



IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. 2 OF 2014

BETWEEN

AB

Plaintiff

AND

C

Defendant

OPEN COURT

Before: Hon Mrs. Justice Marlene Carter (Actg.)

Appearances: Mr Jonathan Jones QC instructed by Ms. Kim Grandage and
Mr Rupert Wheeler of KSG Attorneys for the Plaintiff
Mr Harry Steinburg QC instructed by Ms. Natasha Partos of
Campbells for the Defendant

Date of Hearing: 18 February 2022

Date of Decision: 18 February 2022

Written Ruling Perfected 28 February 2022

**Anonymised and Released
For Publication:** 25 July 2022

HEADNOTE

**Civil procedure – preliminary issue - application to appoint guardian ad litem -
litigation capacity**

RULING ON PRELIMINARY ISSUE

1. By summons dated 17 February 2022, an application has been made for the court to determine as a preliminary issue, before trial, whether the Plaintiff is a patient within the meaning of section 2 of the Mental Health Act (2022 Revision), [hereinafter 'the Act'] for the purposes of O.80, r.2.
2. Order 80 r. 2 states:



***“Person under disability must sue, etc., by next friend or guardian ad litem
(O.80, r.2)***

- (1) A person under disability may not bring, or make a claim in, any proceedings except by his next friend and may not defend, make a counterclaim or intervene in any proceedings, or appear in any proceedings under a judgment or order, notice of which has been served on him, except by his guardian ad litem.*
- (2) Subject to the provisions of these Rules, anything which in the ordinary conduct of any proceedings is required or authorised by a provision of these Rules to be done by a party to the proceedings shall or may, if the party is a person under disability, be done by his next friend or guardian ad litem.*
- (3) A next friend or guardian ad litem of a person under disability must act by an attorney.”*

3. Order 80 r. 3 (4) provides:

“Where, after any proceedings have been begun, a party to the proceedings becomes a patient, an application must be made to the Court for the appointment of a person to be next friend or guardian ad litem as the case may be, of that party.”

4. The summons was supported by the 4th affidavit of Kim Grandage. Within her affidavit, Ms. Grandage set out the chronology which led to the instant application. She related that the psychiatrist instructed by the Plaintiff, Dr. Wayne Kampers, had previously provided reports in this matter relating to the Plaintiff in 2014, 2017 and 2019 in all of which he specifically considered that the Plaintiff had capacity. She related further that:

“8. Following the instruction of my firm the Plaintiff made an application to obtain a medical report from an alternative psychiatrist on the basis he was dissatisfied with Dr Kampers change of mind in the Joint Statement with the Defendant’s expert Professor Greenberg.

9 Whilst the Plaintiff was not permitted at that time to obtain a report from a new psychiatrist, the Plaintiff was permitted to ask questions of Dr Kampers.

10. The questions were put to Dr Kampers and by way of email dated 14 December 2021, Dr Kampers confirmed that he had advised the Plaintiff’s previous Attorneys in March 2020 that he was concerned about the Plaintiff’s capacity. This was the first time we were aware of the concerns.

11. Dr Kampers responded formally to the questions on the 16 December 2021 and following the response a further application was made to the Court.

12. Within the answers to questions, Dr Kampers stated that the Plaintiff was:



“...displaying chronic trauma-inflicted personality changes of a paranoid nature and, there may even be delusional component to his thinking including grandiosity.

I recommend that he has a more detailed personality assessment, for example a SCID-II, with a view to amending the Joint Statement prepared by myself and Professor Greenberg.

[AB] is extremely preoccupied and unshakable regarding his paranoid ideas. My concern is that these will be his only focus within a court hearing. As such I am concerned about his capacity and decision making in this context. I therefore think that the role of the litigation friend (his mother) should be considered as it is my understanding that she would enable the litigation and act in [AB]’s best interests.”

13. Dr Kampers indicated that the Plaintiff is suffering a new serious psychiatric illness and thus he expressed concerns regarding the Plaintiff’s capacity.”

5. On the 26 January 2022 this court ordered that an updated assessment should be undertaken of the Plaintiff by Dr. Kampers. Upon that assessment, in his report dated 16 February 2022, Dr. Kampers concluded:

“He is a mental health patient under the provisions of the Cayman Islands Mental Health Act 2021.

In my professional opinion he lacks litigation specific capacity for the reasons outlined above.”

6. Dr. Kampers’ reasons for his determination that the Plaintiff lacked litigation capacity were as follows:

“It is my observation that there has been a marked increase in his levels of paranoia, irritability and agitation. I have previously mentioned that I had concerns that he may be displaying chronic trauma inflicted personality changes of a paranoid nature.

....

Whilst I have never previously opined that [AB] is in any way psychotic, the nature and degree of his paranoia and the increasing conviction about his conspiratorial beliefs is of concern as they certainly do appear to be far more prominent than before.

In my opinion [they] are interfering with his ability to function on a day-to-day basis as the court date gets closer.

[AB]’s personality traits have been evident throughout this process.

It is the change in [AB]’s presentation that is of concern mostly because of the effect this may have on his ability to be cross examined in Court.”



7. In an addendum report also dated 16 February 2022, Dr Kampers states as follows:

In assessing [AB]’s current Capacity to Litigate:

- *Is the person in question capable of understanding the issues about which they will most likely have to make decisions in the course of the proceedings? In relation to this, the person in question does not have to be able to understand the issues on their own (most lay people would struggle with this), but they must be able to understand them once they have been explained to them by a legal advisor or an expert.*
 - o *[AB] has capacity*

- *In relation to this, the person in question does not have to be able to understand the issues on their own (most laypeople would struggle with this), but they must be able to understand them once they have been explained to them by a legal advisor or an expert.*
 - o *[AB]has capacity*

- *Does the person in question have a basic understanding of how litigation and court proceedings work? In other words, do they understand the legal issues involved and the circumstances that have given rise to the case?*
 - o *[AB]has capacity*

- *Importantly, the person must be able to understand the entirety of the legal proceedings, not just the individual decisions within those proceedings.*
 - o *My opinion is that his paranoid mental state and beliefs will interfere with his capacity in this area*
[AB] has capacity under the general provisions of mental capacity, which allow for the fact that persons may have the capacity to make some decisions but not others

- *In order to have the capacity to litigate, a person must understand all of the decisions and processes involved in the court proceedings (again, assuming that these have been explained to them by an expert)*
 - o *In my opinion [AB]’s paranoid mental state and beliefs will interfere with his capacity in this area*

- *Relatedly, does the person possess the capacity to litigate in a complex case?*
 - o *In my opinion [AB]’s paranoid mental state and beliefs will interfere with his capacity in this area and he lacks the capacity to litigate as part of a more complicated dispute as this is.*

- *Does the person understand, at least in general terms, the vitiating factor, or factors upon which they may have to rely during the course of the proceedings?*



- o In my opinion [AB]'s paranoid mental state and beliefs will interfere with his capacity in this area.*
- Can they weigh up the arguments for and against the litigation?*
- o In my opinion [AB]'s paranoid mental state and beliefs will interfere with his capacity in this area.*

He is a mental health patient under the provisions of the Cayman Islands Mental Health Act 2021.

In my professional opinion he lacks litigation specific capacity for the reasons outlined above."

8. Ms. Grandage also states that the court may consider appointing the Solicitor General as guardian ad litem if it finds that the Plaintiff is a patient within the meaning of the Act. At paragraphs 25-27 of the affidavit she sets out the reasons behind this aspect of the application.

"Guardian ad litem

25. At page 5 the exhibit in his initial report, Dr Kampers states:

"...I had previously mentioned consideration to the role of a litigation friend, and I had mentioned his mother but given her recent presentation and the dynamics between her and her son I did not think that she would enable the litigation and be capable of acting in her sons' best interests."

26. In the time I have had conduct of this matter, I have not been aware of any other family members or friends of the Plaintiff being involved in the Plaintiff's life or the litigation and thus who could be suitable to be appointed guardian ad litem. I have asked the Plaintiff and his mother if there is anybody whom they believe would be suitable for the role but at the time of swearing this Affidavit, they have not responded to this query.

27. Order 80 rule 3 (7) indicates that if it appears to the Court that there is no fit and proper person who is willing and able to act as guardian ad litem it shall appoint the Solicitor General.

28. On the 16 February 2022, I wrote to the Solicitor General and put them on notice of the Application and that we would potentially be seeking for the Solicitor General to be appointed guardian ad litem. They have indicated they may be willing to assist, and we have asked they attend Court at the start of the Trial on the 18 February 2022."

9. The Plaintiff objects to the application and does not accept that he lacks litigation capacity. The Defendant has adopted a neutral position in relation to this application.



10. Upon consideration of a party's capacity to litigate, a court will focus on the person's ability to understand, engage in or follow litigation proceedings. Such consideration is concerned, not only on a person's ability to conduct their own proceedings but also on the ability to conduct proceedings through their attorney. On the instant application the court has considered the evidence of Dr. Kampers in detail, both his written reports and oral evidence. The court has also heard from the Plaintiff's mother and the Plaintiff has, through the court, raised issues surrounding Dr. Kampers' findings. The court has been in a position to observe the Plaintiff's demeanour during this time.
11. The Plaintiff sought to engage the court in a discussion concerning the court's previous rulings on applications by the Plaintiff for the instruction of a second psychiatrist. Although the court was informed by the Plaintiff's attorneys that he had received copies of the court's rulings, the Plaintiff repeatedly returned to this issue when the court sought to direct his mind to Dr. Kampers' evidence. The Plaintiff also referred to the fact that the Defendant had changed one of its experts during the course of these proceedings, a matter that had no bearing on the issue before the court. The Plaintiff referred to the reports of a psychologist who had treated him while he was in the United States. Although Dr. Kampers and the court confirmed that Dr. Kampers had himself interviewed the psychologist and had incorporated this interview within one of his initial reports to the court, the Plaintiff insisted that the court should be considering the psychologist's reports on this application. The Plaintiff appeared unable to fully appreciate that the instant application was in respect of his capacity to litigate and not that of managing his day-to-day affairs.
12. The court has considered the following authorities:
 - **Martin Masterman-Lister v Brutton & Co** [2002] EWCA Civ 1889, (per Chadwick LJ)

"62. The authorities to which I have referred provide ample support for the proposition that, at common law at least, the test of mental capacity is issue-specific: that, as Lord Justice Kennedy has pointed out, the test has to be applied in relation to the particular transaction (its nature and complexity) in respect of which the question whether a party has capacity falls to be decided. It is difficult to see why, in the absence of some statutory or regulatory provision which compels a contrary conclusion, the same approach should not be adopted in relation to the pursuit or defence of litigation."

- **Folks v Faizey** [2006] All ER (D) 83. In this case the court stated that there must be evidence to support any application for an order appointing a litigation friend. *"That is*



necessary if the court is to be more than merely a rubber stamp.” The court went on to recognize that there may be instances where the proposed “patient” disputes the need for and appropriateness of the appointment of a litigation friend. *“In such a situation there can be an issue to be tried...”*

- **Hinduja v Hinduja and Others** [2020 EWHC 1553 (Ch); The court re-iterated that mental capacity is assumed unless the contrary is proved. The burden is on the applicant for an order to establish that a patient lacked capacity. *“...I do not think that the Court of Appeal [in Masterman] was intending to lay down any rigid principle under which medical evidence is required unless the circumstances are exceptional. The question will always depend on what the circumstances are.”* The court found that medical evidence was not required in that case.
13. The court must determine whether there is adequate evidence to support the application for an order appointing a litigation friend or guardian ad litem and where there is no evidence suggesting that the application is anything but a bona fide one, the court should make the order sought. I bear in mind that mental capacity is assumed unless the contrary is proved and that there is no requirement for medical evidence to be presented on an application relating to capacity. In the instant case the Plaintiff disputes the appropriateness of the application for the appointment of a guardian ad litem. This court has adopted the approach in *Masterman* of considering the psychiatric evidence from Dr. Kampers in support of the application. Dr. Kampers is a highly qualified psychiatrist.
 14. Dr Kampers holds a (MBChB), Doctor of Medicine from the University of Cape Town Medical School, South Africa. He is a Licentiate of the Medical Council of Canada since 1993 and a member of the Royal College of Psychiatrists since 1998. He has over 17 years experience in the NHS and Independent Sector as a Consultant Old Age Psychiatrist. Dr Kampers also has extensive medico-legal experience in both the Civil and Criminal Justice Systems and his reports have been successfully used in the following areas: Personal injury medico legal reports relating to PTSD and cPTSD, Battered Woman Syndrome, Road traffic or workplace accidents, Depression and anxiety, Work related stress, and Psychiatric injury due to medical negligence. He has also produced Psychiatric reports relating to mental capacity issues, Testamentary capacity, Dementia, Wills and Probate.
 15. In his evidence, Dr. Kampers stated that he was familiar with the issue of capacity in the United Kingdom, and confirmed that he had taken account of Section 2 of the Act and was



aware of the definition of ‘patient’ under the Act. He related that he had expressed concerns about the Plaintiff’s capacity to litigate when he interviewed him in March 2020.¹

16. Dr Kampers related his observations of the Plaintiff’s paranoia and general mental state when he interviewed him by ZOOM on 10 February 2022. He explained that he had great difficulty in trying to establish and explain to the Plaintiff the reason why he needed to be interviewed because the Plaintiff was very angry and mistrustful. Dr Kampers described that he became concerned about the Plaintiff’s ability in terms of decision-making. He stated that the Plaintiff was paranoid about many things: he believed that there were conspiracies against him and that he was mistrustful of his previous legal team, the court process, the experts involved and Dr. Kampers himself. He described that the Plaintiff displayed a “*mistrust of everybody and everything.*”
17. Dr. Kampers was clear that he had never considered the Plaintiff to be psychotic. He explained that if one were psychotic, he would expect to see reality distortion in every aspect of the subject’s life, for example hallucinations, or the acting out on delusional ideas. However, in the Plaintiff’s case Dr. Kampers expressed that he was in touch with reality but there was evidence of a strong paranoid system that the Plaintiff operates on that affects every aspect of his daily life.
18. Specifically, Dr. Kampers re-iterated that “*it is only in respect of litigation he lacks capacity and not in respect of managing his life. [He has] Capacity in everyday life but capacity specific issue is where issue lies. He knows what to eat, clothes, normal day to day life, no issue of capacity in that respect.*”
19. He related his observations of the Plaintiff and the progressive nature of his paranoia. Dr. Kampers went further to state that the Plaintiff lacked the ability to think through a decision non-impulsively. He found that the Plaintiff did not display reasoned flexible thinking because his fixed or paranoid ideas about lawyers or experts, that they were against him or in a conspiracy, meant that it is difficult for him to incorporate counterbalancing. He stated that it was his opinion that the Plaintiff does not have the ability to demonstrate reasoned flexible thinking as his internally contradicting ideas in terms of his paranoia, affect his ability to give coherent reasoning in terms of this case.

¹ The 4th affidavit of Kim Grandage details that Dr. Kampers confirmed that he had advised the Plaintiff’s previous Attorneys in March 2020 that he was concerned about the Plaintiff’s capacity.

20. It is this effect of the paranoia and mistrust, displayed by the Plaintiff upon evaluation by Dr. Kampers, on the Plaintiff's ability to understand and address the more complex issues in this litigation that is of concern. I find that the application is a bona fide one.
21. Mindful of the foregoing, I find that there is sufficient evidence before me to conclude that the Plaintiff is a patient within section 2 of the Act being a person "*who is suffering from or is suspected to be suffering from mental impairment*". I find that the Plaintiff's paranoid mental state and beliefs will interfere with his capacity to litigate and to understand the entirety of the proceedings. I believe that his mental state and beliefs will interfere with his ability to litigate in what is a complex and complicated case or to properly weigh up the arguments for and against litigation. The Plaintiff's paranoid mental state and belief will also interfere with his capacity to understand a vitiating factor or factors upon which he may have to rely in the course of the instant proceedings.
22. Pursuant to Order 80 r. 2 (2), the Solicitor General or her representative is to act as the Plaintiff's Next Friend in the conduct of these proceedings.

A handwritten signature in black ink, appearing to read 'Marlene J. (Actg.)', written over a horizontal line.

Hon. Mrs. Justice Marlene Carter (Actg.)
Judge of the Grand Court