



Neutral Citation Number: [2024] EWCA Civ 1248

Case No: CA-2022-002229-C

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS
CHAMBER)
UPPER TRIBUNAL JUDGE PEREZ

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/10/2024

Before :

LADY JUSTICE NICOLA DAVIES
LORD JUSTICE STUART-SMITH
and
MR JUSTICE COBB

Between :

TENDRING DISTRICT COUNCIL

Appellant

- and -

(1) AB

Respondents

(a protected party, by his litigation friend THE OFFICIAL
SOLICITOR)

- and -

(2) SECRETARY OF STATE FOR WORK AND PENSIONS

- and -

(3) CD

Kelvin Rutledge KC (instructed by **Tendring Council**) for the **Appellant**
Tom Royston (instructed by **Bindmans**) for the **Official Solicitor**
The Third Respondent appeared in person (CD)

Hearing date: 15 October 2024

Approved Judgment

This judgment was handed down remotely at 2pm on 21 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Nicola Davies, Lord Justice Stuart-Smith and Mr Justice Cobb:

1. This is the judgment of the court.
2. Tendring District Council ('Tendring') brings this appeal in respect of a decision by the Upper Tribunal ('UT') dated 14 July 2022. A Notice of Appeal was issued on 23 November 2022, permission was granted by Coulson LJ on 13 July 2023. The appeal currently proceeds against three respondents: (1) AB, (2) the Secretary of State for Work and Pensions ('SSWP') and (3) AB's wife, CD. The SSWP has taken no part in this appeal, the history of which is lengthy.
3. At its hearing on 15 October 2024 the court made a series of orders. They are attached as Appendix 1 to this judgment, which contains our reasons for the orders made.
4. In summary, the facts are that Tendring paid housing benefit to AB from April 2000 to February 2012 in respect of a property in Clacton-on-Sea. At all material times, AB and CD who are married, owned the property and were not entitled to this benefit. In July 2012, Tendring raised an overpayment decision in the sum of £67,421.79. In September 2012 Tendring notified AB that he and his wife were "jointly and severally liable" as a couple for the repayment of the benefit. In response AB and CD disputed this. In relation to these matters, CD was prosecuted for two offences of dishonesty, following which in February 2014 she was convicted and received a suspended prison sentence.
5. In 2007 AB suffered a stroke which has resulted in persistent neurological symptoms. Deputyship was granted to CD and her son by the Court of Protection in 2013.
6. In 2014, AB appealed Tendring's decision to seek recovery of the housing benefit payments. On 19 May 2015, the First Tier Tribunal ('FTT') upheld Tendring's decision. The UT heard AB's appeal of the FTT's decision in 2017 and remitted the case back to the FTT for re-hearing. Following a second hearing in 2018, the FTT found that both AB and CD were liable for the overpayment. The FTT gave permission to appeal on the issue of recoverability of housing benefit from CD.
7. For a second time, the UT were seized of this matter, CD was not a party to the appeal. The UT ruled that whilst Tendring was entitled to recover the overpayment from AB (a finding which AB has not appealed), it was not able to do so from CD as Tendring had not made a decision to recover sums from CD and any failure to do so had not been cured by her participation by supporting her husband in the proceedings. The judge also found that CD's convictions (para 4 above) were not relevant to the matters before the UT.
8. Tendring appealed the UT decision to this court. In granting permission, Coulson LJ stated that:

“...the appeal raises important points of principle, in particular concern with notification of a decision to recover from someone other than a person to whom the housing benefit was paid, and the issue as to the spent conviction, in circumstances

where it was not spent at the time of the first hearing but was at the time of the appeal.”

9. In a judgment dated 8 November 2023, by which he gave his reasons for joining CD as a party to these proceedings, Coulson LJ stated (para 14) in respect of the ongoing appeal that:

“The position in respect of (AB) is almost an irrelevance because he has already been found liable and there is no appeal in respect of his position; indeed, I suggested that, if (CD) was added as a respondent, Tendring should give some thought to abandoning the appeal in so far as it relates to (AB).”
10. In an application sealed on 20 December 2023, Tendring sought, *inter alia*, permission to discontinue the whole of its appeal against AB, whilst continuing the whole of its appeal against the SSWP and CD. In its application, Tendring noted that the standard Notice of Discontinuance (Form N279) was inapt to deal with the situation where an appellant wished to discontinue an appeal against one party but continue its appeal against the remaining parties. Instead, Tendring sought permission to rely upon a modified version of the form. In written objections dated 5 January 2024, CD objected to Tendring’s application. Coulson LJ considered Tendring’s application and the representations of CD and ordered that Tendring’s request for permission to discontinue the appeal against AB should be listed with the substantive appeal.
11. At a hearing of this court on 8 February 2024, (Nicola Davies LJ, Lewis LJ and Cobb J) the issue of AB’s capacity to litigate was raised and considered by the court which ordered, *inter alia*, that the Official Solicitor should provide a determination as to whether she was willing to act for AB in the discontinuance application and, if refused, on the appeal itself. Following a further case management hearing on 27 March 2024 before the same constitution of the court, Mr Christian Webb an independent mental capacity assessor was instructed and provided a report dated 14 May 2024 which concluded that AB lacks capacity to litigate and requires a litigation friend to act on his behalf. Further, Tendring gave an undertaking in these terms: that it would pay all costs, charges and expenses which may be incurred by the Official Solicitor incidental to her duties as litigation friend on behalf of AB on the following specific issues namely (i) Tendring’s application for discontinuance of the appeal against AB, including any costs incurred in resisting the application if so advised, (ii) if that application is refused, on the substantive appeal itself.
12. In August 2024 Nicola Davies LJ directed that Tendring’s application to discontinue against AB be listed on 15 October 2024 and the substantive appeal be listed on 23 October 2024.
13. At the hearing on 15 October 2024 to which this judgment relates, Tendring made two applications to the court namely: (i) permission to rely on the modified form of Notice of Discontinuance pursuant to CPR 38.3(5); and (ii) an order pursuant to CPR 21.3(4) regularising retrospectively all “steps” taken in the appeal in respect of AB prior to the Official Solicitor’s appointment.

14. At the hearing Mr Rutledge KC appeared on behalf of Tendring, Mr Royston appeared on behalf of the Official Solicitor and CD appeared via CVP in person. The court is grateful to all for their contributions.
15. At the hearing a number of separate issues were before the court namely: (i) the capacity of AB to litigate and the appointment of the Official Solicitor to act as his litigation friend; (ii) Tendring's application to discontinue against AB; (iii) Tendring's application for an order retrospectively regularising all steps taken in the appeal in respect of AB prior to the Official Solicitor's appointment; (iv) in the event that AB continued in the proceedings, an order for costs protection.

AB's capacity to litigate.

16. The court is grateful to Mr Webb for his clear and detailed assessment of AB which it accepts. It is unnecessary to reproduce the detail of the assessment in this judgment given the uncontroversial nature of Mr Webb's opinion namely that as result of the serious stroke which AB suffered in 2007 he is unable to understand, retain and/or weigh the information necessary to litigate these proceedings. In so concluding Mr Webb appropriately referenced his report to the provisions of sections 1 - 4 of the Mental Capacity Act 2005.
17. The Official Solicitor, having considered Mr Webb's report and the documents filed with the appeal, indicated her willingness to act as AB's litigation friend having received the undertaking from Tendring on 12 June 2024 set out in paragraph 11 above. The court is grateful to the Official Solicitor for consenting to act for AB and to Tendring for underwriting those costs.
18. Tendring accepts: (i) Mr Webb's assessment of AB's capacity; (ii) that AB lacks capacity to litigate and is therefore a protected party for the purposes of CPR 21; and (iii) that a litigation friend should be appointed to conduct these proceedings on his behalf pursuant to CPR 21.3(3).
19. Upon the basis of Mr Webb's conclusion that AB lacks the capacity to litigate, we are satisfied that he is a protected party for the purpose of CPR 21 and that pursuant to CPR 21.3(3) the Official Solicitor should be appointed to act as litigation friend on behalf of AB. Accordingly, the court ordered at the conclusion of this first issue that the Official Solicitor is appointed to act as litigation friend on behalf of AB upon the terms of the undertaking as to costs from the appellant.

Tendring's application to "regularise" all steps by the courts taken prior to the mental capacity assessment of Mr Webb dated 14 May 2024.

20. Tendring contends that CPR 21.3(2) applies and that 'retrospective permission' is, or may be, required for all the steps which have been taken by Tendring thus far in this appeal. Mr Rutledge seeks to rely upon CPR 21.3(4): "Any step taken before a child or protected party has a litigation friend has no effect unless the court orders otherwise" and it follows, to obtain this court's permission. Mr Rutledge relied upon the judgment of Kennedy LJ in *Masterman-Lister v Brutton & Jewell* [2003] 1 WLR 1511:

“Provided everyone has acted in good faith and there has been no manifest disadvantage to the party subsequently found to have been a patient at the relevant time I cannot envisage any court refusing to regularise the position. To do otherwise would be unjust and contrary to the overriding objective of the Civil Procedure Rules, but in any given case the ultimate decision must depend on the particular facts”.

21. It is Tendring’s submission that it has acted in good faith, particularly given the presumption of capacity and the poor quality of the capacity evidence filed prior to Mr Webb’s report, that AB had suffered no manifest disadvantage and that it would be just to retrospectively authorise the steps.
22. Tendring also relies upon written questions which it sent to Mr Webb following his report. In his report Mr Webb identified material upon which he had relied which included a “medical assessment of capacity” dated 3.7.2017 by AB’s then general practitioner (‘GP’), an order of HHJ Maloney QC dated 11.8.2017 made in charging order proceedings in the county court which determined that for the purpose of those proceedings AB had, for the entirety of the proceedings “lacked the mental capacity to conduct or take part in litigation on his own behalf” and an update from AB’s GP practice dated 9.8.2023 by another doctor. The GP assessment in July 2017 stated that it was “extremely unlikely that (AB’s) brain function will improve in the future” and that he had “difficulty in retaining information.” This was echoed by the GP in August 2023, albeit that it does not appear to be a new assessment.
23. Following receipt of Mr Webb’s report and pursuant to CPR 35.6(1) Tendring asked written questions of Mr Webb firstly in respect of the documents referred to in the previous paragraph. It sought confirmation as to whether Mr Webb agreed or disagreed with the views expressed in those documents and whether he agreed or disagreed with the view expressed by the Court of Appeal at the hearings in 2024 when it expressed doubt as to whether the previous evidence of incapacity, taken alone, was sufficient to rebut the statutory presumption of capacity. Mr Webb replied in these terms:

“I have not been instructed to agree or disagree with the Court’s view that the previous assessments were not sufficient to rebut the presumption of capacity, and I would not presume to do so. I have noted as matters of fact what those documents conclude, and I have included mention of them for context and because they were provided to me on instruction with the agreement of the Court. I accepted this instruction on the basis that the Court was not yet satisfied and it required current confirmation.

The documents in question provide useful context and history, and the court sought to include them in the list of documents to be provided to me. However, in my view, any assessment of capacity based solely on historical evidence would not be in accordance with the MCA in determining *current capacity* i.e. documents cannot, in isolation, confirm or refute (AB’s) mental

capacity “at the material time”. (section 2(1) MCA 2005 as to (1))

If I had been approached to assess (AB’s) current mental capacity on the basis solely of the previous evidence of incapacity alone, then I would not have felt able to reach a valid conclusion about current litigation capacity (even on the balance of probabilities) and I would not have felt able to accept the instruction.”

24. On 14 October 2024 Tendring served a “NOTE” for the hearing. It stated that following service of the Official Solicitor’s skeleton argument, open discussions had taken place between representatives for Tendring and those for the Official Solicitor as a result of which, “common ground” had been found on a number of matters which included:

“ (1) In the light of Mr Webb’s report dated 14 May 2024, [AB] is a protected party for the purposes of CPR 21 and must therefore have a litigation friend to continue to conduct these proceedings on his behalf.

(2) The OS is both a fit and proper person to act as litigation friend for [AB] and has consented to act for him.

(3) The Court should accordingly appoint the OS to act as [AB’s] litigation friend for the purposes of (i) TDC’s application for discontinuance of the appeal against [AB] and (ii) if that application is refused, on the appeal itself.

....

(5) [AB] is not to be treated as a protected party prior to 14 May 2024. Consequently, all steps taken in the proceedings prior to that date have effect.

(6) Steps taken between 14 May 2024 and the OS’s appointment as litigation friend should be given effect pursuant to CPR 21.3(4).”

25. This position was confirmed to the court by counsel on behalf of Tendring and the Official Solicitor. It is of note that at the hearing CD indicated, and has previously indicated, a desire to revisit orders made against AB.

26. Following the court’s appointment of the Official Solicitor to act as litigation friend on behalf of AB, it is counsel for the Official Solicitor who represents AB. Mr Royston informed the court that on the ‘regularisation’ of the previous ‘steps’ taken a pragmatic approach had been adopted. He confirmed that there was “firm evidence” in the report of Mr Webb as to AB’s current lack of capacity and noted that past capacity was not a focus of Mr Webb’s report. Mr Royston stated that the Official Solicitor was concerned about costs and proportionality and had asked herself the question “Is it in AB’s best interest to revisit earlier decisions?” The Official Solicitor

had concluded that it was not in AB's interest to revisit earlier decisions and whilst understanding CD's concerns, she did not invite the court to revisit any previous decisions.

27. We agree with the views expressed by both counsel that the focus of Mr Webb's report was on current capacity and an uncontroversial conclusion was reached on that issue. As to past capacity, the court had previously raised the question of whether there was sufficient evidence to rebut the statutory presumption of capacity, indeed it was a reason why the instruction of a mental capacity assessor was required. The supplementary questions posed by Tendring to Mr Webb reflect the concern of the court namely that prior to Mr Webb's report there was insufficient evidence to rebut the statutory presumption of AB's capacity and that was addressed by Mr Webb. The common ground identified by Tendring and the Official Solicitor namely that earlier decisions should not be revisited is not binding on the court but it is one with which we agree. There is no sound evidential basis to revisit earlier decisions. Accordingly the court determines that AB is not to be treated as a protected party prior to 14 May 2024. Consequently, all steps taken in the proceedings to that date have effect. Further steps taken between 14 May 2024 and the Official Solicitor's appointment as litigation friend are given effect pursuant to CPR 21.3(4).

Discontinuance

28. Tendring applies pursuant to CPR 38.3(5) for permission to rely on the Notice of Part-Discontinuance of Appeal dated 15 December 2023. CPR 38.1(1) states: "The Rules in this Part set out the procedure by which a claimant may discontinue all or part of a claim. A "claim" includes the cause of action or part of one." The Official Solicitor contends that CPR 38 is not the correct rule as this is an appeal and not a claim. There is no authority as to what constitutes "a claim" save that in the footnote to Part 38 in the 2024 edition of the White Book it is stated that a claim is to be distinguished from a remedy: *Glazi v Christoforou* [2019] EWHC 670 (Ch). Tendring notes that CPR 38.6 and 38.7 refer to "proceedings" and contends that CPR 38.1(1), 38.6 and 38.7 would encompass an appeal.
29. The Official Solicitor's preferred 'option' to discharging AB as a party in these proceedings is pursuant to CPR 19 namely a change of parties. CPR 19.2(3) provides that the court may order any person to cease to be a party if it is not desirable for that person to be a party to the proceedings. The Official Solicitor submits that the court should consider whether it is "desirable" for AB to cease to be a party. The assessment of desirability should be made in the light of the overriding objective of enabling the court to deal with cases justly and at proportionate cost. Key factors relevant to the desirability of AB being removed as a party are (i) whether he is or may be affected by the appeal outcome and (ii) the positions of the parties as to whether they want AB to continue as a party.
30. The Official Solicitor accepts that AB's rights are not directly affected by the appeal. He has not attempted to challenge the findings of the tribunals below that overpaid housing benefit is recoverable from him and Tendring's appeal against the UT in respect of CD would not alter that finding. The only basis upon which AB would or may be affected by the outcome of the appeal is indirectly in that he may benefit financially from the appeal being dismissed as it is possible that the appellant would be unable to recover overpaid housing benefit from CD which would lead to less

money being recovered, or recovered more slowly, from the couple. If the appellant succeeded on the appeal and obtained its costs, which could include the costs incurred by its undertaking to the Official Solicitor, that of itself would have very significant financial consequences for the couple as the costs may be more than the amount of overpaid benefits.

31. Subjectively, the position is that Tendring does not want AB to continue as a party but CD wishes AB to continue as one. The Official Solicitor contends, and we agree, that most weight should be attached to AB's position as it is his participation which is at issue. Critically, the Official Solicitor has decided, after careful consideration of AB's ascertainable wishes, feelings, beliefs and values and all the circumstances of the case, that it is not in AB's best interests to seek to continue as a party. If the appeal succeeded, AB could be at risk of costs being sought from him, his continuance as a party is likely to result in the costs sought from his wife being greater than otherwise they would be. Thus subject to the issue of whether the court would be assisted by the Official Solicitor continuing to support AB as a party if the court felt it would benefit from adversarial argument at the substantive appeal and was willing to make an order protecting AB against costs risks, the Official Solicitor invites the court to discharge AB as a party.
32. The court raised the issue of whether a stay of proceedings against AB would be the appropriate course. It noted that Tendring had originally made an application for a stay as against AB, an application upon which Coulson LJ did not rule and which was superseded by Tendering's application for discontinuance. The Official Solicitor made the salient point, that a stay may not prevent CD seeking at a later date to intervene in respect of previous proceedings on behalf of her husband. Put shortly it would not bring finality to proceedings in respect of AB.
33. We regard the points made on behalf of the Official Solicitor as sound. We agree that an appeal does not appear to fall within the provisions of CPR 38 which refer to a claim. CPR 38 contemplates many situations in which permission of the court is not required to discontinue a claim; indeed Tendring only apparently sought permission because it had applied to discontinue against AB on an adapted form N279. A different rule appears to apply once a 'claim' reaches appellate level (see 52APD.15 (6.1)). We are satisfied that it is in AB's best interests for him to be removed as a party to these proceedings as he has no substantive part to play in this appeal given the unappealed finding that he is liable for overpaid housing benefit. Continuance as a party in these proceedings puts AB at risk of an order for costs, which are considerable, and that cannot be in his best interests. We agree with the views expressed on behalf of AB by the Official Solicitor that the appropriate course to be taken is that pursuant to CPR 19.3 namely that the court should order that AB should cease to be a party as it is not desirable for him to continue as a party in these proceedings.

The future conduct of the appeal

34. In his skeleton argument Mr Royston raised the issue of the court not hearing relevant argument on important points of principle raised in the appeal which concern social security law and decisions of Social Security Commissioners. Upon cessation of AB's involvement in these proceedings, there would be no legal argument provided

by a legally qualified advocate in response to Tendring's submissions as CD will be appearing in person.

35. We are grateful to Mr Royston for the detail provided in his skeleton argument which addresses the points which are likely to be argued at the substantive appeal. We have considered the matter and decided to delay cessation of AB's involvement in these proceedings until 18 October 2024 to allow the Official Solicitor, if so advised, to provide further written submissions in response to Tendring's arguments on the substantive appeal. Mr Rutledge, on behalf of Tendring, has helpfully indicated that it will provide to the court and to CD the authorities referred to by Mr Royston in his skeleton argument. We are grateful to both counsel for the thought and practical assistance which each has given or proposed and we accept the same.

Alternative Dispute Resolution ('ADR')

36. The court raised with the parties the issue of ADR which would include mediation. It has done so because of the costs in this case which must be considerable and are at risk of being disproportionate to the sum claimed. At the hearing, CD said that she would favour ADR/mediation. The court considered whether it should order such a course and decided that because of the past and protracted history of these proceedings, the need for an end to them and the fact that the substantive appeal is to be heard next week, it would not order ADR/mediation but would encourage the parties to consider the same. In an addendum to the orders of the court is an encouragement to the appellant and to CD to participate in ADR, in particular mediation.

APPENDIX 1



Tuesday 15 October 2024

IN THE COURT OF APPEAL

ON APPEAL FROM Upper Tribunal (Administrative Appeals Chamber)
UA-2018-002856-CH

BEFORE LADY JUSTICE NICOLA DAVIES



CA-2022-002229-C

ON PAPER

Application No.

CA-2022-002229-C

B E T W E E N

Tendring District Council

APPELLANT

- and -

AB (by his Litigation Friend the Official Solicitor)

First Respondent

- and -

SECRETARY OF STATE FOR WORK AND PENSIONS

Second Respondent

- and -

CD

Third Respondent

UPON HEARING from Mr Rutledge KC on behalf of the Appellant, Mr Royston on behalf of AB and CD in person;

AND FURTHER to the Reporting Restriction Order made by the Court at the outset of today's hearing:

IT IS ORDERED that:

1. The First Respondent is to be referred to as AB and the Third Respondent is to be referred to as CD in these and all further proceedings.
2. Pursuant to the report of Mr Christian Webb dated 14 May 2024 and the court determining that AB lacks capacity to litigate and is a protected party for the purpose of CPR 21, the Official Solicitor is appointed to act as Litigation Friend on behalf of AB, having received an undertaking from the Appellant dated 12 June 2024 that the Appellant will pay all costs, charges and expenses which may be incurred by the Official Solicitor incidental to her duties as such Litigation Friend, on the following specific issues only:
 - (i) Tendring District Council's application for discontinuance of the appeal against AB, including any costs incurred in resisting the application if so advised,
 - (ii) If that application is refused, on the substantive appeal itself.

3. Pursuant to CPR 19.2(3), AB will cease to be a party in these proceedings at 4pm on Friday 18 October 2024.
4. AB is not to be treated as a protected party prior to 14 May 2024. Consequently, all steps taken in the proceedings prior to that date have effect.
5. Steps taken between 14 May 2024 and the Official Solicitor's appointment as Litigation Friend are given effect pursuant to CPR 21.3(4).
6. Leave to the Official Solicitor, if so advised, to submit and file by 4:00pm on Friday 18 October any further written submissions on the substantive issues to be heard at the appeal.
7. Leave to the Appellant, if so advised, to submit and file by 4:00pm on Monday 21 October 2024, any responsive written submissions to the submissions of the Official Solicitor.
8. Leave to CD, if she wishes, to file and serve, by 4:00pm on Tuesday 22 October 2024 any written submissions in response to those served by the Official Solicitor and/or the Appellant.
9. The substantive appeal in these proceedings will be heard on Wednesday 23 October 2024.
10. Save for the undertaking given by the Appellant to the Official Solicitor (para 2 above) there is no order as to the costs of the today's proceedings.

ADDENDUM TO THIS ORDER

The Appellant and CD are encouraged to participate in Alternative Dispute Resolution, in particular, mediation.

BY THE COURT

* This order was drawn by Onkar Sajjan (Associate) to whom all enquiries regarding this order should be made. When communicating with the Court please address correspondence to The Associate, Civil Appeals Office, Room E307, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44456 Strand) and quote the Court of Appeal reference number. The Associate's telephone number is 0207 947 7183 and 0207 947 7856.