr David Lock QC, for the Local Authority, accepted that Cobb J's guideline would be applied in that way in relation to the making of a final declaration concerning B under the MCA s.15. He confirmed that, if the facts are that B never has

done, does not now do, does not intend to do in the future and is unlikely to do in the future the things mentioned in (iii) and (vi) of Cobb J's list of relevant information, then those parts of the list will be irrelevant.

45. It must also be borne in mind, in relation to the use of social media, as indeed to all other decisions in respect of which it is assessed that B is incapacitous, that those responsible for the care and treatment of B must act in B's best interests pursuant to the MCA s.1(5) and that those best interests may be appropriately served by allowing the act in question subject to appropriate safeguards.

Capacity to consent to sexual relations

46. So far as concerns the third ground of appeal, the OS submits that Cobb J's interim declaration of incapacity pursuant to the MCA s. 48 was flawed because he took into account irrelevant matters.

47. What comprises relevant information for determining an individual's capacity to consent to sexual relations has developed and become more comprehensive over time. It is not necessary, for the purpose of this appeal, to chart the history of that development: see generally Re MAB [2006] EWHC 168 (Fam) at [68] ff, and D Borough Council v AB [2011] EWHC 101 (COP).

48. Cobb J's list of relevant matters, which we have set out in [30] above, is divided into five parts. The OS objects to (iii) and (v) and to the formulation in (iv). Again, for convenience, we set out those parts, as follows:

> "(iii) the opportunity to say no; i.e. to choose whether or not to engage in it and the capacity to decide whether to give or withhold consent to sexual intercourse."
>
> "(iv) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections;"
>
> "(v) that the risks of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom."

49. So far as Cobb J's guideline is concerned, it is not in dispute on this appeal that the test for capacity to consent to sexual relationships is general and issue specific, rather than person or event specific. The application of that test in other cases is, however, a live matter as it is currently under consideration by Hayden J in London Borough of Tower Hamlets v NB [2019] EWCOP 17. In that case the judge observed in his interim judgment (at [12]) that there was only one individual with whom it was really contemplated that NB was likely to have a sexual relationship, her husband of 27 years; and it therefore seemed to the judge entirely artificial to be assessing her capacity in general terms when the reality was entirely specific. He added (at [13]) that it might be that NB's lack of understanding of sexually transmitted disease and pregnancy might not serve to vitiate her consent to have sex with her husband. There was no reason to suggest that her husband had had sexual relations outside the marriage and there was no history of sexually transmitted disease. Hayden J has

reserved his judgment on the issue. Another example would be a post-menopausal woman, for whom the risk of pregnancy is irrelevant. In IM (at [[75]-[79] the Court of Appeal held that, by contrast with the criminal law where the focus, in the context of sexual offences, will always be upon a particular specific past event, in the context of mental capacity to enter into sexual relations the test is general and issue specific. The argument before Hayden J in London Borough of Tower Hamlets v NB was presumably that the conclusion in IM does not preclude the tailoring of relevant information to accommodate the individual characteristics of the person being assessed. We heard no argument on these points and do not need to decide them on the present appeals since it was not contended by the OS that anything in Cobb J's guideline was inapplicable because of B's personal characteristics. The criticism of the OS is that parts (iii), (iv) and (v) in their present form are inapposite in all cases.

50. The OS relies upon the judgments in MAB, LBL v RYJ [2010] EWHC 2665 (COP) at [58] and D Borough Council v AB as authority that the relevant information comprises only the following: a sufficient rudimentary knowledge of what the act comprises and of its sexual nature to enable B to decide whether to give or withhold consent, and a basic knowledge about the risks of pregnancy and sexually transmitted diseases.

51. We understood Mr Karim to submit that part (iii) of Cobb J's list confuses the relevant information for determining the capacity to consent to sexual relations with the actual decision whether or not to give consent. This does not seem to us to be a point of any substance on the correctness of Cobb J's decision that B lacked capacity to consent to sexual relations. Mr Karim referred us to the observation of Parker J in The London Borough of Southwark v KA [2016] EWCOP 20 at [52] that "consent is not part of the 'information' test as to the nature of the act or its foreseeable consequences. It goes to the root of capacity itself". Her point, which is plainly correct, was that awareness of the ability to consent to or refuse sexual relations is more than just an item of relevant information. As she elaborated at [53]:

> "The ability to understand the concept of and the necessity of one's own consent is fundamental to having capacity: in other words that "P knows that she/he has a choice and can refuse"."

The same point had previously been made by Mostyn J in the London Borough of Tower Hamlets v TB [2014] EWCOP 53 at [39]-[41].

52. Moreover, the point seems to be an entirely arid one for the purpose of this appeal as Dr Rippon's report makes clear that B did understand perfectly well that consent could be refused and that to have sexual relations without consent is rape. As Dr Rippon recorded at paragraph 6.14 of her report:

> "At interview, [B] told me that, if a person did not wish to have sex with another individual, they could say "no". It was against the law to force a person to have sex and this was called rape."

53. Mr Karim submitted that part (iv) of Cobb J's list was incorrect insofar as Cobb J considered that B lacked capacity because she thought that sexually transmitted infections are caught through a lack of personal hygiene and did not understand that infection is the result of transmissible germs. Dr Rippon was clear in both her report

and in her oral evidence that B did not understand that sexually transmitted infections were caused by "germs" and was unable to explain how sexually transmitted infections were passed on during sex. As Dr Rippon recorded in part 7.3 of her report:

> "I do not believe [B] understood that infections were caused by "germs". Rather, she believed that sexually transmitted infections equated to lack of personal hygiene and [Mr C] could not have such infection because he took a shower every day and (in her words) "did not have a dirty dick"."

54. Mr Karim, relying particularly on the judgments of Macur J (as she then was) in LBL at 58, Mostyn J in D Borough Council v AB at [42], Hedley J in A Local Authority v H [2012] [2012] EWCH 49 (COP) at [23], the Court of Appeal in IM at [18] and [83] and Parker J in The London Borough of Southwark v KA at [41] submitted that the authorities go no further than requiring that there is an appreciation of a connection between sexual intercourse and a potential risk to health. He said that B had that appreciation. He relied upon Dr Rippon's statement in her report that "[B] could tell me that having sex could lead to disease" and Dr Rippon's evidence in cross examination that B had a basic understanding that you can get disease from intercourse.

55. That criticism of Cobb's J's application of part (iv) of his list is connected to Mr Karim's submission that there is no requirement that capacity also depends upon an appreciation, as articulated in part (v) of Cobb J's list, that the risk of sexually transmitted infections can be reduced by taking precautions, such as the use of a condom.

56. We do not agree with those criticisms of (iv) and (v) of Cobb J's guideline. Section 3(4) of the MCA provides that information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another. That is reflected in paragraph 4.16 of Chapter 4 of the Code of Practice, which provides that relevant information includes the nature of the decision, the reason why the decision is needed, and the likely effects of deciding one way or another or making no decision at all.

57. In IM at [80] the Court of Appeal, approving the approach of Bodey J in Re A (Capacity: Refusal of Contraception) [2010] EWHC 1549 (Fam), [2011] Fam 61 at [63] and [64], said that there must be a practical limit on what needs to be envisaged as "reasonably foreseeable consequences" in the MCA s.3(4) and that, in the context of consent to sexual relations, "the notional decision-making process attributed to the protected person … should not become divorced from the actual decision-making process carried out in that regard on a daily basis by persons of full capacity". The risk of catching a sexually transmitted infection through unprotected sexual intercourse, and the protection against infection provided by the use of a condom, satisfy that requirement. Those are facts well known among all sexually active generations. Accordingly, we consider that, in accordance with the MCA s.3(1)-(4), the ability to understand and retain those facts at least for a period of time and to use or weigh them as part of the decision whether to engage in sexual intercourse are essential to capacity to make a decision whether to have sexual intercourse. What is critical is not that a person, whose capacity is being assessed, is permanently aware of how sexually transmitted infections may be caught and that protection may be

provided by a condom. The assessment is not a general knowledge test. Rather it is an assessment of whether the person being assessed has the ability to understand those matters when explained to him or her and to retain the information for a period of time and to use or weigh it in deciding whether or not to consent to sexual relations.

58. We are not bound by any of the authorities cited to us to reach a different conclusion. None of them state expressly that capacity is sufficiently demonstrated by a mere awareness that some kind of ill health may result from sexual relations even if that awareness is no more than a wholly misguided notion of how or why the ill health is caused and has nothing to do with what are in fact sexually transmitted infections or how they may be caused. We respectfully disagree with Parker J in London Borough of Southwark v KA at [72] that it is not necessary to understand condom use. The only practical purpose of understanding that sexually transmitted infections can be caused through sexual intercourse is to know how to reduce the risk of infection since the purpose cannot be to encourage abstinence from intercourse completely. The point was not directly considered in any of the other High Court cases. So far as concerns IM, the one Court of Appeal authority relied upon by Mr Karim on this issue, the point did not arise. In that case the first instance judge, whose judgment was upheld by the Court of Appeal, decided that LM had "a basic understanding of the risks of sexually transmitted diseases", which is precisely what B did not have in the present case.

59. There are those who would object that many capacitous persons have unprotected sexual intercourse. Indeed, the MCA s.1(4) provides that a person is not to be treated as unable to make a decision merely because he makes an unwise decision. As Peter Jackson J said in Heart of England NHS Foundation Trust v JB [2014] EWHC 342 (COP) at [7], the temptation to base a judgement of a person's capacity upon whether they seem to have made a good or bad decision, and in particular upon whether they have accepted or rejected medical advice, is absolutely to be avoided "as it would allow the tail of welfare to wag the dog of capacity". It is important always to bear in mind, however, as stated in paragraph 4.40 of Chapter 4 of the Code of Practice, that there is a fundamental and principled distinction between an unwise decision, which a person has the right to make, and decisions based on a lack of ability to understand and weigh up information relevant to a decision, including the foreseeable consequences of a decision. As the Code of Practice says, information about decisions the person has made based on a lack of understanding of risks or inability to weigh up the information can form part of a capacity assessment, particularly if someone repeatedly makes decisions that put themselves at risk or result in harm to them.

60. For those reasons, we dismiss this ground of appeal.

61. We would add the following by way of a brief postscript to this part of the appeal. The evidence shows that B had been assessed on a number of previous occasions as having capacity to consent to sexual relations. That was noted in Dr Rippon's report. The evidence of Rebekah Wallbank, a social care assessor and Best Interest assessor, in her statement of 23 January 2019 was that in October 2017 B was able to understand and retain information on sexually transmitted diseases. The MCA s.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 a decision. Further, the MCA s.1(3) provides that 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. In her oral evidence Dr Rippon accepted that she had not asked B about condoms. At one point in his oral submissions Mr Lock appeared to admit that there had been a breach of the MCA s.1(3) because Dr Rippon had not reminded B how sexually transmitted infections were passed and the role of condoms in reducing the risk of infection. We make no observations and no findings in relation to that aspect because it does not form a ground of appeal and only arose in the course of exchanges between Mr Lock and ourselves in the course of the hearing. Further work on whether B has sufficient understanding of sexually transmitted infections and how to reduce the risk of them will no doubt form part of the continuing engagement with B prior to a final decision on capacity to consent to sexual relations under the MCA s.15.

Capacity to decide on residence

62. The Local Authority criticises Cobb J's use and application of the list of relevant information set out in Theis J's decision in LBX at [43], which we have reproduced at [20] above. So far as concerns the appropriateness of the list, as in the case of the list specified by Cobb J in relation to a decision to use social media, we see no principled problem with the list provided that it is treated and applied as no more than guidance to be expanded or contracted or otherwise adapted to the facts of the particular case.

63. At the heart of the Local Authority's appeal against Cobb J's decision that B has capacity to make decisions in relation to residence is the criticism that the Judge failed to take into account information which, in accordance with the MCA s.3(1) and (4), it was necessary for B to be able to understand, to retain and to use or weigh as part of the process of making a decision, including the reasonably foreseeable consequences of deciding one way or another or failing to make the decision. The Local Authority says that the Judge's conclusion on B's capacity to make decisions on residence, in particular whether to move to Mr C's property or to remain at her parents' home or to move into residential care, was fundamentally flawed in (1) failing to take into account relevant information relating to the consequences of each of those decisions, and (2) producing a situation in which there was an irreconcilable conflict with his conclusion on B's incapacity to make other decisions, and so (3) making the Local Authority's care for and treatment of B practically impossible. Mr Lock submitted that the Judge's flawed conclusion followed from his approach in analysing B's capacity in respect of different decisions as self-contained "silos" without regard to the overlap between them.

64. We agree with the Local Authority. The point is simply made. We have already drawn attention to the provision in section 3(4) of the MCA that information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, and to paragraph 4.16 of Chapter 4 of the Code of Practice, which provides that relevant information includes the likely effects of deciding one way or another or making no decision at all. The Judge stated (at [27] and [28]), however, that the implications of living with a particular person (here, Mr C), and the risks which this posed, were more appropriately considered under decisions on "care" and contact than residence. He further stated that the evidence showed that B did understand in broad terms the care she would receive if she lived with Mr C in contrast to living at home or in residential care, even though he concluded elsewhere in his judgment that B did not have capacity to make decisions about her care. In the circumstances, having observed (at [27]) that Dr Rippon

accepted that B had a "basic understanding" in respect of all of the nine areas covered by Theis J's test, the Judge was able to reach his conclusion (in [28]) that the Local Authority had failed to discharge the burden of proving that B did not have capacity.

65. Turning specifically to B's capacity to decide whether or not to move to live with Mr C, Cobb J's decision (in [32]-[33]) to make a final declaration under the MCA s.15 that B did not have capacity to make a decision as to the persons with whom she has contact was plainly relevant. That conflicted directly with the Judge's conclusion that B had capacity to decide to move to live with Mr C. The point is reinforced by the fact that Cobb J had already granted an interim injunction prohibiting Mr C from having any contact with B. Permitting B to move to live with Mr C would presumably have placed both him and B in contempt of court for breach of the injunction. The question whether B was able to understand those consequences and to use or weigh them in a decision about whether to reside with Mr C was not explored in the judgment.

66. Further, Cobb J (correctly, as we hold) decided (at [46]) that he would make an interim declaration under the MCA s.48 that B does not have capacity to consent to sexual relations. One of B's explicit motivations for moving to live with Mr C is to have sexual relations with him and, it would seem, to have his baby. Again, there is a direct conflict with the Judge's interim finding that B has capacity to decide to live with Mr C in his home.

67. Moreover, as we have said, there is a direct conflict between, on the one hand, Cobb J's conclusion that B had a sufficient understanding of the care she would receive if she lived with Mr C, and (by implication) that she was able to use or weigh that information as part of the process of deciding whether to live with him, and, on the other hand, the Judge's final determination that B did not have capacity to make decisions about her care.

68. Turning specifically to B's capacity to decide whether or not to continue to live at her parents' home rather than to move to residential care, as the Local Authority proposes, Cobb J appears to have addressed this only with a passing observation (at [28]) that "[B] does understand in broad terms the care she would be receiving if she lived with Mr C in contrast to living at home or in residential care". In view of the Judge's final determination that B did not have capacity to make decisions about her care, such limited understanding as B had as to her care needs could not properly form the basis for a conclusion that she had capacity to decide to reside at her parents' home rather than residential care approved by the Local Authority.

69. For those reasons, we allow the appeal of the Local Authority.

Conclusion

70. For the reasons above, we dismiss the appeal of B and allow the appeal of the Local Authority.