



Neutral Citation Number: [2019] EWHC 2579 (QB)

Case No: QB-2018-000575

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
AND IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 October 2019

Before :

MR JUSTICE PUSHPINDER SAINI

Between :

DXW (By his Mother and Litigation Friend, MXC)

Claimant

- and -

PXL

Defendant

Jacob Levy QC (instructed by Barlow Robbins LLP) for the **Claimant**

Derek O'Sullivan QC (instructed by DWF LLP) for the **Defendant**

Hearing date: 3 October 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE PUSHPINDER SAINI

MR JUSTICE PUSHPINDER SAINI:

1. These proceedings arise out of a serious accident which occurred on 9 September 2016. On that day the Claimant (DXW) fell through a roof landing onto his head and suffered severe brain injuries. The accident took place while the Claimant was working for the Defendant (PXL). The detailed nature of the injuries is described in a number of expert reports which have been put before me including reports from a neurorehabilitation expert, a neuropsychiatrist and neuropsychologist.
2. The substance of the nature of the Claimant's injuries may be summarised as follows. As a result of the fall the Claimant sustained severe physical injuries and a traumatic brain injury (TBI). He sustained a moderate-severe TBI and he has been left with neurological (dysarthria, right hemiparesis and impaired balance), cognitive (predominantly memory and executive deficits) and behavioural problems (organic personality disorder/dysexecutive syndrome). These deficits are severe. The Claimant had suffered from anxiety and depression for many years prior to the accident and he had used illicit drugs. The combination of his psychiatric problems and drug use had resulted in a poor educational and work record. Following the TBI, the Claimant's anxiety and depression have become much less severe, while his organic personality change has been the main neuropsychiatric problem. Some three years after the accident, the Claimant's cognitive and behavioural deficits are likely to be permanent. The Claimant will not be able to work or live independently in the future.
3. A negotiated settlement in the sum of £6.6m has been arrived at between the parties. Given that the Claimant is a protected person under the Mental Capacity Act 2005 the Court's approval was required for that settlement. I gave approval to the settlement by order dated 3 October 2019 and also made certain anonymity orders on that day pursuant to CPR 39.2(4) (hence the abbreviations used to describe the parties). Those orders were made essentially to protect the Claimant as a vulnerable person. I have sought to keep my observations in this judgment limited in a way which will not undermine the protections of those anonymity orders.
4. In the Application Notice seeking approval of the settlement, the Claimant also sought what has been called an "EXB Order" after the judgment of Foskett J in EXB v FDZ and others [2018] EWHC 3456 (QB). In that case, Foskett J made what was a novel form of order to the effect that it was not in the best interests of the claimant to know the amount of a settlement of his personal injuries action in circumstances where the court had also determined that the claimant lacked capacity to decide whether or not he should know the amount of the settlement. Foskett J's order was made administering the jurisdiction of the Court of Protection as well as the Queen's Bench Division. I am asked to make a similar order and to make a determination as to the "best interests" of the Claimant.
5. Before turning to the evidence and submissions, I will set out the relevant statutory provisions.
6. Section 4 of the Mental Capacity Act 2005 ('MCA') provides as follows:

“(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—

(a) the 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 what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider—

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) ...

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so”

7. I also need to set out in the following subsections of Section 4:

“(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) ...

(b) anyone engaged in caring for the person or interested in his welfare,

(c) ...

(d) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

...

(11) “Relevant circumstances” are those—

(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.”

8. Subsections (4) and (6) establish that the views of a person lacking capacity are still relevant even if he or she lacks capacity to make the particular decision. This accords with the UN Convention on the Rights of Persons with Disabilities (‘CRPD’) and, in particular, Article 3 which is in the following terms:

“The principles of the present Convention shall be:

1. Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
2. Non- discrimination;
3. Full and effective participation and inclusion in society

....”.

9. A person in the Claimant’s position should be informed of the details of a settlement award because this would be to treat him in the same way as a person without a disability. Depriving the Claimant of knowledge of the size of his award clearly constitutes an interference with basic rights. An essential aspect of autonomy and respect for personal dignity must be the ability of an individual to make financial decisions which others may regard as unwise or foolish. It is a serious interference with such common law rights as well as the above provisions (and also Article 8 ECHR rights) to make an order which would deprive an individual of such rights. Accordingly, a strict justification based on evidence of real necessity would need to be before the Court before it made any such order.
10. It also follows that in the ordinary case, the views of the Claimant should be sought in relation to the application itself and I note that in the EXB case at paragraph 11 there was such evidence.
11. That is a matter which has concerned me in this application where there has been no such communication with the Claimant. The reasons for that however are properly explained in the evidence before me. Essentially, it is considered that such a communication would itself undermine the best interests of the Claimant. I will return to this matter below.

12. Turning to the evidence in more detail, it is fair to say that both the expert medical evidence and the evidence from lay witnesses all goes one way. I have considered the evidence of the Claimant's Deputy, his parents and a number of experts including the treating neuropsychologist and a neuropsychiatrist and neuropsychologist in the claim. They all consider that the Claimant does not have the capacity to decide whether he should know the settlement amount and it would not be in the best interests of the Claimant to know of the amount. Of course, there has been no argument before me to challenge this evidence but I accept it is given in good faith and based upon detailed knowledge of the Claimant. I did not require any oral evidence because it did not seem to me that it was necessary in the circumstances before me.
13. The decisions as to both capacity and best interests have been out before the Court in the present application and cannot be dictated by the witnesses. The Court can make a declaration as to whether a person has or lacks capacity to make a decision specified in its declaration or that an individual lacks capacity to make decision on such matters as are described in declaration, pursuant to Section 15(1) of the MCA 2005. The Court may also make a decision on the Claimant's behalf in relation to the specific matter in issue here - whether he should know of the precise settlement sum agreed: Section 16(2)(a) MCA 2005. I will now consider the evidence in more detail.
14. To my mind the evidence clearly and strongly suggests that the Claimant does not have sufficient insight into or understanding of the need to keep confidential the amount of money that he might be awarded or would be approved by the Court. He also does not appear to have sufficient insight to understand that a settlement fund is in respect of past and future losses and principally in respect of care and case management and his long-term assistance.
15. Further, the witness evidence also indicates that the Claimant does not have sufficient insight to understand that money could and should be used wisely and properly only for his reasonable needs and requirements moving forward as part of his ongoing care and assistance. I am particularly struck by the statements which indicate that knowing the amount of the settlement would be likely to cause the Claimant upset and confusion and make him vulnerable. Specifically, knowing the precise sum would be very likely to disrupt the Claimant's rehabilitation which is being carefully managed and thus far has proved challenging. The Claimant's knowledge of the precise sum would make the task of the Claimant's Deputy harder and would also be likely to make the task of those dealing with him therapeutically and through care and support, that much harder. The evidence also persuades me that knowing the precise sum may make the Claimant vulnerable to approaches by unscrupulous people who might gain knowledge through the Claimant that he has access to a large sum of money. The evidence of the Claimant's parents is particularly striking and powerful in this regard.
16. As indicated above, I had a real concern that the Claimant's views should have been sought on the matter in issue before me. I have however been persuaded that undertaking this exercise is itself likely to be contrary to the Claimant's interests and make his rehabilitation all the more challenging. Evidence from a claimant would ordinarily be an absolute necessity. The evidence in this specific case however persuades me that this would not be appropriate. It will undermine the very protections which are being sought for the Claimant's longer-term benefit.

17. My conclusions on the application are as follows on the balance of probabilities (based on the evidence at this stage):
 - (i) The Claimant lacks capacity not just to litigate but to manage his financial and property affairs;
 - (ii) That is likely to persist into the long-term future but in any event will be the subject of review by his Deputy (to be provided for in the order); and
 - (iii) It is not currently in the Claimant's best interests that he know the amount of the settlement.

18. Accordingly, I will make the following declarations and orders pursuant to Section 15(1)(c) and Section 16 of the Mental Capacity Act 2005:
 - (a) The Claimant lacks the capacity to decide whether or not he should know of the amount of the settlement;
 - (b) It is in the Claimant's best interest that he does not know the amount of the settlement;
 - (c) It shall be unlawful for any person (whether the Claimant's Deputy or any other person who has knowledge of the amount of settlement money) to convey by any means to the Claimant information about the amount of the settlement, save that this declaration does not make unlawful the conveyance of descriptive information to the Claimant to the effect that the settlement is sufficient to meet his reasonable needs for life.

19. The Claimant's Deputy has also given an undertaking to the Court to consider whether any application should be made to the Court of Protection to revoke or vary the order at least once a year from the date of the Court's Order. The final approved gross sum in respect of settlement, £6,675,000, includes an appropriate allowance for the potential or contingent costs arising from the Order.