



Neutral Citation Number: [2024] EWHC 542 (KB)

Case No: KB-2023-004109

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2024

Before :

THE HONOURABLE MRS JUSTICE FARBEY

Between :

LZL
(A Protected Party)
By HXS as Litigation Friend

Claimant

- and -

(1) HYC

(2) CALPE INSURANCE COMPANY LTD

Defendants

Rhiannon Jones KC (instructed by Carpenters Limited) for the Claimant
Oliver Rudd (instructed by Horwich Farrelly Limited) for the Second Defendant
The First Defendant did not appear and was not represented

Hearing date: 19 February 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 11 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MRS JUSTICE FARBEY :

Introduction

1. By a claim form filed on 25 October 2023, the claimant seeks damages for personal injury arising from a road traffic accident. Following the Order of His Honour Judge Bilal Siddique sitting as a Deputy Judge of the High Court (“the Judge”), the case came before me to decide whether to require a different litigation friend for the claimant. The present litigation friend is Ms HXS. She is the claimant’s mother-in-law and the first defendant’s mother. In the absence of any other realistic candidates, the question I have to decide is whether Ms HXS should be replaced by the Official Solicitor.
2. I heard submissions from Ms Rhiannon Jones KC on behalf of the claimant. Ms HXS appeared in person. She made oral submissions and relied on a witness statement dated 11 February 2024 which she had written. Ms HXS did not provide Ms Jones with a copy of that statement. Ms Jones did not insist on seeing one. The claimant and her eldest daughter came to court. The claimant told me her views on issues as and when they arose in discussion. Ms HXS’s neighbour, Ms Hunter (who is a close and longstanding family friend), came to court and answered some questions from me in order to clarify a small number of points.
3. Mr Oliver Rudd appeared on behalf of the second defendant. The first defendant did not attend and was not represented.
4. I was provided with a bundle of documents and separately with a privileged witness statement by the claimant’s current solicitor, Ann Allister, which has not been served on the defendant. I confirm that I have taken the privileged statement into consideration.

Factual background

5. The claimant was born on 26 May 1984. The first defendant is her partner. They have five children whose ages range from 23 to 6.
6. On 17 July 2021, the claimant was the passenger in a vehicle being driven by the first defendant. There was an accident. It is believed that the vehicle hit a tree before rolling over onto its roof and then rolling back onto its wheels. The claimant very sadly sustained a traumatic brain injury including a subarachnoid haemorrhage, bifrontal subdural haematomas and other brain damage.
7. Owing to brain damage, the claimant cannot manage the litigation process. She cannot manage any award of damages. I have read the psychiatric reports which deal with her lack of capacity in these regards. She is a protected party and so she requires a litigation friend.
8. Ms HXS has been acting as the litigation friend without a court order since 3 September 2023. Although Ms HXS is the first defendant’s mother, the claimant’s solicitors took the view that she was a suitable litigation friend. Ms HXS has taken care of the claimant since the claimant moved into Ms HXS’s home when she was 14 years old. Ms HXS has been like a mother to the claimant. The solicitors weighed

the closeness of the relationship against the apparently low risk of any real conflict of interest with the first defendant. They saw nothing to suggest that Ms HXS would do anything other than act in the claimant's best interests.

9. Unfortunately, since then, various things have become tangled together.
10. **First**, the second defendant made a voluntary general interim payment in the sum of £100,000 which was received on 6 June 2023. The extent of the claimant's injuries means that she is not living in a suitable home. She wants to use the interim payment to move home.
11. The case came before the Judge on 20 December 2023 for the approval of the interim payment. The Judge approved the payment in order that the money may be spent by the claimant's solicitor or case manager on the claimant's rehabilitation and other injury-related costs. The solicitors have to date spent some of the money on case management fees so that £94,042.68 remains.
12. As I have said, the claimant wants to use the funds to move home. It seems that she and the family had their hopes raised when they visited a property which they liked very much. They wanted to move into the property. However, the Judge expressed his concern that the claimant's solicitor had not applied to the Court of Protection ("COP") for the appointment of a Professional Deputy. He ordered the claimant's solicitor to make an application. There has been no challenge to his Order which remains in force.
13. Irrespective of the legal position which I need not set out, the practical effect of the need to apply for a Professional Deputy is that the interim payment has not been used for the claimant to move into her chosen property. She expressed to me her great distress and told me that she has lost an ideal home.
14. **Secondly**, the Judge ordered that the application to the COP should be made by 12 January 2024. The claimant is intractably opposed to making the application. Ms HXS and the claimant both told me that it is an important part of the claimant's self-identity that she continues to care for her children. She fears that a Professional Deputy will remove her remaining autonomy. In particular, she fears that the Deputy will remove her ability to use and distribute her social security benefits to care for her children. She is opposed to any distribution of her money by anyone who is not a family member. She feels that a Professional Deputy will infantilise her. She will lose self-respect as a loving and caring mother.
15. Ms HXS has been at the receiving end of the claimant's anxiety about a Professional Deputy. In light of the claimant's opposition, she opposes an application to the COP for any reason other than that the court has ordered it. Ms Jones explained that the deadline of 12 January 2024 was in any event not workable from a practical perspective.
16. These factors mean that no application to the COP has been made and that the claimant is in breach of the Order. Her solicitor has had to apply for an extension of time.

17. **Thirdly**, soon after the accident and before the claimant had taken legal advice, she applied for lasting powers of attorney (“LPOAs”) in relation to property and financial affairs and in relation to health and welfare. As I understand the chronology, the LPOAs were registered (respectively) on 15 September 2022 and 5 July 2023. The attorneys are the first defendant and the claimant’s eldest daughter. Ms HXS told me that the attorneys are needed to help the claimant carry out her daily tasks. She said that the attorneys can spend money for the claimant in accordance with her wishes. The claimant is very keen for the attorneys to remain in place and wants them to deal with all her financial affairs.
18. **Fourthly**, Ms HXS did not provide the claimant’s solicitor with sufficient documentation about the LPOAs to enable the application to the COP to be made. Ms HXS brought the remaining documents to the hearing before me and gave them to Ms Jones. This problem appears to have been resolved.
19. **Fifthly**, the Judge raised concerns about conflict of interest. The claimant’s solicitor too has become concerned because:
 - i. Ms HXS is the first defendant’s mother.
 - ii. The first defendant has a LPOA in relation to the claimant’s finances when he is an opposing party in a claim for very significant damages.
 - iii. Ms HXS facilitated the applications to make her son an attorney. There is a risk that the LPOAs might be used to secure the family’s financial situation at the expense of the claimant’s best interests. If that were to happen, it would be irreconcilable with Ms HXS being the claimant’s litigation friend.
 - iv. Ms HXS facilitated the LPOAs at a time when it was not clear that the claimant had capacity to enter into them. I heard no argument about the legal relationship between the existence of LPOAs and the appointment of a Professional Deputy. I did not need to hear argument on this point because it is not part of my task to consider the advantages or disadvantages of the arrangements for the claimant’s financial affairs. I am dealing only with the question of the appropriate litigation friend. Ms Jones accepted that different considerations might apply to capacity to enter into LPOAs and capacity to manage a damages claim. Nevertheless, Ms Jones suggested that it was on the face of it difficult to see how the claimant could have had capacity to apply for LPOAs. Ms Hunter had signed certificates to say that the claimant knew what she was doing in applying for LPOAs but it was not clear that Ms Hunter should have done so.
20. The Judge was alive to these issues which are recorded in his Order. In addition, at the time of the hearing before him, Ms HXS wanted to be appointed as the Deputy and there was a dispute as to whether the family had refused to allow a medical examiner to assess the claimant at home.
21. The Judge ordered that the question of whether Ms HXS be removed as litigation friend should be decided at a hearing on notice to the Official Solicitor.

22. By 5 January 2024, the claimant and Ms HXS had lost confidence in the claimant's solicitor. They took the view that the solicitor had misrepresented to the family the position about moving home. They believed that the solicitor had misrepresented to the Judge that the family had refused to allow the medical examiner to see the claimant.
23. The claimant's solicitor sent a letter to the Official Solicitor on 10 January 2024 enclosing a copy of the Judge's Order and explaining the potential need for the Official Solicitor's involvement. I was informed by Ms Jones that the Official Solicitor has read the correspondence and is awaiting my judgment whereupon the case will be given further consideration. The claimant has meanwhile changed her solicitor within Carpenters: she is now represented by Ms Allister.

Legal framework

24. CPR 21.2(1) provides that a protected person must have a litigation friend to conduct proceedings on their behalf. CPR 21.4(3) provides that a person may act as a litigation friend if they:

“(a) can fairly and competently conduct proceedings on behalf of the... protected party;

(b) have no interest adverse to that of the... protected party;
and

(c) where the... protected party is a claimant, undertake to pay any costs that the claimant is ordered to pay, subject to any right to be repaid from the assets of the... protected party.”

25. By virtue of CPR 21.7:

“(1) The court may-

- a) direct that a person may not act as a litigation friend;
- b) terminate a litigation friend's appointment; or
- c) appoint a new litigation friend instead of an existing one.

(2) An application for an order under paragraph (1) must be supported by evidence.

(3) The court may not appoint a litigation friend under this rule unless it is satisfied that the person to be appointed satisfies the conditions in rule 21.4 (3).”

26. The Editors of the White Book observe at para 21.4.1 that the requirements of the rules do not mean that a person cannot be a litigation friend unless they have no interest at all in the outcome of the case. Their commentary says:

“A litigation friend is required to act for the benefit of the relevant individual and to safeguard their interests. The

litigation friend must not be seen as having a conflict but where the litigation friend has an interest in the litigation that is not adverse to the individual, they may be properly able to act as a litigation friend. The question is whether that personal interest affects the litigation friend's ability to fairly and competently conduct proceedings; if they remain able to weigh up legal advice and make decisions in the individual's best interest, they are still able to act as litigation friend."

The different positions

27. Ms Jones emphasised that there was a very significant family dynamic and outsiders were not at all trusted. Ms HXS had managed the claimant's appointment with a care expert. The re-scheduled appointment with the medical examiner had gone ahead in January 2024. Nevertheless, the Judge's Order was clear: the making of an application to the COP was a condition of his approval for the interim payment. The ability to enter into a lease for a new home was currently tied to having a Deputy so the claimant needs to make the application as the first step towards moving home. An application could be made within the Deputyship for the claimant to keep control over the distribution of her social security benefits.
28. Having received from Ms HXS a copy of the applications for the LPOAs during the course of the hearing, Ms Jones was satisfied that the Professional Deputy (who has already been selected and is willing to act) would have all the necessary documents to make the application. However, Ms HXS was prevaricating about whether to instruct that the application be made.
29. Ms Jones accepted that there is no evidence that Ms HXS has an interest adverse to the claimant as opposed to having misguided or untenable views about the appointment of a Professional Deputy which is the main sticking point. Ms Jones confirmed that the only alternative litigation friend would be the Official Solicitor. Replacing Ms HXS with the Official Solicitor would not be a "golden bullet" and would not necessarily make the litigation easier or smoother. The family dynamic and lack of trust in non-family members will continue.
30. Ms Jones emphasised that the question of whether to replace Ms HXS was a question for the court. She very properly made suggestions as to what I might do rather than seeking to take a firm line on a matter that was of such sensitivity and importance to her client. She suggested that the court might make an Order saying that unless the application to the COP is made within a certain period, the Official Solicitor would be invited to replace Ms HXS.
31. Ms HXS in her submissions emphasised to me that she has put her own life on hold since the accident in order to provide 24-hour care for the claimant and the best possible medical treatment for her. The claimant suffered from severe anxiety and had serious issues with trusting people even before the accident. Ms HXS has together with her partner (whom the claimant refers to as "dad") protected the claimant since she was 14.
32. Ms HXS has expressed strong opposition to the appointment of a Professional Deputy. She says in her witness statement that the first defendant and she have agreed

to a Professional Deputy being appointed but only so that they should not breach the Judge's Order. The family is not happy for a Professional Deputy to be appointed. The claimant's eldest daughter is an attorney and the claimant wants her to organise her financial affairs, even if a conflict of interest means that the first defendant's LPOAs should be revoked.

33. Ms HXS has struggled to persuade the claimant to agree to a Professional Deputy and has been unwilling to take action that the claimant does not want. She told me that she can see the benefit of a Deputy but the role could be given to the eldest daughter. She herself does not want to be the Deputy as she is not interested in money. She drew my attention to part of the neuropsychiatry capacity assessment dated 21 August 2023 which said that the claimant was able to weigh up the pros and cons as between her family as attorneys and an independent Deputy.
34. Mr Rudd expressed concern about the delay and cost that was likely to be caused by any future sticking points of the sort that has arisen in relation to the appointment of a Professional Deputy. The delay and the cost occasioned by the litigation friend's conduct of the litigation, which has already required early intervention by the court, is contrary to the overriding objective in the Civil Procedure Rules.

The claimant's wishes and feelings

35. The claimant expressed great concern that people are taking her money and that she is not being asked for her views. She is angry about the need for any non-family members to be involved in the litigation. The claimant wants Ms HXS to remain as the litigation friend. She wants her finances to be managed only by family members, principally her eldest daughter. She wants the first defendant and her eldest daughter to organise her finances under the LPOAs. She does not want a Professional Deputy and feels that she is being harassed.

Discussion

36. On the one hand, Ms HXS has at best prevaricated about the need for a Deputy. She has been unwilling to progress the application both because the claimant does not want her to do so and also (in my judgment) because she lacks insight into the need for a Professional Deputy.
37. The Judge's Order has been breached. Ms HXS's lack of insight and (as a separate, serious matter) the breach of an Order give rise to real concern that she cannot competently conduct the proceedings on the claimant's behalf. Not least, the key to unlocking the funds for the claimant to make her much-wanted move to suitable accommodation has been delayed.
38. It is tempting in these circumstances to conclude that the current heated attitudes can only be overcome by the appointment of the Official Solicitor.
39. On the other hand, there have been some positive developments since the approval hearing. The claimant has a new solicitor. Ms HXS has produced all the information needed to apply to the COP. She has confirmed that she does not want to be a Deputy. She has told me (and I accept) that the family did not block the medical examiner; rather the claimant refused to see him. The appointment was rescheduled

and has taken place. With the exception of applying to the COP, there has been reasonably good co-operation by Ms HXS which is (in all the circumstances) to her credit. It is no longer suggested that the LPOAs are likely to be intentionally misused. Ms Jones accepts that there is no evidence that Ms HXS cannot safeguard the claimant's interests because she is the first defendant's mother.

40. I agree with Ms Jones that Ms HXS will be in a better position than the Official Solicitor to facilitate the claimant's compliance with further medical appointments. The proceedings are at an early stage and may get easier for Ms HXS after the obstacle of the COP application has been overcome.
41. Weighing all the various factors, I am persuaded that Ms HXS should be given another chance. There is an Order requiring an application to the COP. The Order is in force and the claimant must comply with it. I will allow the claimant's application to extend time for compliance because it is fair and just to do so. However, unless the application to the COP is now made promptly, such as within 14 days or some other reasonable and limited period as Ms Jones may indicate is needed, the Official Solicitor should in my judgment replace Ms HXS as litigation friend. No alternative third person could do so.
42. It is in the interests of the claimant that, after the COP application has been made, the litigation should proceed smoothly. Mr Rudd expressed the second defendant's concerns about costs if further stumbling blocks are encountered that require further court hearings. Assuming that the COP application is now made, the claim should be listed for hearing in 6 months' time to review progress and for the court to satisfy itself that Ms HXS remains a suitable litigation friend.
43. I invite Counsel to agree the terms of a draft Order for my approval which should reflect this judgment.