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Court of Protection update

Thirty Nine Essex Street Court of Protection Newsletter: March 2011

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Editors

Introduction

Welcome to this month's newsletter, which includes a wide range of cases, and, in particular, the hotly awaited decision in *P and Q* (formerly *MiG and MeG*). We look forward to welcoming many of you to our forthcoming seminar in Chambers in which we will discuss both this decision and other recent developments in the jurisprudence relating to deprivation of liberty.

As usual, the cases discussed should be available on www.mentalhealthlaw.co.uk if not otherwise available.

Court of Protection cases

P and Q v Surrey County Council [2011] EWCA Civ 190

Summary

This case, which had previously been known as *MiG and MeG*, is the first decision of the Court of Appeal as to what constitutes a deprivation of liberty. The two incapacitated adults were sisters, aged 18 and 19 years old, who both suffered from a learning disability. P had a moderate to severe learning disability and found it difficult to communicate. Q had better cognitive functioning but exhibited challenging behaviours. At the time of the first instance hearing before Parker J, P was living with a foster family where she had her own bedroom, and where the house was not locked, although if P had tried to leave on her own, her foster mother would have restrained her. P attended college each day and went out on trips and holidays. Q was living in a small residential placement which did not qualify as a care home. She had her own bedroom and was not locked in, but was always accompanied when she left. She also attended college. She sometimes required physical restraint when she attacked other residents, and required continuous supervision and control (to meet her care needs). She was in receipt of medication for controlling her anxiety. Did either arrangement constitute a deprivation of liberty?

Under the ECtHR caselaw, three elements must be satisfied for a deprivation of liberty to exist: an objective confinement, attributable to the State, to which the individual has not validly given consent. The only issue before the Court of Appeal was whether there was an objective confinement: the existence of the other two elements was not disputed.

The first issue dealt with was the status of any objection to the alleged confinement by the individual. The Official Solicitor for P and Q submitted that this was irrelevant to whether there was objectively a confinement. The Court

of Appeal disagreed, concluding that where there is an objection, this may well generate further restrictions (for example preventing the person from leaving, or forcibly returning them), and that where there is no objection, there may be a 'peaceful life' which is equally relevant to whether there is a confinement.

The second issue examined by the Court was the use of medication. Again, the conclusion was reached that the use of tranquilising medication was a pointer in favour of objective confinement, and the absence of medication a pointer the other way.

The third issue considered was the purpose of the restrictions. At first Instance, Parker J had appeared to suggest that a benign or benevolent purpose (ie. to provide care and a safe environment) might mean that restrictions were not to be viewed as contributing to a deprivation of liberty. The Court of Appeal, in somewhat unclear terms, said that it was wrong to attach significance to the fact that restrictions were imposed in a person's best interests. It did however consider it relevant whether the person was in a 'normal' environment, for example whether one had social contacts, was living in a family or in an institution, and so forth.

One member of the Court of Appeal expressly rejected the suggestion made by the local authority that it was relevant to compare the alternative, historic arrangements for P and Q, which had been much worse for both, as they had been subject to neglect and abuse. However, no concluded view was expressed on this issue by Wilson LJ, and Mummery LJ simply recorded that he had initially found the argument attractive but could see the danger that it risked conflating whether there was a deprivation of liberty with whether such deprivation of liberty was in the person's best interests.

Wilson LJ concluded that P was clearly not subject to an objective confinement, and that Q's case, although more borderline, also fell outside Article 5 due to Q's 'attendance at an educational unit, her good contact with such members of her family as were significant for her, and her other, fairly active social life'. The other members of the Court of Appeal agreed with his analysis and conclusions.

Comment

The wait by practitioners for clear guidance from the courts about how to identify a deprivation of liberty appears set to continue for the foreseeable future: the Court of Appeal's decision may be appealed to the Supreme Court, and, in the view of the authors, still leaves a number of questions unanswered.

First, it is not clear whether the Court of Appeal considered that the absence of factors that would point towards a deprivation of liberty (such as medication and attempts to leave a placement) actively weigh against other factors, or are simply an indication that the case falls towards one end of the spectrum. Secondly, it is unclear how a lack of objection by an incapacitated individual can be said to be relevant to the question of whether there is an objective confinement. While it is obviously true that where P objects to confinement, additional restraint and restrictions may well be needed, and that this will be relevant in determining whether there is a deprivation of liberty, it is far from clear that the reverse is true. Is deprivation of liberty about supervision, control, and absence of choice, or is it about locked doors, sedation, and physical restraint? The authors tend to the view that in relation to people without capacity, it is the former, although the court appears to have concluded that supervision and control are likely to give rise to a deprivation of liberty only when they are exercised in an institutional setting. A locked door, or use of physical restraint may be a sufficient factor to demonstrate an objective confinement, but are they necessary components when considering the situation of people who do not have a normal capacity to assert their own independence? It might be said that the safeguards put in place by Article 5 ought to apply not just to those who have the capacity and/or temperament to cause a fuss. There are likely to be many examples where individuals without capacity may be oblivious to their circumstances, or unhappy but too miserable or too incapacitated to object. It is perhaps unsurprising that there is a reluctance to think that the concept of a deprivation of

liberty could apply where individuals appear to be living relatively normal lives in the community, particularly when large and isolated institutions are a thing of the past. However, the importance of the procedural safeguards imposed by Article 5, whether through the court or through DOLS, is that they require proper thought to be given to less restrictive solutions, and provide a mechanism for independent scrutiny. It is arguable that accepting that an incapacitated adult is deprived of his or her liberty does not necessarily mean adopting a paternalistic or old-fashioned approach, but may in fact give substance to the person's apparent autonomy.

The Court of Appeal said expressly that the decision was not influenced by 'floodgates' arguments and the risk that the courts would be inundated with applications requiring declarations sanctioning deprivations of liberty and the subsequent reviews required by Article 5(4), but it is easy to imagine such considerations being in play. A concern expressed by the government in the seminal Bournewood case was that if HL was deprived of his liberty, then so were many thousands of people in care homes and hospitals up and down the country. The end result was the introduction of Schedule A1, and it may yet be that the Supreme Court adopts a position which requires similar legislation to be introduced in respect of supported living placements.

B Local Authority v RM, MM and AM [2010] EWHC 3802 (Fam)

Summary

This case, decided by Hedley J in October last year but only reported on Lawtel in March, provides useful guidance as to the circumstances under which the Court will transfer an application for a care order in respect of a 16 or 17 year old to the Court of Protection. Such applications are, as Hedley J noted, likely to be rare, but raise some difficult questions.

The expert evidence was that the child in question, AM (who was nearly 17 at the time that the matter came before Hedley J), suffered from severe learning disability, autism and Tourette Syndrome. Her disability was lifelong, she would never be able to live independently and would require a high level of support from the adults around her in order to ensure that her day-to-day needs were met. The local authority sought a care order on the basis that AM's mother had never really appreciated or accepted the difficulties caused by these profound disabilities and, despite all the evidence, the mother adhered to the belief that this child could be cared for at home.

The s.31(2) Children Act 1989 threshold was conceded; the question for the Court was therefore what order (if any) should be made. The mother contended for no order on the basis that she was prepared to cooperate with the local authority; the local authority contended for a care order (supported in this by the Guardian). Hedley J confessed his doubts as to both approaches, and then (at paragraph 24) identified as a source of further concern the fact that the issues in the case (which boiled down the quality of care AM was receiving at a specific unit, and the speed at which a move to another was planned or carried into effect) would not be resolved by the time AM turned 18. As he noted "[h]*er disabilities are both grave and permanent, the demands made by her needs will be no less as she becomes an adult. Indeed, she may present even greater challenges to carers. The period of 12 months* [to her 18th birthday] *is wholly arbitrary in her life and in dealing with the needs that she has*." Hedley J therefore ventured the view that the case should be transferred to the Court of Protection, a question which he noted that the Counsel before him did not understand had been considered before by the Court.

Hedley J set out the statutory framework, and, in particular, Article 3 of the Mental Capacity Act 2005 Transfer of Proceedings Order, SI2007/1899, which provides in material part (Article 3(3)) that a Court deciding whether to transfer proceedings to the Court of Protection from those under the Children Act 1989 must have regard to: (a) whether the proceedings should be heard together with other proceedings that are pending in the Court of Protection; (b) whether any order that may be made by the Court of Protection is likely to be a more

appropriate way of dealing with the proceedings; (c) the extent to which any order made as respects a person who lacks capacity is likely to continue to have effect when that person reaches 18; and (d) any other matters that the Court considers relevant.

Hedley J noted at paragraph 28 that

"[t]*hat raises the question particularly under Article 3(3)(d) as to what matters the Court should take into account in deciding whether to exercise these powers and to adopt this approach. An ex tempore judgment in a case on its own facts is no basis for attempting an exhaustive analysis of these issues; nevertheless, a number of matters suggest themselves, matters which may often be relevant in the relatively small number of cases in which this issue is likely to arise. One, is the child over 16? Otherwise of course, there is no power. Two, does the child manifestly lack capacity in respect of the principal decisions which are to be made in the Children Act proceedings? Three, are the disabilities which give rise to lack of capacity lifelong or at least long-term? Four, can the decisions which arise in respect of the child's welfare all be taken and all issues resolved during the child's minority? Five, does the Court of Protection have powers or procedures more appropriate to the resolution of outstanding issues than are available under the Children Act? Six, can the child's welfare needs be fully met by the exercise of Court of Protection powers? These provisional thoughts are intended to put some flesh on to the provisions of Article 3(3); no doubt, other issues will arise in other cases. The essential thrust, however, is whether looking at the individual needs of the specific young person, it can be said that their welfare will be better safeguarded within the Court of Protection than it would be under the Children Act*."

On the particular facts of the case before him, Hedley J concluded that he was "*wholly satisfied*" (paragraph 29) that AM's welfare would be better protected within the Court of Protection; he therefore transferred the case under Article 3(4)(a) to the Court Protection, reconstituted himself as a judge of the Court of Protection, and dedicated the remainder of his judgment to giving effect to his conclusions within the framework of the MCA 2005.

Comment

The parallel jurisdiction of the Court under the Children Act 1989 and the MCA 2005 in respect of children aged between 16 and 17 has proved in the authors' experience to be the source of some difficulties in practice, and this guidance is welcome in terms of setting out the framework both for transfer and also for when proceedings should be issued within the Court of Protection, rather than for orders under the Children Act 1989.

The judgment does throw into relief one interesting question of principle, however, namely the difference in approach between the CA 1989 and the MCA 2005. The CA 1989 enshrines a protective jurisdiction; the MCA 2005 enshrines both this jurisdiction, but also the enabling jurisdiction of the Court to promote the autonomy of P. Where a 16 or 17 year old suffers from life-long disabilities rendering them effectively permanently incapable of making welfare decision, which approach should prevail? Should it make a difference that proceedings have been brought under the CA 1989 or the MCA 2005? Should it, in turn, make a difference as to whether the Court should transfer proceedings from one to the other? Hedley's judgment might suggest that it should – but, as he noted, it is likely that these issues will have to be fleshed out further in future judgments.

Re C [2010] EWHC 3448 (COP)

Summary

This case concerned the best interests of a 21 year old man who had been seriously injured in a car accident when he was 16 years old. There was a consensus of medical opinion that C was in a persistent vegetative state. C's family, including his twin brother, his treating consultant, his general practitioner and two independent experts agreed that it was in C's best interests for his artificial nutrition and hydration to be withheld because it was futile. The staff who cared for C at the unit where he was placed,

however, did not support the application. They considered that he had shown some behaviours that suggested some level of awareness. The medical evidence was that these behaviours were non-cognitive reflexive behaviours.

The court considered the established approach to cases involving patients in PVS and concluded that C's situation was indistinguishable from that of Anthony Bland in Airedale NHS Trust v Bland [1993] AC 789. It was in his best interests for ANH to be withheld, and C would be moved to a new unit for this to take place, given the staff at his current placement did not agree to the withdrawal of ANH. The court confirmed that no issue under Article 2 or Article 3 ECHR arose.

Comment

This decision is a clear and comprehensive exposition of the factors the court will take into account in a PVS case and demonstrates that the advent of the MCA 2005 has not altered the approach to be taken.

AH v (1) Hertfordshire Partnership NHS Foundation Trust (2) Ealing Primary Care Trust [2011] EWHC 276 (CoP)

Summary

This case arose out of proposals by a number of commissioning authorities to move twelve residents of a specialist residential service ('SRS') into facilities within the community. Each of these residents suffered from lifelong disabilities, typically a combination of childhood autism and severe learning difficulties, and spent most of their lives in large hospitals before they were closed down; as their needs could not be met in any other way, the SRS had been designed and built for them, where they had been resident since 2001.

Each proposal (depending on the stage it had reached) was either before the Court or was to be before the Court for a decision from the Court as to whether the move would be in the relevant service user's best interests. This judgment reflected an attempt on the part of Jackson J to bring about a streamlining of the process of determining the twelve decisions. Whilst expressed in terms of a "*firm provisional decision*" (paragraph 4) in relation to one service user alone, expressly stated not to binding on any actual or potential parties, AH, Jackson J expressed the hope that it would assist the parties in the actual or potential cases to reach conclusions.

In his careful judgment, Jackson J analysed the national context and, in particular, the campus closure programme that has formed an integral part of moves away from institutional care towards care in the community. He noted that the programme fell some way short of representing an absolute policy (let alone that there was an arguable case that campus living was unlawful). He then turned to the specifics of AH's case, noting, and clearly being struck by, the quality of care given by SRS and the extent to which AH and his fellow service users benefited from living on the campus. He noted that the motives of the commissioning authority in seeking to move AH were laudable; in particular, there was no question that SRS was to close (in any event, as he commented in passing in paragraph 2), were the real issue to be the discontinuance of SRS, then the appropriate forum would be judicial review, not the Court of Protection). Rather, the commissioning authority genuinely believed that a move to a residential facility within the community would benefit AH, on the basis (it would appear) in significant part on the basis that such a move would be in accordance with best practice and moves in similar circumstances had benefited others who suffering from similar conditions. Jackson J, however, concluded that it was not possible to identify a single dependable benefit arising from the proposed move (paragraph 77), and had little hesitation in concluding that a move would not be in AH's best interests. His concluding remarks in paragraph 80 are telling:

"*This case illustrates the obvious point that guideline policies cannot be treated as universal solutions, nor should initiatives designed to personalise care and promote choice be applied to the opposite effect. The very existence of SRS, after most of the institutional population had been resettled in the community, is perhaps*

the exception that proves this rule. These residents are not an anomaly simply because they are among the few remaining recipients of this style of social care. They might better be seen as a good example of the kind of personal planning that lies at the heart of the philosophy of care in the community. Otherwise, an unintended consequence of national policy may be to sacrifice the interests of vulnerable and unusual people like Alan."

Comment

This judgment is of no little interest, not least as a clear reminder of the necessity of identifying the risks and benefits to the individual the subject matter of the proceedings by reference to factors specific to the individual, not just to questions of general policy or best practice. It is also of interest as one of the first examples of the Court wrestling with what is an increasing phenomenon, namely 'group' cases arising where there is a proposal to move a number of service users from one location to another (or to multiple locations). In this regard, it is not surprising that Jackson J in giving his firm provisional view also directed that the costs figures of all parties should be disclosed by the time of the hearing "*so that minds are focused on that very relevant question*" (paragraph 6). Balancing the needs of case management with the need to focus on the individual is no easy task; but this judgment provides one useful model.

London Borough of Hillingdon v Steven Neary [2011] EWHC 413 (COP)

Summary

This case concerned an application by journalists from a range of organisations to report details of the case of Steven Neary, a young autistic and learning disabled man who had been prevented from living with his father in circumstances which the Official Solicitor and his father contended were unlawful.

It will be evident from this summary that the journalists' application was successful, and that reporting restrictions were lifted. The judge repeated the established principles governing such applications and found that since there was no concrete evidence that Steven Neary would be damaged by being identified, his details had already been published in a number of places including *Private Eye* and online, and there was a genuine public interest in the work of the Court of Protection not being kept secret, it was appropriate to allow the names of the parties to be published at the outset of the proceedings.

Comment

This case provides a useful illustration of the principles concerning publication of the identities of protected parties in the Court of Protection. It will be interesting to see whether some of the judge's assumptions are borne out, for example that journalists will not behave irresponsibly towards Steven Neary, and that there would most likely be a positive reaction to his situation rather than a hostile one.

A Local Authority v PB and P [2011] EWHC 502 (COP)

Summary

This decision relates to a relatively 'standard' best interests case concerning the residence and care arrangements for P, a man suffering life-long learning disability who had been cared for by his mother for the majority of his life, but had then been removed to be cared for by the local authority. It is of wider interest because Charles J set out in it in a reportable judgment for the first time that these authors are aware of his views as to the interaction between the MCA 2005 and judicial review proceedings. His comments, although expressed in provisional form, are of some considerable utility in clarifying the issues in a debate which has become increasingly vigorous: namely, what is the Court of Protection to do where a local authority declines to put an option before it for consideration? Charles J repeated views expressed (in relation to the inherent jurisdiction) by him in *Re S (Vulnerable Adult)* [2007] FLR 1095 and Munby J (as he then was) in *A v A Health Authority* [2002] Fam 13, and by the House of Lords (in relation to the Children Act 1989) in *Holmes-Moorhouse v Richmond-upon-Thames Borough Council* [2009] 1 WLR 413, to

the effect, in essence, that the Court in exercising its best interests jurisdiction is "*choosing between available options*" (paragraph 22). He noted that jurisdictional questions then arose as to the approach that was to be taken if someone wished to challenge the refusal of the local authority to place a particular option on the table by way of judicial review, not least as to the approach to be taken to findings of fact. At the time of writing, it would appear that the hearing listed specifically to consider those jurisdictional questions may not be effective, but the outcome of any such hearing will be covered in a subsequent edition of this newsletter.

Charles J also took the opportunity in this judgment to set out his views as to the cardinal importance of identifying the point in best interests proceedings at which it is no longer possible to proceed down the consensual route (which militates against the seeking of findings of fact adverse to a family member) and it becomes instead necessary to deploy the full panoply of the Court's forensic mechanisms. In the instant case, and with the benefit of hindsight, it had become clear that that point had not been identified in time, such that all parties (including the Official Solicitor) had appeared before him for a final hearing in circumstances where he did not consider that the issues had been sufficiently delineated to allow that final hearing to be proceed. To this end, and with a view to giving general guidance, he suggested (at paragraph 46) that at an appropriate stage, sufficiently prior to the final hearing, a direction should be given to the effect that each party should serve on the other a document setting out:

(1) (a) the facts that he/she/it is asking the court to find, (b) the disputed facts that he/she/it asserts the Court need not determine, and (c) the findings that he/she/it invites the Court to make by reference to the facts identified in (a);
(2) With sufficient particularity the investigations he/she/it has made of the alternatives for the care of P and as a result thereof the alternatives for the care of P that he/she/it asserts should be considered by the Court and in respect of each of them how and by whom the relevant support and services are to be provided;
(3) By reference to (1) and (2) the factors that he/she/it asserts the Court should take into account in reaching its conclusions;
(4) The relief sought by that party and by reference to the relevant factors the reasons why he/she/it asserts that those factors, or the balance between them, support the granting of that relief; and
(5) The relevant issues of law.

Comment

Even if only provisional, the comments of Charles J in relation to the CoP/judicial review divide are of importance, as it will only become a more regular feature of best interests proceedings going forward that cash-strapped local authorities will simply decline to put on the table particular options. Quite where and how such decisions are to be challenged is a matter that will no doubt be the subject of further judicial consideration but Charles J has laid his cards out clearly on the table.

The procedural comments made by Charles J are also of significance, but no little difficulty. Those who regularly appear before the Court of Protection will know both that there is not complete unanimity between the judiciary as to the merits of conducting fact-findings hearings, and also that identifying the point at which it is necessary to abandon attempts to find consensus (with all the benefits that that brings for the maintenance of a working relationship with members of the family) and instead to segue into adversarial mode is a uniquely tricky exercise. Doing so too early can be just as damaging as doing so too late.

Re A [2011] EWHC 727 (COP)

Summary

The President of the Family Division recently gave a useful indication of the approach to be taken by the Court of Protection in s.21A DOLS challenges where the only person objecting to a standard (or urgent) authorisation is P him or herself. The case concerned an elderly man suffering from dementia and other mental health

issues, who was deprived of his liberty in a care home, and wished to leave. All professionals working with P and P's son, who visited him regularly, agreed that it was in P's best interests to remain in the care home. However, the President observed that since P's rights under Article 5 ECHR were at stake, it was important that the court did not simply 'rubber stamp' the standard authorisation. It was proportionate to require a Court Visitor to prepare a report on P's capacity and best interests, and, in the event that the report concluded that it was in P's best interests to remain in the care home, for the matter to be concluded by way of a draft consent order and statement of reasons being considered by the court on the papers.

Comment

The decision is of interest because in many DOLS cases, it is only P who objects to the deprivation of liberty. The President's approach suggests that even where P's prospects of showing that the deprivation of liberty is not in his or her best interests, P is entitled to have the matter brought to court and examined. It is not clear how this fits with the LSC guidance on non-means tested funding for s.21A challenges which require borderline prospects if the issue is of overwhelming importance to P. The authors suspect that in a great number of DOLS cases, P's prospects may be below borderline, yet the safeguard of requiring the court's intervention is required in order to protect P's right to review by a court under Article 5(4). Nor is it clear the extent to which the Court Visitors will be able to deal with such cases in the event that there is an increase in the number of DOLS challenges that are brought.

Other cases

Dunhill v Burgin [2011] EWHC 464 (QB)

Summary

This case concerned an application by the Claimant to have a compromise agreement into which she had entered declared void due to her having lacked litigation capacity at the time it was agreed. The Claimant had suffered a brain injury in a car accident and had instructed solicitors to bring a claim for personal injury. The claim was settled for £12,500 on the first day of trial, but it had subsequently transpired that if properly pleaded, the claim would have been worth at least £790,000, and possibly as much as several million pounds.

The court held that the Claimant had not lacked capacity at the time the consent order was agreed, and had been given a sufficiently clear explanation of the terms of the order, which she had understood. In reaching this conclusion, the court first had to grapple with the question whether the Claimant's capacity to agree to the consent order was the material issue, or whether it should consider her capacity to deal with the litigation had it been conducted effectively. It may have been that while the Claimant had litigation capacity in respect of a relatively low-value claim (as reflected by the consent order), she did not have capacity in respect of a very high-value claim. The court determined however that this was not relevant. It was required to consider the decision that had actually been taken by the Claimant, not hypothetical possibilities and counterfactuals.

Comment

It is likely to be rare that a court has to assess litigation capacity retrospectively, but this case provides a clear answer to the approach that must be adopted in such circumstances. It also reinforces the view that in assessing litigation capacity, one must look at the actual decisions that are likely to be required of the prospective litigant. As the court noted, the Claimant will no doubt pursue her original solicitors for the lost chance to secure a substantial sum in damages as a result of her accident, having failed to persuade the court that a broader approach to capacity should be taken.

R(W) v LB Croydon [2011] EWHC 696 (Admin)

Summary

This was a judicial review challenge on behalf of an autistic and learning disabled young adult whose care and residence was funded by the LB Croydon. It was argued on W's behalf that

Croydon had failed to consult adequately with W's parents and the staff at W's current placement before making a decision to move him. The cost of the placement was high and it was clear that this was a motivating factor in the decision. While the local authority was entitled to have regard to cost when making its decision, it was required by the National Assistance Act 1948 (Choice of Accommodation) Directions 1992, the Community Care Assessment Directions 2004 and the MCA Code of Practice to consult W, his carers, his family and, in the circumstances, his care providers, before making a final decision. The court found that LB Croydon had not complied with these obligations, and that by the time information from the parents and the care providers was given to LB Croydon, it was too late to affect its decision.

Comment

This case is of particular interest in light of the increased focus on saving costs which will inevitably be part of local authority decision-making in coming months. The judgment confirms that 'the council is entitled to terminate a placement because of the greater cost' but makes clear that before making such a decision, proper consultation must take place. In the case of a service user who lacks capacity, the MCA 2005 imposes a particular burden in relation to consultation, because, the judge held, it requires not only P's wishes to be considered, but, under s.4(7), the views of anyone engaged in caring for the person, which includes not just family members but also professional care providers. This is so even though a current care provider will often have a particular interest in preserving the status quo. The case says that a best interests decision about an incapacitated adult is still required, and the proper processes must be followed, even where there is a strong provisional view that a particular option is not financially viable. It does not grapple with the more difficult question (see also the *PB and PB* case above) whether, if it was not in W's best interests to move, but the cost of the placement was too high, the local authority would have been acting lawfully in moving W to a new placement.

Re Hunt [No.86 of 2007; 12.6.08]

Summary and comment

Finally, and by way of coda to the decision in *Haworth v Cartmel & Commissioners for HM Revenue & Customs* [2011] EWHC 36 (Ch) reported in last month's edition, District Judge Ashton has kindly brought to our attention a decision of his from 2008 (reported in the Insolvency Law Reports), in which he annulled a bankruptcy order made upon the petition of a Borough Council in respect of a reclusive individual suffering from Huntington's disease who had failed to pay Council tax. He found, inter alia, that the individual was incapable of engaging in the insolvency proceedings by virtue of his mental disorder (and also by virtue of his physical affliction or disability arising out of his Huntington's disease which essentially prevented him from attending Court). In ordering a further hearing of the petition to be conducted on the basis that Mr Hunt was an incapacitated adult, DJ Ashton was highly critical of the approach taken by the local authority both in pursuing the petition and in questioning whether the Court was (in essence) being over-zealous in investigating his capacity to participate in the proceedings.

Our next issue should be out at the end of April, unless any judgments are handed down before then which merit urgent dissemination. Please email us with any judgments and/or other items which you would like to be included.

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