



Neutral Citation Number: [2022] EWHC 1771 (Ch)

Case No: BL-2018-000544

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building, Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 15/07/2022

Before:

MRS JUSTICE FALK

Between:

- (1) TONSTATE GROUP LIMITED (IN LIQUIDATION)
(2) TONSTATE EDINBURGH LIMITED (IN LIQUIDATION)
(3) DAN-TON INVESTMENTS LIMITED (IN LIQUIDATION)
(4) ARTHUR MATYAS

**Applicants/
Claimants**

- and -

- (1) EDWARD WOJAKOVSKI

**Respondent/
Defendant**

Andrew Fulton QC and Sam Goodman (instructed by **Rechtschaffen Law**) for the **Claimants**
Chris Daw QC and Mark Lorrell (instructed by **Karen Todner Limited**) for the **Defendant**

Hearing date: 27 June 2022

APPROVED JUDGMENT

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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30am 15 July 2022.

Mrs Justice Falk:

Introduction

1. This is my decision following a hearing to determine whether the defendant in these proceedings, Edward Wojakovski, has capacity to conduct contempt proceedings against him. The contempt application was made as long ago as 6 July 2021. It alleges a number of breaches of orders and further alleges that false statements were made. The relevant orders were made following a decision in November 2019 in which Mr Wojakovski had been found to have made unlawful extractions of funds totalling around £15m from the Tonstate group of companies, his defence to the claim having been struck out. A further claim in which his parents in law sought the reversal of a gift of shares was settled. Mr Wojakovski was made bankrupt in October 2020.
2. At a hearing on 4 February 2022 I made an order giving permission to Mr Wojakovski to adduce expert medical evidence on the issue of capacity from a professional who had not previously treated him and permission to the Claimants to provide expert evidence in response, making provision for the issue to be determined at a hearing in the event of disagreement. In the judgment I gave on that date I noted the importance of dealing with contempt applications without delay, and criticised Mr Wojakovski for the delays that had already occurred as a result of his evading service for some five months, then seeking a stay that was found to be totally without merit whilst continuing to pursue applications in the related bankruptcy proceedings, and only after the stay application was thrown out making a very belated application for legal aid.
3. Expert evidence has since been provided by Dr Raman Deo on behalf of Mr Wojakovski and by Dr James Warner on behalf of the Claimants. In summary, the opinion of Dr Deo is that Mr Wojakovski does not have capacity to conduct contempt proceedings, whereas Dr Warner's opinion is that he does. The position of Mr Wojakovski's legal team is that I should grant a stay for at least 12 months, on the basis that Mr Wojakovski lacks capacity now and for the reasonably foreseeable future.
4. At the hearing on 4 February I also made an order staying the application of Mr Wojakovski's trustees in bankruptcy for a suspension of his automatic discharge, in view of the capacity issue that had been raised by Mr Wojakovski's own legal team in the contempt proceedings, the effect being that his discharge from bankruptcy continues to be suspended. My order also prevented Mr Wojakovski from making applications in the bankruptcy proceedings, including an intended application to annul the bankruptcy order. Mr Wojakovski subsequently applied unsuccessfully to set that order aside. In dismissing that application on the papers, I made clear that the aim of the order was to provide a temporary stay while the issue of capacity was addressed, albeit that I had recognised in my earlier judgment that a finding in respect of capacity in relation to the contempt proceedings would not necessarily also apply to the bankruptcy proceedings.

The test for capacity

5. Issues of capacity to conduct proceedings are governed by CPR 21, which applies the tests set out in the Mental Capacity Act 2005 (the “MCA”). If a person lacks capacity then they must have a litigation friend to conduct proceedings on their behalf. Contempt proceedings obviously raise additional issues, both in relation to the appropriateness of pursuing them in circumstances where the respondent lacks capacity, and the potential implications in respect of the alleged contemptuous acts, to the extent that they may have been carried out at a time when the individual lacked capacity. This decision relates only to the question of whether Mr Wojakovski currently has capacity to conduct the contempt proceedings against him.
6. Section 1 of the MCA sets out five statutory principles, of which the first three are particularly pertinent:
 - a) A person must be assumed to have capacity unless it is established that he lacks capacity (s1(2)).
 - b) 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 (s1(3)).
 - c) A person is not to be treated as unable to make a decision merely because he makes an unwise decision (s1(4)).
7. The test for capacity is set out in section 2. Subsections (1) to (4) provide:
 - (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
 - (2) It does not matter whether the impairment or disturbance is permanent or temporary.
 - (3) A lack of capacity cannot be established merely by reference to—
 - (a) a person’s age or appearance, or
 - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
 - (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
8. The MCA provides for a Code of Practice. Under s42(5) of the MCA the court must take its provisions into account so far as they appear relevant.
9. As the Code of Practice explains, the MCA mandates a two-stage approach. It is necessary to determine first whether the relevant individual has an impairment of the mind or brain or some disturbance in its functioning, and secondly, and if so, whether that impairment or disturbance means that the individual is unable to make the decision in question at the relevant time.

10. Section 3 defines what is meant by a person being unable to make a decision for himself. It is worth setting out in full:

3. Inability to make decisions

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
- (a) to understand the information relevant to the decision,
 - (b) to retain that information,
 - (c) to use or weigh that information as part of the process of making the decision, or
 - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
- (a) deciding one way or another, or
 - (b) failing to make the decision.

11. It is uncontroversial that questions of capacity are not only time specific but issue specific: see *Dunhill v Burgin* [2014] UKSC 18; [2014] 1 WLR 933 at [13], referring to *Masterman-Lister's* case [2003] 1 WLR 1511. I had that point very much in mind at the February hearing, although unfortunately the constraints of legal aid funding meant that it was not possible to require the medical evidence to extend to Mr Wojakovski's capacity to conduct the related bankruptcy proceedings. I had made provision to permit the Claimants' responsive evidence to extend to that issue, but in the event it did not.

The contempt allegations

12. Given that questions of capacity are issue specific, I need to summarise the contempt allegations in more detail. They are set out in a one page table that forms part of the (brief) affidavit filed in support of the contempt application. They total six in number and are as follows:

Breach of a proprietary injunction dated 16 January 2020: It is alleged that, following imposition of the injunction, Mr Wojakovski funded expenditure from a Lloyds bank account which he knew contained extractions of rental income from a company called Quastus Holdings Ltd, including causing a further £70,000 of rental income to be transferred into the account and continuing to spend it. In a witness statement dated 23 April 2020, drafted at a time when he had legal assistance, Mr Wojakovski apologised for spending sums in breach of the injunction.

Breach of an asset disclosure order dated 6 July 2020: It is alleged that:

(1) Mr Wojakovski made no attempt to comply with paragraphs of the order that required disclosure of details of his parents' wills and Mr Wojakovski's actual or expected inheritance from them, or alternatively to take all reasonable steps to obtain those details from the executors. Instead, it is alleged that Mr Wojakovski simply asserted that his interest under the will was "discretionary"; and

(2) Mr Wojakovski failed to disclose his interest in a sum of £50,000 which he paid to a company called Intelligent Legal Solutions Limited ("ILS") on 10 July 2020.

Breach of a worldwide freezing order dated 27 August 2020: It is alleged that payments were made to two solicitors' firms, Raydens and Keidan Harrison, from funds deposited on 10 July 2020 with ILS, with no prior notification having been given to the Claimants as required by the order.

Knowingly false statements: It is further alleged that, to deny and conceal the breaches of the order dated 27 August 2020, Mr Wojakovski knowingly made false statements in a witness statement and affidavit, asserting that the payments came entirely from third-party resources and that his disclosure of bank statements was complete. The Claimants seek permission in respect of this ground under CPR 81.3(5)(b).

Breach of a specific disclosure order dated 14 May 2021: It is alleged that Mr Wojakovski failed to disclose July 2020 Lloyds Bank statements in his possession or control which evidenced an "intermediate transfer" of funds to ILS which was subsequently used to pay Raydens and Keidan Harrison.

13. The affidavit in support of the application states that there is a "long list" of false statements and non-compliance which could potentially be relied on, but that the Claimants had confined themselves to certain selected allegations. The affidavit also notes that while a breach of the proprietary injunction has already been admitted, it has not been remedied.

The evidence, and challenges to it

Documentary and oral evidence

14. The principal documentary evidence comprised expert reports from Dr Deo and Dr Warner respectively. Reliance was also placed, particularly for Mr Wojakovski, on medical notes and other reports related to his mental health over the period from November 2016 to December 2021. The Claimants additionally relied on a judgment of DJ Duddridge dated 18 June 2021 in financial remedy proceedings in the Central Family Court relating to Mr Wojakovski's divorce, which made findings following a hearing during May 2021 at which Mr Wojakovski gave written and oral evidence.
15. In addition to the expert reports, two witness statements were filed on behalf of Mr Wojakovski five days before the hearing, namely a witness statement from Mr Michael Marx dated 21 June 2022 and one from Ms Karen Todner dated 20 June 2022. There had been no permission to provide either of these statements and they were served too late to be properly addressed in the Claimants' written

submissions. Nonetheless, I decided to admit them on the basis of their relevance and my assessment that the Claimants' legal team had in fact had a sufficient chance to consider them by the time of the hearing. I did not, however, admit a supplementary bundle served on behalf of Mr Wojakowski without warning on the morning of the hearing, which appeared to satisfy neither of those criteria.

16. Both experts, and Mr Marx, were cross examined. However, Mr Fulton for the Claimants chose not to cross-examine Ms Todner, whose written evidence is therefore unchallenged. It is convenient to refer to the evidence of Mr Marx and Ms Todner first.

Mr Marx

17. Mr Marx is an individual who has known Mr Wojakowski for over 20 years. He has provided material assistance to him in the bankruptcy proceedings, amounting (by his estimate) to around 1000 hours of work, without payment. He has been treated as Mr Wojakowski's McKenzie Friend at several hearings and has been permitted to address the court on his behalf. He is a retired chartered accountant.
18. I had no reason to doubt Mr Marx's candid, and helpful, evidence. His witness statement describes his concerns about what he perceives to be a decline in Mr Wojakowski, referring to significant reductions in attention span, memory, ability to focus and attention to detail. He refers to haphazard correspondence, to comments often being non-sequiturs, to difficulty in prioritising, conversations being diverted from difficult topics, exasperation being displayed and incorrect statements being made which Mr Marx attributes to confusion. He observes that maintaining concentration on "complex matters" is "clearly problematic" and that Mr Wojakowski finds it "difficult to follow and internalise complex arguments or arrangements". He says that he is "not at all confident" that Mr Wojakowski could deal with the contempt proceedings because his recollection was normally muddled and confused, and he fixated on matters that were not germane or which were unnecessary detail. Mr Marx also said that he had:

"... not yet tried to sit down with Edward and go through the contempt allegations in detail. I am more than a little apprehensive that this will not be an easy task."

19. As I discuss below, while I accept Mr Marx's evidence it does not follow from it that a lack of capacity has been established. The three observations I would make at this stage are as follows. First, Mr Marx is clearly heavily invested, in terms of personal effort, in seeking to put right what he sees as a wrong against Mr Wojakowski in the form of the bankruptcy proceedings. The unavoidable inference is that contempt proceedings are at least an unwelcome distraction, and risk interfering with that objective. In that sense, it is understandably not possible for Mr Marx to be truly impartial. Secondly, an assessment of capacity is not one undertaken relative to a person's abilities at an earlier point in time. Rather, it is an assessment of a person's ability to make the decision or decisions in question at the time that they need to make them. A capacity assessment will no doubt be informed by an individual's history, but it is not determinative. Thirdly, the sort of difficulties that Mr Marx described do not mean that there is a lack of capacity. In short, that turns on inability, not difficulty, being established.

Ms Todner

20. Ms Todner is the solicitor representing Mr Wojakovski in the contempt proceedings. She explains in her most recent statement (her third) that she has substantial experience in dealing with mentally disordered clients. She was also a part-time president of Mental Health Review Tribunals for 12 years, and for 10 years was her firm's head of what she describes as the largest mental health department in the country.
21. Ms Todner's first witness statement was provided for the purposes of the hearing on 4 February. It explains her concerns about Mr Wojakovski's mental state when she first met him, saying that she was unable to take clear instructions from him, his thoughts seemed disjointed and he was unable to follow her train of thought when moving from one topic to another. He was instead assisted at the meeting by a Mr Rugova, who helped with explanations. Ms Todner also observes that documents she was sent were very muddled, and many emails she had received from Mr Wojakovski seemed confused and not relevant to the issues on which she was instructed. The statement adds that she has been unable to "take full and clear instructions", and expresses concern about whether Mr Wojakovski was able to instruct her and understand her advice.
22. Ms Todner's third witness statement confirms her opinion that Mr Wojakovski is "unable to conduct litigation on his own behalf". She refers to Dr Deo's evidence and states that she believes that Mr Wojakovski was initially annoyed with her for raising the issue of capacity. She also refers to a further meeting with Mr Wojakovski, this time with Mr Marx, describing Mr Wojakovski's contribution to the conversation as being disjointed and saying that she could not follow his train of thought. After a "short time" Mr Marx and Ms Todner advised Mr Wojakovski that they would be talking about him as if he was not there, as he had nothing useful to contribute and was distracting them. Ms Todner refers again to emails from Mr Wojakovski which had all been confused and contained no useful instructions.

The experts, and their instructions

23. Dr Deo is a consultant forensic psychiatrist based in Essex. He holds leadership roles in secure mental health services. Dr Deo has significant experience in preparing expert psychiatric reports for use by the CPS, courts and the Mental Health Tribunal.
24. Dr Warner is a consultant psychiatrist specialising in older adults' mental health, including the assessment, diagnosis and treatment of disorders that include dementia and anxiety. Among other appointments, he has held the chair of the Faculty of Old Age Psychiatry at the Royal College of Psychiatrists. Dr Warner has had over 20 years of experience in assessing mental capacity, including capacity to litigate, and has published in that field.
25. I was satisfied that both experts sought to assist me, and I deal with my assessment of their evidence below. However, I should first address two challenges to the ways in which the experts were instructed. The challenges led to the disclosure, during the course of the hearing, of the instructions to each of them.

26. First, it became apparent during his evidence that Dr Deo had not seen the contempt allegations. The understanding he had formed about them was clearly heavily affected by a conversation he had had with Mr Marx. Dr Deo's report records Mr Marx as having described the contempt proceedings as "hugely complex". I accept Mr Marx's evidence that he did not say this in terms, rather he would have referred to the complexity of the broader litigation. However, it is clear from the report that Dr Deo was under the impression that the contempt proceedings were very complex.
27. The written instructions to Dr Deo from Ms Todner are brief. The letter refers without any detail to High Court litigation and (in error) to contempt allegations relating to breaches of six court orders and the risk of a prison term of up to 12 years, states that it appears to Ms Todner that Mr Wojakowski "is not in a position to defend himself without assistance" and that the paperwork provided has been chaotic, makes a comment about the aggressive stance of the Claimants' legal team and states that it seems that Mr Wojakowski does not really grasp the seriousness of his position, rather only being interested in the High Court litigation. The letter refers to Mr Wojakowski's mental health history and encloses a note about the Mental Capacity Act.
28. It is notable that there is a sharp contrast between the lack of detail about the contempt allegations in the instructions and what the transcript records as Mr Daw's description to me at the hearing on 4 February of what a psychiatrist would be provided with to carry out a capacity assessment, bearing in mind its fact specific nature, and specifically that what was proposed was, "to set out in summary the nature of the alleged contempts and the overall nature of the case and the evidence relating to the contempts", adding later that the test, "requires the expert to be given instructions as to the detail". I agree with those comments, and it is unfortunate that none of that was provided, leaving Mr Fulton to have to take Mr Deo to the detail in cross examination. The gap in Dr Deo's instructions was a material one.
29. A different criticism was made of Dr Warner's instructions. This was that, unlike Dr Deo, he had formed his assessment at a single appointment with Mr Wojakowski alone, having obtained no collateral information from anyone else familiar with Mr Wojakowski. In particular, he had been requested not to allow Mr Marx to have input into his report or to be present for the assessment "unless you regard it as essential". The specific reasons given were a concern about the extent to which Dr Deo appeared to have been influenced by Mr Marx's input and a suspicion that Mr Marx might be assisting Mr Wojakowski to feign a lack of mental capacity. I should say now that nothing in Mr Marx's oral evidence provided support for the latter suspicion, but Mr Marx was candid as to the focus of his efforts, namely the bankruptcy proceedings.

The expert evidence

Dr Deo's report

30. Dr Deo reviewed Mr Wojakowski's mental health history and spoke to Mr Marx. He examined Mr Wojakowski by video link. In summary, Dr Deo found a degree of mild cognitive impairment. He noted that Mr Wojakowski lost the train of their

conversation at intervals, and had explained to Dr Deo that he felt he had the information in his head but could struggle to get it out without the assistance of someone who knows him well. Mr Wojakovski had also described to him a marked drop off in his ability to write coherent letters and a decline in memory.

31. Dr Deo's examination found some impairment around memory and verbal fluency. While Mr Wojakovski had a normal result on a standard test (the Addenbrookes Cognitive Examination, or ACE III), Dr Deo considered that the result was consistent with mild cognitive impairment.
32. Dr Deo referred in some detail to Mr Wojakovski's mental health history, which included periods of severe anxiety requiring hospitalisation, and a diagnosis of Parkinson's disease. This included the conclusion in October 2021 of one doctor, a Dr Dannhauser, that Mr Wojakovski had developed Parkinson's disease dementia. Dr Deo referred to the conclusion that other clinicians had reached of a Parkinson's disease related cognitive impairment. Dr Deo's own diagnosis is harder to discern from the report, though he did conclude that on examination there was "certainly some degree of mild cognitive impairment".
33. Dr Deo's report summarised his conversation with Mr Marx, including the latter's explanation of Mr Wojakovski's inability to prioritise, the fact that he regularly changed the topic of conversation to unrelated matters and made factually incorrect comments, the fact that he tired quickly, and that Mr Marx was concerned that Mr Wojakovski would make decisions contrary to his best interests. Mr Marx had also proffered the view that Mr Wojakovski would give invented answers to fill gaps in his memory rather than lie, that Mr Marx did not believe that Mr Wojakovski could manage the contempt proceedings if he had support, and that he did not appreciate their seriousness. Dr Deo's own questions to Mr Wojakovski about the contempt allegations did not receive clear answers, with Mr Wojakovski appearing confused, lacking recollection of what he had been asked and changing the subject to unrelated matters.
34. Dr Deo concluded that Mr Wojakovski lacks capacity to instruct his legal team in relation to the contempt proceedings. He considered that Mr Wojakovski appeared not to understand the consequences of the proceedings and was concerned that his condition would prevent him from using relevant information to instruct his legal team. He was also concerned about Mr Wojakovski's ability to retain information. Dr Deo referred explicitly to the complexity of the proceedings in reaching his conclusions.
35. Dr Deo also observed in his report that Mr Wojakovski's condition was a degenerative one which was unlikely to improve much with time. Elsewhere he referred to difficulties faced in the light of "Parkinson's disease, related anxiety and the fluctuating nature of [Mr Wojakovski's] cognitive performance".

Dr Deo's oral evidence

36. Dr Deo was taken to the detail of the contempt allegations in cross-examination. Essentially, he agreed that the detail he was shown did not appear to be particularly complex, but repeated that he had been troubled by Mr Wojakovski's difficulty in maintaining focus and "on point", rather than turning to irrelevant

matters. He remained concerned about Mr Wojakovski's ability to instruct his legal team, in particular his ability to retain information and the likelihood of confusion. Dr Deo placed weight on what Ms Todner had said. He thought that in any event Mr Wojakovski would require significant help.

37. Dr Deo was shown parts of DJ Duddridge's judgment. He confirmed that Mr Wojakovski's presentation to him appeared genuine, and on re-examination agreed that the judge's reference to Mr Wojakovski's evidence in the financial remedy proceedings being vague and tending to shift was not inconsistent with Dr Deo's conclusions. He also agreed in cross-examination that the prior medical evidence showed that Mr Wojakovski had made a recovery from the breakdown he suffered in 2016, though he thought that the overall weight of the evidence was more consistent with cognitive impairment.
38. It was clear from Dr Deo's oral evidence that he had placed material weight on Dr Dannhauser's diagnosis of Parkinson's disease dementia.

Dr Warner's report

39. Dr Warner's report was provided in response to Dr Deo's, and so obviously took account of its content. Dr Warner had also seen the medical records referred to by Dr Deo and referred to them in his report.
40. Dr Warner interviewed Mr Wojakovski in person in the latter's kitchen for a little over two hours. His assessment found no evidence of dementia or significant cognitive impairment, and no evidence of functional mental disorder. He found no impairment within s 2(1) MCA sufficient to set aside the presumption of capacity, and expressed the view that, on the balance of probabilities, Mr Wojakovski does have capacity to conduct contempt proceedings.
41. Dr Warner explained that he had adopted standard psychiatric practice in his interview with Mr Wojakovski, including an examination, cognitive testing and an exploration of mental capacity. He made clear that his assessment would ordinarily involve the seeking of collateral information, but that he had not done so in this case.
42. The tests undertaken included the ACE III test, the Repeatable Battery for the Assessment of Neuropsychological Status (RBANS), which Dr Warner described as particularly good at testing verbal memory, and a further test of executive function called Frontal Assessment Battery.
43. Dr Warner noted the previous diagnosis of Parkinson's disease, and observed signs that might be in keeping with that diagnosis. He found that Mr Wojakovski performed in the normal range on all cognitive tests. There was some relative reduction of delayed memory performance comparative to immediate memory, but it was still within the normal range. He considered that Mr Wojakovski's anxiety, which appear to have improved since 2016, may have mildly affected Mr Wojakovski's performance, and noted that mild situational anxiety was demonstrated at some, but not other, times during the assessment. He found no evidence of functional mental or cognitive disorder.

44. In particular, and subject to the caveat that he had not had access to independent collateral information, but commenting that in any event the lack of marked cognitive impairment mitigated against it, Dr Warner disagreed with the previous diagnosis of dementia. Further, he thought that Mr Wojakovski probably did not meet the criteria for mild cognitive impairment (now more properly referred to as mild cognitive disorder, or MCD). Although Mr Wojakovski appeared to have a mild impairment of delayed learning as compared to other cognitive domains, he was still functioning within the normal range for memory.
45. Dr Warner set out the WHO definition of MCD. That refers to a decline from an individual's previous level of functioning, but with cognitive impairment not being severe enough to "significantly interfere with an individual's ability to perform activities related to personal, family, social, educational, and/or occupational functioning or other important functional areas". He also set out its definition of generalised anxiety disorder, and concluded that Mr Wojakovski's anxiety did not amount to anxiety disorder, not appearing excessive and being understandable in the circumstances.
46. Notwithstanding his conclusions about the absence of any relevant disorder, Dr Warner proceeded with a capacity assessment using the MCA framework, whilst acknowledging that the question was one for the court.
47. As part of this, Dr Warner showed Mr Wojakovski the table already referred to that sets out the contempt allegations and asked a number of questions about them, responses to which are set out in some detail in the report. He concluded on the balance of probabilities that Mr Wojakovski does have mental capacity in relation to the contempt proceedings. He found no evidence of an inability to understand and retain information.

Dr Warner's oral evidence

48. Dr Warner made clear in his oral evidence, as he had in his report, that he would ordinarily seek collateral information, meaning speaking to someone else who knew the individual well, but that he had not done so in this case. This was obviously a reference to what had been said to him about Mr Marx. Dr Warner clarified in his oral evidence that the approach of obtaining collateral information followed NICE guidelines as to best practice, which also covered taking a history and undertaking cognitive testing (and possibly scanning). However, he also clarified that what collateral information was primarily relevant to was the determination of the existence of an impairment, and not the second stage of the determination of capacity. Rather, the second stage should be date and decision specific, "uncontaminated by other people's views".
49. Dr Warner had not seen Ms Todner's evidence, including her first witness statement where she described Mr Wojakovski's inability to follow her train of thought, although the papers he took into account would have made clear that she had raised an issue about capacity. (I note that Dr Deo had also not seen that evidence, but only Ms Todner's instructions.) Dr Warner would have regarded that evidence as significant, but repeated that the capacity decision should be date and decision specific. His conclusion was unchanged. As regards his assessment of the lack of cognitive impairment, he accepted that he was something of an

outlier in comparison to other physicians who had examined or treated Mr Wojakovski, and that he might have seen him on a good day. There certainly had been periods when Mr Wojakovski had been in a worse condition than Dr Warner had observed.

The prior medical evidence

50. It was clear from the earlier medical evidence that Mr Wojakovski had had serious mental health crises in 2016 and 2017 that required hospitalisation. In a letter dated 22 April 2021 to the solicitors acting for Mr Wojakovski in the family proceedings, Dr Popelyuk, a psychiatrist who had been involved in Mr Wojakovski's treatment since June 2016, described chronic anxiety and depression, underpinned by adverse life events. He referred to what he described as disturbing residual symptoms which did not appear to have improved, and to the intense degree of stress that Mr Wojakovski was under as a result of legal and bankruptcy proceedings. Symptoms described by Mr Wojakovski to him included difficulty in maintaining concentration for longer than 30-40 minutes without considerable effort, unpredictability in his communication skills, and at times extreme fatigue. Dr Popelyuk also referred to a diagnosis of Parkinson's made by a consultant neurologist, Dr Jarman, in late 2020 (details of which were also in the bundle).
51. Dr Dannhauser, another consultant psychiatrist, assessed Mr Wojakovski later in 2021 and, as already indicated, diagnosed Parkinson's disease dementia. His report, dated 27 October 2021, described Mr Wojakovski as presenting with cognitive impairment and related functional impairment, with a history of severe anxiety and stress. On examination Dr Dannhauser found that there was "clear Parkinson's disease, cognitive impairment, depressed and anxious affect". However, on a mental state examination he also recorded that Mr Wojakovski's thoughts were "coherent and logical" and his "thought form displayed normal reactivity and continuity", with "good insight" and an ability to consent to treatment. In recording Mr Wojakovski's history, while he noted that ADLs (activities of daily living) took a lot longer and there were absences of attention, impaired concentration and some anxiety and depression, Mr Wojakovski was socialising and exercising normally. Mr Wojakovski's care plan included a proposal to arrange cognitive testing.
52. There was a follow-up consultation on 9 December 2021, a brief report from which repeats the diagnosis and also refers to Mr Wojakovski giving a good account of himself, with good insight and the ability to consent to treatment. There is a further reference to arranging cognitive testing, but there is no indication that testing was done pursuant to his recommendation.
53. Mr Daw placed significant reliance on aspects of the prior medical evidence, including parts of Dr Dannhauser's findings. He also relied on a conclusion in November 2016 in an expert report commissioned by claimants in earlier proceedings from a Dr Lipsedge, another consultant psychiatrist, that Mr Wojakovski had early symptoms of a neurodegenerative disorder, with symptoms that would not improve, and was incapable of engaging in a trial process. Mr Daw additionally relied on a letter also dating from November 2016 from a further consultant psychiatrist, Dr Fonseca, which referred to a possible underlying

neurodegenerative condition, to the criteria for dementia not being met because ADL functions were preserved, but to there also being a loss of function from Mr Wojakovski's previous level of ability, the working diagnosis being one of amnesic mild cognitive impairment. Dr Fonseca had similarly concluded at that time that Mr Wojakovski would not be able to participate in proceedings.

54. However, in 2016 both Dr Popelyuk and Dr Fonseca had disagreed with Dr Lipsedge's view that a diagnosis of a neurodegenerative disorder from which recovery was unlikely was appropriate. That disagreement appears to have been vindicated by evidence indicating that in 2017 there had been a significant improvement. A letter dated 11 May 2017 from Dr Fonseca referred to Mr Wojakovski having "significantly recovered in all his symptoms". Those symptoms clear continued to fluctuate, however. The records indicate that there was another crisis in September 2017 and an acute stress-induced reaction in 2019.

DJ Duddridge's decision

55. Mr Wojakovski was represented by both solicitors and Counsel at the hearing before DJ Duddridge in May 2021. He provided both written and oral evidence. Dr Lipsedge's 2016 report and an expert report by Dr Jarman were also seen by the judge. The judge noted at para. 54 that it appeared to be common ground that Mr Wojakovski suffered from ill-health.
56. The judge made adverse findings about Mr Wojakovski, including that he had not given full, frank and timely disclosure and had given inconsistent evidence (paras. 62 and 63). Specific adverse findings were made about Mr Wojakovski's failure to provide information about his interest in his parents' estates, with the judge concluding at paras. 82 and 83 that he had discussed the position with his brother and appeared to be cooperating with him to defend assets in Israel from claims by Mr Wojakovski's trustee in bankruptcy. The reference to vague and shifting evidence on which Mr Daw relied in re-examining Dr Deo, which appears as part of the judge's discussion of his parents' estates in para. 82, needs to be read in the context of the conclusions that the judge reached, and indeed in the context of earlier findings in these proceedings about Mr Wojakovski.

Assessment of the medical evidence: impairment

57. In summary, I generally preferred the evidence of Dr Warner to Dr Deo. Dr Warner has a particular specialisation in conditions that include dementia and anxiety. His level of expertise and experience was obvious from his oral evidence as well as his carefully written report. While Mr Daw sought to diminish reliance on "standard tests", Dr Warner's report carefully explained the value of each of them and what the results meant. I accept Dr Warner's incomprehension of Dr Dannhauser's diagnosis of dementia – a very serious diagnosis for anyone – as being made without cognitive testing first being carried out. Further, Dr Warner did not simply rely on tests, but on his overall assessment and examination over a relatively lengthy consultation. His report also clearly separated, and followed, the two-stage approach contemplated by the MCA and reflected in the statutory Code of Practice, first determining whether there is an impairment of the mind or brain, or disturbance affecting the way it works, and secondly considering

whether that impairment or disturbance means that the person is unable to make the relevant decision.

58. Dr Warner was clear both in his report and oral evidence that he was at a disadvantage in not being able to obtain collateral information. However, that must be balanced with the obvious care he took in his assessment and the extent of his experience. In contrast, I found Dr Deo's own conclusions about the extent and precise nature of Mr Wojakowski cognitive impairment somewhat unclear.
59. Dr Deo had the benefit of speaking to Mr Marx, but in my assessment this also proved something of a disadvantage. The perspective that Mr Marx was able to offer would undoubtedly have been helpful, but its usefulness was materially affected by the impression that Dr Deo wrongly obtained about the complexity of the contempt proceedings. The result was heavy reliance on what appeared to be Mr Marx's assessment of the difficulty that Mr Wojakowski would have in coping with those proceedings. In other words, Dr Deo appears to have been heavily influenced by Mr Marx in considering the second stage of the two-stage test, rather than in determining whether and what impairment existed, whereas Dr Warner explained that collateral information was far more important in the first part of the test (see [48] above).
60. I accept Dr Warner's opinion that a diagnosis of dementia was inappropriate, and further that Mr Wojakowski probably does not meet the strict criteria for MCD or anxiety disorder. However, Mr Wojakowski has had periods of severe mental ill-health and, overall, there has clearly been some decline in cognitive function as compared to the position before 2016, particularly in memory and ability to concentrate. The diagnosis of Parkinson's disease is also unchallenged, although the evidence indicates that it is currently well controlled.
61. Mr Daw's reliance on medical evidence dating from 2016 is in my view largely misplaced. It provides relevant context and describes the difficulties that Mr Wojakowski faced at that time, but it does not really assist me to answer the question whether Mr Wojakowski currently has an impairment or disturbance within s 2 MCA and, if so, whether that means that he does not have capacity to conduct the contempt proceedings.
62. I would be prepared to accept that, even if Mr Wojakowski does not meet the strict criteria for MCD or anxiety disorder, his reduced cognitive function could amount to an impairment or disturbance within s 2(1) MCA. The evidence of Mr Marx and Ms Todner about Mr Wojakowski's difficulty in following complex matters, concentration lapses and confusion, supports this. However, that does not determine that Mr Wojakowski is unable to make relevant decisions for himself, an issue to which I now turn.

Assessment of capacity

63. Taking account of all the evidence, I have concluded that it has not been established that Mr Wojakowski lacks capacity to conduct the contempt proceedings.

64. The first two principles set out at [6] above are particularly important in this case. There is a statutory presumption of capacity (s 1(2)), and a person may not be treated as unable to make a decision unless all practicable steps to help him to do so had been taken without success (s 1(3)). I agree with Mr Fulton that the evidence adduced does not demonstrate that all practicable steps have been taken, sufficient to discharge the presumption.
65. With great respect to her experience, the evidence from Ms Todner demonstrates *difficulty* in obtaining instructions, and not that it is impossible to do so. The fact that emails are confused or thoughts disjointed, or that Mr Wojakovski might need more assistance than some clients, are certainly hindrances, but they are insufficient to establish a lack of capacity. Rather, the test requires an assumption that all practicable steps are taken to help the relevant individual to make a decision for himself.
66. The evidence of Mr Marx is telling. He refers to undoubted difficulties and fears that going through the contempt allegations with Mr Wojakovski will “not be an easy task”, but he has not attempted to do so. Instead, Mr Marx has concentrated his efforts entirely on assisting Mr Wojakovski in the bankruptcy proceedings. It was clear from his oral evidence that, albeit with difficulty, he has managed to take Mr Wojakovski through a number of complex matters in that regard.
67. In particular, there was a witness statement from Mr Wojakovski dated 13 February 2022 in support of an application to set aside my order of 4 February in the bankruptcy proceedings. That stated among other things that Mr Wojakovski knew that he wanted to oppose the suspension application because his bankruptcy was stopping him beginning the “process of rebuilding his life”, and also made clear that the statement was approved, though not written, by him. There was also a “Positional Argument” document signed by Mr Wojakovski on 7 December 2021, produced for a hearing the following day at which Zacaroli J was to consider the request for a stay of the contempt proceedings. This set out detailed reasons that were said to favour a stay, essentially that the Claimants were employing diversionary tactics to prevent Mr Wojakovski establishing the real truth of their own wrongful action in making him bankrupt. Whilst the document was also not written by Mr Wojakovski it was evidently approved by him. Mr Marx confirmed that he had taken Mr Wojakovski through the document, although he suggested that Mr Wojakovski had relied on him and was unsure of the extent to which he understood the complexities. He did not believe that Mr Wojakovski could have written either document. However, I am satisfied that Mr Wojakovski had a sufficient understanding of what were relatively complex matters to approve what was being said.
68. Dr Warner carefully took Mr Wojakovski to the actual contempt allegations and discussed them with him in some detail. That evidence must carry real weight. In truth, the contempt allegations are not that complex, and my assessment of the evidence is that Mr Wojakovski has capacity to deal with them.
69. In reaching my conclusion I make no assumption that Mr Wojakovski will be assisted by Mr Marx. There is obviously no obligation on Mr Marx to provide assistance. Instead, Mr Wojakovski has the benefit of a legal team who should perform that function.

70. I do not underestimate the seriousness of contempt proceedings in terms of the potential outcomes for Mr Wojakovski. However, whilst I have had careful regard to that in reaching my conclusion, it cannot be a determining factor. Further, any concerns that Mr Wojakovski's legal team have about the motivations and aggressiveness of the Claimants are not relevant to the issue of capacity.
71. I have also taken careful account of the fact that it was Ms Todner who first, and in my view properly, raised the issue of capacity. This is not a case of Mr Wojakovski simply feigning or relying opportunistically on mental health difficulties. Indeed, and as she explained, Mr Wojakovski was initially annoyed with her for raising the issue. However, it is undoubtedly the case that Mr Wojakovski has shown no willingness to engage in the contempt proceedings, and has wished, and continues to wish, to concentrate his efforts entirely elsewhere. I have to take that point into account as well, because the reality is that it is likely to have affected the quality of Mr Wojakovski's interactions with Ms Todner at least to some degree.
72. Ms Todner also expressed concern that capacity issues had not been raised by Mr Wojakovski's previous advisers, particularly following the assessment by Dr Lipsedge in 2016. Whilst I understand that concern, a perfectly rational explanation would be that those advisers did not, in fact, have sufficient justifiable concerns about capacity to raise it as an issue. Mr Wojakovski has had the benefit of advice from five different firms during the course of proceedings against him, namely Mishcon de Reya and then Candey in the Chancery proceedings, Evolve Law and then Raydens in the family proceedings, and Keidan Harrison for bankruptcy advice (although they did not go on the record). He has since had some pro bono assistance in the bankruptcy proceedings.
73. One of the evident concerns of Mr Marx is that Mr Wojakovski does not appreciate the seriousness of the allegations made against him. Dr Warner's evidence of his discussion with Mr Wojakovski on the subject indicates otherwise. However, even if Mr Marx's concern was correct, that does not mean that there is a lack of capacity. The same applies to Mr Marx's concern that Mr Wojakovski may make decisions contrary to his best interests. As s 1(4) MCA makes clear, unwise decisions do not equate to incapacity. I would also observe that it is not uncommon for those who face contempt proceedings to fail to face up to the seriousness of their position, at least until late in the day, and to prefer to focus on other things.
74. The reality is that Mr Wojakovski has made a choice, with Mr Marx, to focus efforts on the bankruptcy proceedings, in particular the opposition to suspension and the proposed annulment application. He evaded service of the contempt application for months and then sought a stay that was found to be totally without merit, only then finally determining to obtain the free legal advice to which he was entitled. That is a choice that it was open to him to make, but the effects of his lack of focus on the contempt proceedings cannot then be used to support an argument that he lacks capacity.

Timing and adjustments

75. Although not directly relevant to my assessment of capacity, I should also refer to the public interest that exists in contempt proceedings, and to the related general principle that they should be dealt with promptly. It is of concern that the proceedings have been outstanding for a year without material progress being made. Directions must now be made which ensure that a properly controlled timetable is put in place to enable the proceedings to be determined without undue further delay.
76. The fact that I have concluded that capacity exists does not mean that the proceedings should be conducted without any adjustments. In particular, it is appropriate to proceed on the basis that Mr Wojakovski should be treated as a person who is at least potentially a vulnerable party for the purposes of Practice Direction 1A. I have asked the parties to consider, and if possible agree, directions that will allow for frequent breaks during the court day (and potentially between days), a careful approach to and structuring of any cross-examination, and any other special measures that may be appropriate. It may also assist for a named individual, for example a member of Mr Wojakovski's family, to have responsibility for his welfare at the hearing, and the ability through his legal team to alert the judge to any difficulties.

Conclusion, and impact on other proceedings

77. In conclusion, Mr Wojakovski currently has capacity to conduct the contempt proceedings against him. However, the directions for trial should permit for appropriate adjustments.
78. My decision that Mr Wojakovski has capacity is limited to the contempt proceedings. It cannot be applied automatically to any step in the bankruptcy proceedings, and unfortunately the expert evidence that has been obtained does not address that issue. However, the evidence does of course address the first stage of the two-stage capacity test, namely the existence of impairment, and my findings are relevant to that extent. I will be requesting submissions from Mr Wojakovski's trustees in bankruptcy to determine the best way forward, bearing in mind that the temporary stay granted in those proceedings also requires prompt resolution.