Re BKR
[2013] SGHC 201

Case Number	: Originating Summons (Family) No 71 of 2011 (Registrar's Appeals Subordinate Courts Nos 223 and 224 of 2012)
Decision Date	: 01 October 2013
Tribunal/Court	: High Court
Coram	: Lai Siu Chiu J
Counsel Name(s)	: Lee Eng Beng SC, Kelvin Poon, Low Poh Ling and Wilson Zhu (Rajah & Tann LLP) for the first and second appellants; Alvin Yeo SC, Aw Wen Ni, Wendy Lin, Monica Chong, Chan Xiao Wei (WongPartnership LLP) for the third appellant; Sarjit Singh Gill SC, Terence Seah, Benjamin Ng (Shook Lin & Bok LLP) for the respondents.
Parties	: Re BKR

Courts and Jurisdiction – District Court

Mental Disorders and Treatment

1 October 2013 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 These were appeals to the High Court by way of Registrar's Appeals Subordinate Courts Nos 223 and 224 of 2012 ("RAS 223/2012" and "RAS 224/2012" respectively, and collectively "the Appeals") against the decision of a Senior District Judge in Originating Summons (Family) No 71 of 2011 ("OSF 71/2011"). The Appeals relate to an application taken out in the court below ("the application") under the Mental Capacity Act (Cap 177A, 2010 Rev Ed) ("MCA") for the plaintiffs to be appointed as deputies of their sister [BKR] in relation to her property and affairs. The Senior District Judge found, *inter alia*, that [BKR] lacked mental capacity as she was unable to decide on her property and affairs because of an impairment or disturbance in the functioning of her brain, and thus granted the application.

2 At the trial below and at the hearing of the Appeals before this court, parties raised a whole host of incidents and issues. I found a number of those issues irrelevant to the main crux of the Appeals (as they were at the hearings below), but shall address them nonetheless since they were raised. While it was commendable of counsel to leave no stone unturned in their preparation for the case of their respective client(s) in the Appeals, a certain amount of discretion should have been exercised as to what facts and issues were really essential. The court is not in favour of a "lock, stock and barrel" approach in litigation. In preparing their cases, counsel is duty-bound to advise their clients as to what really matters, so as not to prolong proceedings unnecessarily.

3 After taking time to consider the parties' lengthy arguments, I am allowing both Appeals.

The facts

4 The parties and their relationships have been succinctly described in the Senior District Judge's

decision and there is no need to repeat them in any detail. If necessary, the parties will be identified where they concern specific findings made by the Senior District Judge. For ease of reference, I shall refer to the main parties in the following manner:

(a) [AUR], who was the first plaintiff in the trial below, and the first respondent in the Appeals;

(b) [CY], who was the second plaintiff in the trial below, and the second respondent in the Appeals;

(c) [AUT], who was the first defendant in the trial below, and the first appellant in RAS 224/2012.

(d) [AI], who was the second defendant in the trial below, and the second appellant in RAS 224/2012; and

(e) [BKR], who was the third defendant in the trial below, and the appellant in RAS 223/2012.

Together with the Appeals, the plaintiffs filed for hearing before this court Summons No 331 of 2013 ("the plaintiffs' application") to strike out RAS 223/2012 on the ground that [BKR] lacked capacity to instruct solicitors to file an appeal on her behalf, pursuant to O 99 r 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules").

5 In response to the plaintiffs' application, [BKR] filed Summons No 2535 of 2013 ("the third defendant's application") under O 99 r 8 of the Rules, applying for leave to appoint a litigation representative. I declined to grant the plaintiffs' application but granted the third defendant's application to appoint a named third party as her litigation representative in RAS 223/2012 and all ancillary matters.

6 I should observe at this juncture that in arguing their clients' cases, parties had drawn this court's attention (as in the court below) to innumerable incidents leading up to OSF 71/2011, primarily to persuade the court to draw a legal conclusion on the lack of mental capacity of [BKR] and/or the purported undue influence/manipulation by [AUT] and [AI] over [BKR]. The court below had made various findings in relation to those events. Rather than set them out here, I shall elaborate on those findings when addressing the defendants' arguments in the Appeals.

The decision below

7 In coming to her decision, the Senior District Judge considered two main threads of evidence. The first thread related *directly* to [BKR]'s mental capacity, and comprised:

(a) evidence on [BKR]'s mental capacity starting with reports by her Hong Kong doctors in October 2005 and 2009, and also medical reports from October 2010 to February 2011 in relation to her capacity to create a trust;

(b) evidence on [BKR]'s mental capacity from her Singapore medical experts based on their assessments of her conducted in March, June and December 2011, and February 2012;

(c) evidence given in the court below by [BKR] from 12 to 21 February 2012;

(d) evidence of the plaintiffs' medical experts;

(e) evidence of the bankers who dealt with [BKR] from mid-2009 till end-2010; and

(f) evidence of the family members of [BKR].

8 The second thread of evidence concerned contemporaneous events from late-2008 until the first quarter of 2011 in the intra-family relationships of [BKR]. This related somewhat to the (irrelevant) incidents I have mentioned at [2] above. The Senior District Judge drew certain inferences of [BKR]'s mental capacity from her behaviour in those incidents. However, parties often gave conflicting accounts of the same events. Hence, the Senior District Judge also went further at times to make certain factual determinations which were generally unrelated to the mental capacity of [BKR] and should not have been taken into consideration in reaching her decision.

9 After considering both threads of evidence, the Senior District Judge found that [BKR] lacked mental capacity to make decisions on her property and affairs. Attendant thereto, the Senior District Judge also found that [BKR] did not have the capacity to litigate. She then appointed both plaintiffs as [BKR]'s deputies to act in respect of her property and affairs. The powers granted to them as deputies were generally very wide

The issues in the Appeals

10 There are three broad issues before this court:

(a) Did the Senior District Judge err in law and in fact in finding that she had the jurisdiction to entertain OSF 71/2011, including the issues of purported undue influence ("Issue 1")?

(b) Did the Senior District Judge err in law and in fact in applying the principles of the MCA wrongly, when considering the medical evidence and other contemporaneous events ("Issue 2")?

(c) Did the Senior District Judge err in law in the appointment of deputies and the scope of the powers granted ("Issue 3")?

Given the length of my decision and for good order, I summarise briefly my findings pertaining to these three issues. Under Issue 1, I find that the Senior District Judge did not have the jurisdiction to entertain OSF 71/2011 or the issues of purported undue influence. Under Issue 2, I find that the Senior District Judge had misapplied the principles of the MCA, and therefore erred in law in finding that [BKR] was unable to make a decision under the MCA (this is the functional component of the applicable legal test, as will be addressed later). Finally, under Issue 3, given that the Appeals would have been allowed based on my findings under Issue 1 and/or Issue 2, I observe that the declarations of incapacity (and consequently the powers granted to the deputies) were too wide. I would add that the Senior District Judge should have accorded more weight to [BKR]'s present wishes.

Issue 1 – Did the Senior District Judge err in law and in fact in finding that she had the jurisdiction to entertain OSF 71 including the issues of purported undue influence?

The Law

The jurisdiction of the Senior District Judge

11 The issue of jurisdiction is often raised by counsel as a threshold issue in many cases. However, the concept is often misunderstood, and many a time arguments of jurisdiction have been misconceived. As described by the Court of Appeal in *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258

("*Nalpon*") (at [11]), the word "jurisdiction" is an etymological chameleon that often takes colour from its context. Indeed, as a legal term, it is clear that it has been used to mean many things. For example, Prof Yeo Tiong Min suggests at least six different ways in which the word "jurisdiction" has been employed (see "Jurisdiction of the Singapore Courts" in *The Singapore Legal System* (Singapore University Press, 2nd Ed, 1999) (Kevin Y L Tan ed)).

1 2 *Nalpon* concerned an appeal against the decision of Chan Sek Keong CJ made pursuant to an application under s 82A(5) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA"). Before the Court of Appeal, a preliminary issue of whether there could even be an appeal from a decision made under s 82A(5) of the LPA was raised. The issue therefore concerned the jurisdiction of the Court of Appeal. After some discussion, the Court of Appeal in *Nalpon* (at [13]) adopted the definition of "jurisdiction" in *Muhd Munir v Noor Hidah and other applications* [1990] 2 SLR(R) 348 (at [19]):

> The jurisdiction of a court is its authority, however derived, to hear and determine a dispute that is brought before it.

13 The court in *Nalpon* went on to repeat the trite principle that the jurisdiction of a court is primarily derived from statute (see also *Ng Chye Huey and another v Public Prosecutor* [2007] 2 SLR(R) 106; *Blenwel Agencies Pte Ltd v Tan Lee King* [2008] 2 SLR(R) 529; *Law Society of Singapore v Top Ten Entertainment Pte Ltd* [2011] 2 SLR 1279).

14 The jurisdiction of the District Court to hear cases involving mental capacity is derived from paras 2 and 3 of the Supreme Court of Judicature (Transfer of Mental Capacity Proceedings to District Court) Order 2010 (S 104/2010), which provide that:

> **Proceedings transferred to District Court**
>
> **2.**—(1) Subject to sub-paragraph (2), any proceedings under the Mental Capacity Act 2008 (Act 22 of 2008) commenced in the High Court on or after 1st March 2010 shall be transferred to and be heard and determined by a District Court.
>
> (2) Where any application under the Mental Capacity Act 2008 is made, on or after 1st March 2010, in relation to any proceedings commenced in the High Court before that date under Part I of the Mental Disorders and Treatment Act (Cap. 178) in force before that date, that application shall be heard and determined by the High Court.
>
> **Jurisdiction of District Court**
>
> **3.** For the avoidance of doubt, a District Court shall have jurisdiction to hear and determine any proceedings referred to in paragraph 2(1), notwithstanding that any amount involved in those proceedings exceeds the monetary limit of the ordinary jurisdiction of a District Court.

15 As can be seen, this jurisdiction relates to "proceedings under the Mental Capacity Act 2008 (Act 22 of 2008)", which Act was subsequently revised in 2010. The District Court is therefore seised of jurisdiction if the proceedings fall "under the Mental Capacity Act". Exactly what entails proceedings under the MCA?

16 In the introductory text of the MCA, it is stated that the MCA is "[a]n Act to make new provision relating to persons who lack capacity and to provide for matters connected therewith". In the *Singapore Parliamentary Debates, Official Report* (15 September 2008) vol 85 at col 109, then Minister for Community Development, Youth and Sports, Dr Vivian Balakrishnan, briefly described the

MCA in the following terms:

> The Mental Capacity Bill puts in place a framework for proxy decision making. This framework sets out who can make the decisions on behalf of *those who are mentally incapacitated*, which includes persons with dementia, intellectual disabilities or brain damage. It also specifies the processes for doing so. Family members and caregivers who make decisions *on behalf of those lacking capacity* will be guided by this overall framework. And recognising that *persons who lack capacity* are specially vulnerable, this Bill provides safeguards against abuse by proxy decision makers. [emphasis added]

The parliamentary debates went on to consider other features of the proposed regime, which include, *inter alia*, the appointment of deputies, the lasting power of attorney, and safeguards and protections.

17 At the risk of stating the obvious and to use the words of the introductory text, it is clear that proceedings under the MCA are proceedings which relate to "persons who lack capacity". Therefore, jurisdiction is seised only when the dispute involves an individual's mental capacity and matters connected therewith. In my opinion, "matters connected therewith" does not refer to any event that is merely loosely connected with the mental capacity of an individual, but refers instead to the various matters that are covered within the framework of the MCA. To be precise, this would refer to the nine different parts of the MCA.

18 The jurisdiction of the court must be strictly circumscribed by the MCA. This interpretation is supported by certain doctrinal issues of jurisdiction the common law faced before the enactment of legislation in the UK. In *Blackstone's Guide to The Mental Capacity Act 2005* (Peter Bartlett) (Oxford University Press, 2nd Ed, 2008) ("*Blackstone's Guide*"), at para 2.09, the author explores the development of the common law leading up to the enactment of the UK Mental Capacity Act 2005 (c 9) (after which the MCA is modelled), and states that:

> The creative use of common law in response to the gap in statutory provision since 1989 has been astonishing. While it is difficult to criticize the motives of those concerned and their desire to craft a pragmatic solution to the statutory difficulties discussed above, *the development was doctrinally unsatisfactory*. At issue have been the questions of how incapacity was to be defined, *what legal jurisdiction existed to make decisions on behalf of persons lacking capacity* and who could exercise it; and how the best interests of the person lacking capacity were to be determined. [emphasis added]

19 Apart from the issue of jurisdiction, the courts were also facing other problems as well, for example, certain definitional problems, such as defining the "best interests" of the individual. Legislation was therefore enacted specifically to address these problems, the relevant one in question now being the possible lacunae in the law (regarding jurisdiction).Given this background, it would make sense then that jurisdiction is seised only insofar as the statute prescribes – where the substantial dispute revolves around the mental capacity of an individual, or matters connected therewith.

Vulnerable people

20 A related issue of law which arose was whether "vulnerable" individuals, or those subject to undue influence, fell under the protection of the MCA. Given my observations regarding the law on jurisdiction above, it would only be consistent that the issues which do not involve the mental capacity of the individual would *not* fall within the protection of the MCA.

21 This position is supported by the decision of *In re L (Vulnerable Adults with Capacity: Court's Jurisdiction) (No 2)* [2012] 3 WLR 1439 ("*In re L*"). In that case, the issue arose as to whether the court had the jurisdiction to issue an order to "protect" a vulnerable elderly couple from their violent son, if it were found that the elderly couple were of sound mind (but vulnerable nonetheless). At [38] and [39], McFarlane LJ considered counsel's argument that the issue of adding "vulnerable adults" into the scope of the MCA had already been considered and that the eventual decision was not to include them:

> 38 It was apparently this category of individuals that the committee drew back from recommending should be included within the terms of the Bill.
>
> 39 Miss Lieven therefore submits that the resulting Act expressly left out of its terms, as it clearly does (see section 2(1) of the 2005 Act), those individuals who do not lack mental capacity. *Her case is that the inevitable conclusion must be that Parliament intended individuals outside the compass of the legislation to be free from court intervention in their ability to make decisions about their own lives*. Miss Lieven did not accept the point put to her during argument by Davis LJ, to the effect that the 2005 Act is simply a statutory scheme for adults who lack mental capacity and is not intended to deal, one way or the other, with any other individuals.
>
> [emphasis added]

22 Eventually, the court found that it did have the jurisdiction to make the relevant protective orders, but this was because of its inherent jurisdiction. To be precise, counsel's argument there was couched to support her point that because of the English equivalent of the MCA, the court no longer had the inherent jurisdiction to deal with cases falling outside of that Act. After considering counsel's argument, McFarlane LJ (at [57]) made it very clear that "the Act is expressly limited to 'people who lack capacity'", and (at [58]) stated that:

> Nothing in the 2005 Act makes express provision with respect to individuals who may lack capacity for a reason *other than an impairment of, or disturbance in the functioning of, the mind or brain.* Neither is there any express reference to the *inherent jurisdiction of the High Court.* [emphasis added]

23 The reference to the court's inherent jurisdiction is significant, because it meant the source of jurisdiction the court would rely on for cases pertaining to vulnerable people was derived from its inherent jurisdiction, rather than the MCA. This was made even clearer at [63]:

> My conclusion that the *inherent jurisdiction* remains available for use in cases to which it may apply *that fall outside the 2005 Act* is not merely arrived at on the negative basis that the *words of the statute are self-limiting* and there is no reference within it to the inherent jurisdiction. [emphasis added]

24 Therefore, even though the court in *In re L* eventually disagreed with counsel that it no longer possessed the inherent jurisdiction to hear such cases, it is clear that the court accepted counsel's argument that the MCA did not pertain to individuals who did not lack mental capacity as defined in the Act. That the inherent jurisdiction is invoked to protect such vulnerable people was also explored and accepted by the court in *Re SA* [2006] 1 FLR 867. There, Munby J (as he then was) said (at [79]):

> The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from

making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. The cause may be, but is not for this purpose limited to, mental disorder or mental illness. *A vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction* if he is, or is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors. [emphasis added]

25 The real issue is that vulnerable people fall into a category which is separate and distinct from that contemplated under the MCA. Because of this distinction, there is a need to rely on the inherent jurisdiction of the court as the court would not have been seised of the requisite jurisdiction under the MCA. As was observed in *LBL v RYJ and another* [2011] 1 FLR 1279 at [62], this inherent jurisdiction:

> [S]upplement[s] the protection afforded by the Mental Capacity Act 2005 for those who, whilst 'capacitous' for the purposes of the Act, are 'incapacitated' by external forces …

26 To summarise, under the MCA, the court will not be seised of the jurisdiction to hear the case if the dispute concerns the vulnerability, as compared to the mental capacity, of the individual.

Application of the law

Was the substantial dispute between the parties the mental capacity of [BKR]?

27 The question before this court is therefore whether the substantial dispute between the parties centres on the mental capacity of [BKR], such that the court below was seised of the requisite jurisdiction under the MCA. Admittedly, this is a threshold question which in most cases should be easily crossed. Understandably, it would only seem normal that if an application is taken out under the MCA, the dispute would definitely concern the mental capacity of an individual. What more could a party do then but to plead the right case? After all, all that the plaintiff has to do is to frame his case such that the dispute is centred on the mental capacity of an individual, and then produce supporting evidence.

28 The difficulty for the court is therefore discerning when the substantial dispute is in fact something else. To this end, the prayers asked for, the evidence of parties, and the submissions of counsel must be considered in totality before coming to such a conclusion. The motives or purposes of the parties in taking out the action may also help to shed some light. At the end of the day, it is a matter of discretion for the judge to decide what the substantial dispute is. I would add that in most cases, there should be significant evidence proving otherwise before a court would be minded to find that the substantial dispute is something else than what was actually framed.

29 In this case, the appellants at the trial below had very vigorously argued that the real dispute between the parties was one of access and (purported) undue influence, rather than of mental capacity. The Senior District Judge briefly addressed this point at [87] of her grounds of decision ("GD"), where she concluded that:

> The defendants submit that this application was all and only about access[BKR] and not her mental capacity and that all correspondence prior to start of the proceedings did not mention [BKR]'s lack of mental capacity. When [BKR] was being cross-examined, I allowed the plaintiffs to address her on their reasons for the application. [The] 1st plaintiff said in substance that they had applied because they wanted to see her and bring her back to Singapore to talk to her. The 1st plaintiff had spoken, as a sister, to reassure K at what she gauged to be [BKR]'s level of

understanding and concern and her sensitivities. What [the] 1st plaintiff said was not a statement to the court, on the legal grounds or bases for the plaintiff's' application. I accept the submission that the plaintiffs, had, in their correspondence not wanted to specifically refer to [BKR]'s lack of mental capacity, as this was very [*sic*] sensitive point and would upset [BKR]. This was borne out by [BKR]'s reaction to [NG] over the 21 March 2009 medical examination with Dr [AD], when [BKR] misunderstood that [NG] was unhappy that the doctor had not certified [BKR] as lacking in mental capacity.

30 After considering the parties' arguments and the evidence before me, I am of the opinion that the substantial dispute between the parties was not so much about [BKR]'s mental capacity than about her access and the undue influence which she was allegedly subjected to. I draw this conclusion with the following two points in consideration.

(A) Evidence of the respondents

31 The first point to be noted is that the respondents' true concerns were borne out of the evidence from the respondents in the trial below. A review of the evidence below would show that the respondents consistently repeated two points:

(a) that when given the right advice and assistance, [BKR] could understand information and make a decision; and

(b) that [BKR] had to be given access to the right people so that they could give her such advice and assistance.

32 In the cross-examination of [AUR] on 4June 2012, [AUR] had first stated that she would give financial advice to [BKR] to aid her to make certain decisions. The following evidence is revealing:

Q: What your concern is now – and I accept that you have some sisterly concern on this part – is that she's not listening to you, she's listening to somebody else who could have very bad motives that they might try to steal her inheritance away from her to benefit themselves?

A: That's correct.

Q: That's your concern?

A: Yes.

…

Q: It is not so much that if she doesn't get help and assistance, [BKR] can't understand what she's doing. That's not so much your concern, am I right? Your concern is that her daughter, [AUT], and her husband, [AI], are taking advantage of her by manipulating her to do what they want?

A: Yes.

33 During the cross-examination of [AUR] on 5 June 2012, [AUR] reinforced her point that [BKR] had to get the right advice from the right person. In answering counsel's question as to why she ([AUR]) did not want the bank to act on [BKR]'s instructions without her or [CY]'s presence, [AUR] answered that "it must be important that it's *explained* to [BKR] what she is purporting – what she's

trying to do" [emphasis added]. The following exchange with counsel then took place:

Q: So you were not telling the bank that she can't understand, but you are not sure whether someone is explaining fully to her?

A: Yes.

Q: And if you explain it fully to her, she can understand?

A: Yes.

Q: But you were suspicious that she was listening to other people who weren't explaining it properly?

A: Listening and being influenced by --

Q: Being influenced by people who weren't explaining it properly?

A: Yes.

…

Q: Your concern was *not* that she *could not understand what she was doing but she needed someone to explain this to her so she could understand what was being done?*

A: Yes.

Q: And if it was just [AUT] and a legal adviser who purported to be independent, then there wouldn't be a fair explanation being given; right?

A: Yes.

[emphasis added]

34 In the cross-examination of [CY] on 7 June 2012, [CY] also agreed that "with the right advice, the honest advice" from the sisters, [BKR] could make the right decision. In her re-examination which followed, [CY] stated explicitly:

> [M]y sister is very vulnerable at the moment, so we would like to make sure that the circumstances are properly explained to her before she starts any new account or introduced by whichever of her children.

35 A similar position was taken by [BKR]'s daughter, [NG], as well. In her cross-examination on 15 June 2012 , she stated that

A: Quite honestly, I don't mind if – I'm very happy if she wants to live with [AUT] and [AI]. *If she could just basically speak to other members of the family, her sisters, just so that she had her view on her other children corrected.*

Q: One of your concerns must be that [AUT] and [AI] are perhaps misleading her, not telling her the whole truth or telling her things which are just not correct. Is that your concern?

A: Yes.

Q: So you actually believe that *if she has access to other family members, she'll be fine. She can form her own independent views?*

A: I think -- yes.

[emphasis added]

36 The evidence also hints that the true purpose of the application was really so that [BKR] could have access to the right family members. During [AUR]'s cross-examination on 5 June 2012, [AUR] stated:

A: … we all decided to take this big step to bring her back …

…

A: As you know, Mr Yeo, and you said I have a mind of my own, and I have a mind of my own that my sister needs help and we all want to help. Every one of us. We made the decision on my late brother's birthday … on 3 February, we all get together and we all had worked out that there was something very wrong with the whole thing, and we all decided then and there that the only way we could bring back to her would be under the Mental Capacity Act, and we all decided that we must do something to help her.

…

Q: You couldn't find any proper avenue of bringing her back, *so you hit on taking this action under the Mental Capacity Act to bring her back*?

A: Yes.

[emphasis added]

37 One of the strongest intimations of this point surfaced during [AUR]'s cross-examination on 6 June 2012:

Q: [AUR], I'm going back to the first sentence of your answer, but isn't it true that you are bringing [BKR] to court and wanting a court order to say that she's mentally incompetent?

A: *No I didn't say she was mentally incompetent*. I think that's very unfair for you to say that. …

…

Q: [AUR], you come to court and ask for certain orders; correct?

A: Yes.

Q: I just want to be clear about what you want from the orders. Surely you can tell the court that?

A: *I want her to come back to Singapore* because I think if she's in Singapore, she will be able

to be free from any influence by [AUT] or [AI].

[emphasis added]

38 During the cross-examination of [BKR]'s son, [CK], on 11 June 2012, he stated that:

The motivation by my uncles and aunts for this application is not just what state or an affirmation, it's to protect her entire inheritance, which is now at risk as a result of conduct by [AUT] and [AI], which is to say the least, highly abnormal. That is the key reason for the application and that's why among other reasons, I agree with all my uncles and aunts. So it's not just a matter of dollar and cents, it's a matter of principle, the true intention, what she really wants to get done, free of obstruction of access and free of manipulation.

39 Likewise, [NG] during her cross-examination on 15 June 2012 had expressed similar concerns:

Q: [NG], what is your position on these proceedings by your two aunts to have themselves appointed as your mother's deputies?

A: My position. Let's see. Well, I would like to see my mother again. I would like my children to see their grandmother again, *so I support my aunts because I do not see there's any other way to have my mother back*.

…

Q: Can you tell us the circumstances in which you signed this document?

A: I signed this *because I consent to the proceedings to get my mother back*.

Q: [NG], that was signed on 24 February 2011. What is your position today?

A: My position remains the same.

[emphasis added]

40 Apart from these positions taken during the course of oral testimony, counsel for the appellants has also drawn the court's attention to other pieces of evidence which reflected a similar sentiment – that the concern was of lack of access to, and of undue influence on, [BKR] and not her lack of mental capacity. For example:

(a) in an email from [CK] to [KG] on 7 December 2010, the former mentioned that "ACCESS is the key point…"; and

(b) in [AUR]'s letter to UBS dated 5 December 2010, she stated that "The Bank must see her in the presence of myself, [IE] or [CY] so that we can all be absolutely clear that [BKR] fully understands the transactions that she is undertaking".

41 The position taken by the respondents is further emphasised in their closing submissions in the trial below. At para 9.3.2, p 338 of the respondents' closing submissions, it is stated that:

These MCA proceedings were instituted precisely to liberate her from those family members who sought only to use her for their own financial and other gain.

42 Later at para 11.1.2, pp 366–367, it is also stated that:

> These proceedings were started not only because [BKR] started behaving erratically and out of character, but also because [BKR]'s access to her entire family was cut off. Without the advice and support of her family, [BKR]'s siblings and children knew she would be unduly influenced into making decisions that did not coincide or protect her best interests:
>
> (a) At line 11, page 19 of the transcript of 6 June 2012, [AUR] informed the Court that this action was commenced to ensure that [BKR] makes decisions that are truly and entirely hers.
>
> (b) At line 11, page 167 of the transcript of 6 June 2012, [AUR] explained that her "*ultimate purpose*" in bringing this action is to ensure that decisions [BKR] makes on her inheritance is [*sic*] made voluntarily and without influence, whatever those decisions may be.
>
> (c) At line 19, page 100 of the transcript of 7 June 2012, [CY] explained to the Court that all the [Respondents] want to do is explain the circumstances to [BKR] properly before she makes any decision.
>
> …
>
> [emphasis in original]

43 Leaving aside the question of jurisdiction for the moment, I would observe that it is commendable that the respondents have been truthful about their concerns regarding [BKR] and their motivations for the application. Indeed, they could have easily stated otherwise. However, what this overview of the evidence shows is that at least one of the main concerns for the respondents was access and undue influence. These sentiments were not individual one-off instances, but, as will be seen later, formed a continuous theme which was repeated throughout the whole proceedings.

(B) The sequence and string of events

44 The second point I took note of was the sequence of events leading up to the application, and the fact that great emphasis was placed on various instances of undue influence that [BKR] was allegedly subjected to.

45 From the evidence, it appears that the respondents accepted that while [BKR] might have memory problems, up until at least November 2010 [BKR] could make her own decisions. I would note that in any case, [BKR] was used to receiving advice from her loved ones, be it from her husband or siblings, in making her financial decisions. At para 3.1.9(d) of the respondents' aide-memoire to their closing submissions, it is stated that:

> … all transactions undertaken by [BKR] up till 2010 were obviously made transparently and with the advice and assistance of the [Respondents], and [BKR] had full access to the necessary information, assistance and support from her family members. Her wishes and best interests were always given attention to. … [BKR] was [thus] able to make those decisions with the aid of her family members then. [emphasis in original]

46 In his closing submissions, counsel for the respondents had also submitted that "the [Respondents] do accept that [BKR] had capacity to make decisions up to December 2010…", concluding that "we have an individual who had capacity, who knew what she wanted and who chose people whom she loved, had grown up with and trusted to advise her and from whom she was taken

away in November 2010".

47 I also accept the appellants' argument that [BKR] had carried out numerous transactions before 2010, and that this was not contested by the respondents. Tellingly, the Senior District Judge had also noted this at [83]–[84] of her GD, where she said:

> 83 … I find that before end November 2010, the [Respondents] and in particular [AUR], were trusted sisters and advisers, to whom [BKR] turned willingly for help in her finances and investments including buying a flat to stay in Singapore and buying investment property following [CY]'s lead. …
>
> 84 … All this changed after [BKR] left for Hong Kong. There was little communication with the [Respondents], her other siblings and her two children …

48 Therefore, if the respondents were indeed disputing the mental capacity of [BKR], the key time-frame of the dispute would be from November 2010 to February 2011 (the month when the application was taken out). With this in mind, two observations can be made at this juncture.

49 First, there was a substantial body of evidence pertaining to events that occurred before November 2010. This was so significant that the learned Senior District Judge felt obliged to include those events in the "second thread" of evidence. At [37] of her GD, the Senior District Judge noted that she had considered "two main threads of evidence". The first thread "*relates directly*" [emphasis added] to [BKR]'s mental capacity. At [38], the Senior District Judge described the second thread of evidence as follows:

> The second thread comprises contemporaneous events from late 2008 to the first quarter of 2011 in the intra-family relationships of [BKR], including the plaintiffs and [BKR]'s children. The sibling disputes amongst [BKR]'s children began in 2008 and converged upon creation of the 3rd Trust in October/November 2010. It was around this time, that [AUT] bought a good class bungalow property in Singapore in October 2010 for [AI] to hold in trust for their young children. This occurred around the same time as the intra-bank transfers of [BKR]'s assets within DBS Bank and instructions for the inter-bank transfer of [BKR]'s assets from UBS Bank to DBS Bank in November/December 2012. After [BKR] returned to Hong Kong with [AUT] in end November 2010, [BKR] became increasingly isolated, when telephone and physical access to [BKR] was denied to family members because the home phone was engaged or on fax, the employment of bodyguards and the threat of legal action and injunctive relief against [NG] and [CK], should they try to see [BKR]. These events are related and the confluence is not coincidental. [emphasis in original omitted]

50 The disputes over those events surfaced during the proceedings in the court below. At [100] to [105] of the GD, the Senior District Judge mentioned a number of those events, which included, *inter alia*, the disputes between the siblings and [BKR] regarding some property in Hong Kong or London, [BKR]'s late husband's Malaysian project, letters from [BKR] to [AUT] admonishing [AUT], and rental disputes.

51 Second, even during the key period, the respondents led evidence detailing numerous instances of undue influence. At [106] to [126] of her GD, the Senior District Judge addressed three of the many events which were raised – the setting up of the [xxx] Trust by [BKR], the isolation of [BKR] when she was brought to Hong Kong, and the purchase of a good class bungalow by [AUT] and [AI]. (To be precise, the Senior District Judge also addressed the issue of conflicting instructions to the bankers at this part of her GD.)

52 Indeed, much ink has been spilled over those issues. The affidavits of the respondents filed in the trial below were replete with events which were cited as examples to show how [AUT] and [AI] were unduly influencing [BKR]. Details of what happened during the wake and funeral of the respondents' elder brother [AN] were even brought into the picture. Although in itself inconclusive, the length and extent to which counsel's submissions addressed these issues both in the trial below and in the Appeals goes to show how significantly the parties viewed the events.

(C) Evaluation of the real dispute

53 With these two points in mind, I now return to the question which has to be answered – Did the substantial dispute between the parties centre on the mental capacity of [BKR]? To answer this question, the evidence must be examined in its entirety. Having done so, I am of the opinion that the substantial dispute between the parties *did not* centre on the mental capacity of [BKR].

54 When the respondents testified in the court below, they repeatedly said that their real concern was of access and undue influence. This was further supported by the fact that a *significant* amount of evidence was led detailing events which did not *directly* relate to the mental capacity of [BKR]. As this argument was canvassed by counsel for the respondents, some form of clarification is warranted here – how relevant were the issues of undue influence in deciding the mental capacity of [BKR]?

55 In their submissions, counsel for the respondents argued that "the undue influence findings are material to OSF 71". Later on in the submissions, they said:

> …the Respondents do not argue that [BKR] lacks capacity because of undue influence and manipulation. Undue influence is not asserted as a cause of action for specific transactions; it is raised as further proof of and contributing factor to [BKR]'s lack of capacity.
>
> …
>
> It is clear that [BKR]'s ability to make decisions is compromised by intrinsic defects (including the impairment and disturbance to the functioning of her mind or brain, and significant cognitive deficits) which render her unable to make her own decisions under the MCA. This is compounded and heightened by external influence and pressure, and places her at very high risk of elderly abuse. Moreover, because [BKR] lacks capacity (and her true medical condition was withheld from the family), [AUT] and [AI] have been able to easily and effectively cut off all normal access to [BKR].
>
> [emphasis in original]

56 The Senior District Judge seemed to have taken a similar position that the issues of undue influence were material to the findings on [BKR]'s mental capacity. At [129] of her GD, she said:

> [BKR]'s situation is compounded because she denies and does not accept that she has serious deficits especially with her memory, a belief which has been encouraged by [AUT] and [AI]. [BKR] is vulnerable and susceptible to undue influence and manipulation, which could lead her to trust, accept and follow without question, suggestions and instructions on her property and affairs from persons, who do not have her best interests at heart and who, if they know [BKR] well, can play on her vulnerabilities and fears, to inveigle themselves into a position of trust to manoeuvre and manipulate her.

57 With respect to the Senior District Judge and the respondents' counsel, I cannot agree with the

positions taken. I discuss the tests prescribed by the MCA in detail below (at [69]) but for now it suffices to observe that the words of s 4(1) of the MCA are patently clear – the incapacity of the individual must be *because* "of an impairment of, or a disturbance in the functioning of, the mind or brain", and nothing else. Even taking the respondents' case at its highest, I cannot see how the actions of [AUT] and [AI], be they in the purchase of a good class bungalow in Singapore, the "whisking" of [BKR] off to Hong Kong, the prevention of access to other family members, or even the relationship between them and [BKR], are relevant to the determination of [BKR]'s mental capacity. These incidents may justifiably be a cause of concern for the family, and if proven true might even lead to certain forms of legal recourse. However, these actions or events of undue influence cannot, as the respondents have argued, be considered a "contributing factor to [BKR]'s lack of capacity". The MCA is clear that the *only* causal factor to be considered is an impairment of the mind.

58 At the very best, the above events may be of circumstantial value in proving [BKR]'s lack of capacity. A possible syllogistic argument that could have been raised was as follows:

(a) Premise 1 – Individuals lacking mental capacity are more prone to being unduly influenced;

(b) Premise 2 – Given the string of events, [BKR] was shown to be more prone to being unduly influenced;

(c) Conclusion – Therefore, it is likely that [BKR] lacked mental capacity.

59 However, it is noted that the respondents never explicitly advanced this argument at the trial below or during the course of the Appeals. Furthermore, even giving counsel for the respondents the benefit of the doubt that this argument was impliedly put forth, no arguments or evidence was led to prove the veracity of Premise 1 as well. Even then, this must still be considered against the fact that the respondents had time and again repeated that their real concern was that [BKR] was being subjected to undue influence, and that access to her was prevented. The intention, therefore, was that [BKR] should not be subjected to undue influence and should be brought back. This is in contrast to the hypothetical argument I had considered above, where the *eventual* concern would be the state of [BKR]'s mental capacity (with the events of undue influence merely proving such). In any case, it is also hard to see how the physical prevention of access (such as preventing [BKR] from answering the telephone, or physically preventing her from meeting her siblings at [AN]'s funeral, *etc*, which the respondents mentioned throughout the trial) is relevant to proving the mental incapacity of [BKR].

60 Granted, the respondents tendered to the court below medical evidence and reports contesting the mental capacity of [BKR]. However, given the way the evidence was presented and the weight and significance the respondents attached to events wholly unrelated to the mental capacity of [BKR], I am left with the inevitable conclusion that the respondents were really concerned about something else rather than the mental capacity of [BKR].

61 I accept that the Appeals are not to determine if the respondents had a secondary or subsidiary motivation behind taking out these MCA proceedings. A secondary or subsidiary motivation will not always be considered an abuse of process, so long as there remains some form of dispute over the mental capacity of the individual. However, in this case, after reviewing the evidence in its totality, I am of the view that the substantial dispute really does not centre on the mental capacity of [BKR]. In fact, it is clear from the evidence of the respondents that with the appropriate help, [BKR] is able to make decisions for herself (which suffices the test prescribed by the MCA – see [69] below). As a result of this finding, the MCA does not apply and the Senior District Judge erred in finding that she had the jurisdiction to entertain the application.

The findings pertaining to undue influence and other factual events

62 This would be an appropriate juncture to deal with the substance of RAS 224 – that the Senior District Judge had erred in her findings that [AUT] and [AI] had unduly influenced [BKR]. After considering a number of "intra-family matters" from [100] to [126] of her GD, the Senior District Judge made, *inter alia*, the following findings:

(a) As to the [xxx] Trust – While it is not for the court to rule on the [xxx] Trust, injection of [BKR]'s assets into the trust could give [AUT] some measure of control and say over those assets in her capacity as Protector. In this manner, the role of the Protector as described by [AUT] in her evidence is far different from reality.

(b) As to the purchase of a good class bungalow – [AUT]'s active interest and participation in helping [BKR] move her assets from the other two banks to DBS Bank for injection of those assets into the [xxx] Trust and the purchase was not a mere coincidence. This was because of the similarity between the price of the house and the funds transferred, the timing of the transfer, and parallel attempts to transfer [BKR]'s assets from other banks into her DBS Bank accounts. Since [AUT] was the Protector of the [xxx] Trust with some form of control, there could possibly be some leakage of the funds as well.

(c) There were clear instances of [AUT] prevailing over [BKR]. Given [BKR]'s frugal nature, it was unlikely that [BKR] would have gone to instruct a lawyer to send letters with a deed of undertaking to her children, and therefore she must have done this with the encouragement or at the behest of [AUT]. Another example would be [BKR]'s sudden change of heart when she stated that she would not be attending the annual remembrance prayers for her late father.

(d) [AUT] was intent upon precluding access to [BKR] by members of her family and her bankers except when [AUT] was involved in some way and could somehow control and manage the access in a way that would not interfere with [AUT]'s plans relating to [BKR]'s wealth.

63 Given my observations above, it would naturally follow that the findings of undue influence that the Senior District Judge made should be set aside as they are *irrelevant* to the issue of the mental capacity of [BKR]. Counsel for [AUT] and [AI] had very vigorously argued that the evidence supports their case – that the Senior District Judge had no factual basis to reach her findings. I see no need to make any findings regarding this point or the events in [62] above, as they have little bearing on the mental capacity of [BKR]. If the respondents were concerned that [BKR] was vulnerable to undue influence, or that [AUT] and [AI] had been wrongfully preventing access to her, the right recourse would perhaps be to ask the court to invoke its inherent jurisdiction to protect vulnerable people, similar to the situations in *In re L* or *Re SA* discussed earlier. However, this argument was also not raised by counsel, and I therefore see no need to belabour the point.

Summary of Issue 1

64 The following points summarise my findings under Issue 1:

(a) Jurisdiction under the MCA is seised only if the substantial dispute centres on the mental capacity of an individual, or issues connected therewith. The issues connected to the mental capacity of an individual are exhaustively set out under the various parts of the MCA.

(b) Vulnerable people do not fall under the jurisdiction of the MCA, unless they are deemed to lack mental capacity under the MCA.

(c) The oral evidence of the respondents, and the voluminous evidence submitted to the Senior District Judge which did not relate directly to the mental capacity of [BKR] strongly suggests that the dispute did not centre on the mental capacity of [BKR], but instead, on the undue influence she was allegedly subjected to and the prevention of access. In the premises, the Senior District Judge did not have the jurisdiction to entertain the application.

65 Given that an application under the MCA must centre on the mental capacity of an individual, events which were not materially relevant to this issue fell outside the scope of the MCA. The Senior District Judge had considered and made a number of factual findings on irrelevant events. Since these were outside the scope of the MCA, the Senior District Judge did not have the jurisdiction to make such findings. Therefore, there is no need for this court to make any factual findings regarding those events, although my preliminary observations are that some of the Senior District Judge's findings were incorrect (such as her suspicion that [BKR] paid for the good class bungalow, when in truth it was purchased by [AUT] in the name of [AI] using her own inheritance from her late father, [EW]).

Issue 2 – Did the Senior District Judge err in law and in fact in applying the principles of the MCA wrongly, when considering the medical evidence and other contemporaneous events?

66 Given my findings on Issue 1, the Appeals would already be allowed based on the fact that the Senior District Judge had no jurisdiction to entertain the application, much less make any findings on the events of undue influence alleged against [AUT] and [AI]. However, in the event that I am wrong in that there was some form of dispute regarding [BKR]'s mental capacity, I move on to address the issue of whether [BKR] lacks mental capacity as contemplated by the MCA. This does not detract from my view that the alleged events and instances of undue influence remain irrelevant to the findings of mental capacity.

67 A declaration of the incapacity of an individual is not a trivial one. Effectively, the court is declaring that a particular person no longer has the ability to make a decision for himself and therefore, such decisions are to be effectively disregarded insofar as they no longer have any legal significance. For example, under contract law, agreements made by an individual who lack capacity are deemed void. Under criminal law, incapacity forms an effective defence in many cases. All in all, it is an encroachment upon the autonomy of an individual because the court is declaring that the individual has lost his ability to make a choice, and therefore, society should not take into account the individual's "decision". Upon the declaration of incapacity, a common step to take next is for deputies to be appointed who will then decide on the behalf of the individual.

68 Given the significance of such a declaration, the MCA sets out a number of important principles which are to be strictly followed in determining the capacity of an individual. These are to be found in s 3 of the MCA. Flowing from s 3, the legal test as to whether an individual lacks capacity is found in s 4 and further elaborated on in s 5 of the MCA. Before discussing the core principles of the MCA, it may be helpful to first set out the test for incapacity.

The law

The test for incapacity

69 The test for incapacity is found in s 4 of the MCA:

Persons who lack capacity

4.—(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 (other than proceedings for offences under this Act), any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

(5) Subject to section 21, no power which a person ("D") may exercise under this Act —

(*a*) in relation to a person who lacks capacity; or

(*b*) where D reasonably thinks that a person lacks capacity,

is exercisable in relation to a person below 21 years of age.

70 Section 4(1) makes it clear that it is a two-step test. There is a *functional component* that the individual "is unable to make a decision for himself in relation to the matter", and a *clinical component* that this inability stems from "an impairment of, or a disturbance in the functioning of, the mind or brain". Section 5 elaborates on what it means when an individual is "unable to make a decision", and provides that:

Inability to make decisions

5.—(1) For the purposes of section 4, 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.

71 In determining whether an individual is able to make a decision, it must be noted that the requirements of ss 5(1)(*a*) to 5(1)(*d*) are to be read *conjunctively*, in that all four requirements must be met – a person must be able to understand, retain, and weigh the relevant information, and then communicate his decision if he is to be found able to make a decision. A deficiency in any one of these requirements would mean that the individual lacks mental capacity. For precision, I would observe that all four functions engage different forms of cognitive activity – understanding demonstrates an ability of *comprehension*, retaining demonstrates an ability of *memory*, weighing demonstrates an ability of *logic and reason* and finally, the individual must be able to *communicate* in a way such that others actually understand his decision. This distinction is important as the impairment of the mind takes many forms, and may affect different brain functions. I accept that the first three requirements are usually considered together. As stated in *Re F* [2009] EWHC B30 (Fam) (at [21]):

> The "[inability] to make a decision for himself" refers to a defect or deficiency in normal powers of reasoning, ie a shortcoming in the ability to understand, or to retain, or to weigh up relevant information and/or to communicate a conclusion (s 3(1)(a)-(d)). Plainly the first three aspects go together, and can well be of a different character from the fourth.

72 To conclude, if an individual is unable to understand, retain, or weigh the relevant information, or to communicate his decision (the functional component), because of an impairment of the mind (the clinical component), he will be found to lack capacity under the MCA.

The relevant principles of the MCA

73 The core principles of the MCA are to be found in s 3, which provides:

> **The principles**
>
> **3.**—(1) The following principles apply for the purposes of this Act.
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (3) 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.
>
> (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
>
> (5) An act done, or a decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
>
> (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

74 The first three principles (ss 3(2), 3(3) and 3(4)) are directly applicable to the test for

incapacity, while the fourth and fifth principles pertain to matters after an individual is found to have lacked capacity. Pertinently, s 3(3) further elaborates on the *functional component* of the test for incapacity (whether an individual is "unable to make a decision"). "All practicable steps" must be taken to help an individual before determining that he is unable to make a decision. Reading this with s 5, this means that all practicable steps must be taken to aid an individual to understand, retain, or weigh the relevant information, and to communicate his decision. This requirement of assistance is acknowledged in *Blackstone's Guide* (at para 3.16):

> The requirement to provide assistance should ensure that such persons fall under the MCA only if they really are unable to communicate their wishes, not merely because they may require specialist assistance in being understood. Similarly, this principle would suggest that *individuals who may have difficulty assimilating information should not be found to lack capacity because it is inconvenient to spend the required time working through the information with them*. Moreover, the degree of support an individual receives in his or her overall environment may affect the decisions he or she can make. *The presence of carers, professional or lay, may make it possible to organize the individual's life so that decisions are simplified to a degree where an individual of marginal capacity can make the decision.* [emphasis added]

75 An example from para 5.2 of the Singapore *Code of Practice: Mental Capacity Act 2008* (Office of the Public Guardian, 2010) ("COP") illustrates this principle of assistance. In an example where Ching Ching needs to make a decision on whether to undergo medical treatment A or medical treatment B, the committee of persons encourages that the following (non-exhaustive) information be provided to Ching Ching:

(a) the purpose and effect of each treatment;

(b) the consequences of each treatment; and

(c) the consequences of not having either treatment.

The COP further indicates that these options should be presented to Ching Ching in a fair manner. All in all, the example advocates that the individual be given appropriate support in making his decision.

76 Section 3(4) of the MCA states that an individual who makes an unwise decision should not be treated as being unable to make a decision. This sheds some light on how s 5(1)(*c*), which concerns the individual's ability to use or weigh that information as part of the process of decision-making, is to be assessed. As *Blackstone's Guide* elaborates (at paras 3.27 and 3.28):

> The MCA requires that the incapable individual must be unable to understand the reasonable foreseeable consequences of deciding one way or another, and of failing to decide. This would seem to include reasonably foreseeable risks and benefits flowing from the various decisions possible, or of failing to make a decision. …
>
> Through all of this, it should be emphasized that the MCA is *phrased in terms of ability*. Certain academic literature has drawn a distinction between ability to understand and actual understanding. In the legal context of the MCA, where capacity determination is so closely related to specific decisions, the distinction may seem somewhat precious, but insofar as it is an issue, the MCA speaks in terms of ability. *It follows from this that people of marginal capacity have the same rights as those of robust capacity to waive information provision. The fact that an individual chooses to hush the warnings of his or her stockbroker regarding equity transactions or doctor regarding adverse effects of treatment may be manifestly unwise, but it*

does not of itself bespeak incapacity.

[emphasis added]

77 The legal inquiry at the end of the day is to assess the individual's *ability*. Therefore, it is clear that an individual is not to be found to lack capacity simply because he cannot *foresee* potential benefits or risks flowing from the various decisions. Only when he is *unable to understand* such benefits or risks is he then found to lack capacity. There is therefore a difference between a person who consciously makes an unwise decision and another who makes a decision that turns out to be unwise because he lacks the ability to understand, retain, or weigh the information necessary to make the decision. That said, I also note para 3.5.3 of the COP, which states:

> If a person *makes several decisions which are unusual bearing in mind his usual behaviour* or makes decisions which make it easy for him to be exploited or harmed, then further investigation into that person's capacity should be conducted. [emphasis added]

I should point out here that I am bound under s 41(6)(*a*) of the MCA to take the provisions of the COP into account.

78 Therefore, as I have mentioned above, the detailing of any factual incidents is only helpful insofar as they provide the court with an opportunity to assess whether the individual is consistent in making his decisions. If, for example, the individual continuously makes bizarre decisions with no pattern of consistency between such decisions, the court may be more likely to make a finding of incapacity.

79 I would also add that a finding of mental capacity is issue-specific, depending on the nature and complexity of a transaction, and time-specific, as capacity may fluctuate.

Difference in assessment between the functional component and the clinical component

80 It is important to distinguish the *functional component* and the *clinical component* of the test because they are two separate components which are to be assessed differently. The MCA clearly specifies how the *functional component* of the test is to be evaluated. As elaborated above, there are a set of principles to be applied when assessing whether or not an individual is unable to make a decision. However, the MCA is silent on how one is to assess the *clinical component* of the test. The trial judge will therefore have to assess the *clinical component* of the test by considering the totality of the evidence before him, similar to any other issues before him.

81 The distinction between the two components is thus critical because the assessment of the evidence takes on a *different perspective* depending on which component is being assessed. To illustrate, if factual instances are raised to show that an individual is generally forgetful (alongside expert medical evidence), this may aid the court in finding that the person suffers from dementia, which may satisfy the *clinical component* of the test. However, there is an additional step to be taken to satisfy the *functional component* of the test – the court must be further satisfied that the individual *is unable to make a decision*. To do so, the court is then to be guided by the principles contained in the MCA. In considering the factual instances, for example, the court must consider whether all practicable help had been given. If no such help was given, the court must then be satisfied that *even if all practicable help was given* in that factual scenario, the individual would still have been unable to make a decision, before finding that he lacks capacity.

82 There is also legal significance stemming from this distinction. As the assessment of the

functional component is premised on the guiding principles in the MCA, an appellate court may reverse the findings of the trial judge if the principles were not followed. However, a finding on the *clinical component* of the test is essentially a finding of fact, based on the evidence before the judge (including expert medical evidence). The trite principle that an appellate court should be slow to intervene in the trial judge's findings of fact would apply in this regard.

83 That said, while the two components are to be distinguished, the clinical component of the test invariably affects the functional component of the test. For example, if an individual is suffering from such a severe state of dementia that it significantly affects his memory, this directly relates to s 5(1)(*b*) of the MCA, which is the individual's ability to retain the information. If the retention of information is so compromised such that all practicable steps are still rendered useless, the court will have no choice but to find that the individual lacks capacity. As stated by Neville J in *Richmond v Richmond* (1914) 111 LT 273 ("*Richmond*") at 274:

> In my opinion, the mere fact that *the immediate memory is lost is in itself a fact which, broadly speaking, must disable the person* so afflicted from properly conducting his or her own affairs. It is a question of whether the patient can be made to understand the nature of the act which he or she is asked to do.
>
> Her memory being a blank as to what happened yesterday and the day before, how can such a person exercise a judgment upon an affair which is placed before her?
>
> [emphasis added]

84 The above case was cited by the Senior District Judge at [28] of her GD. Although *Richmond* was decided at a time before significant changes to the mental capacity regime in England were made, I generally agree with Neville J's observations as to the loss of immediate memory. The court will be more inclined to find an individual lacking in capacity when this memory loss is *immediate*, as it may be impossible to assist the individual despite all *practicable* steps taken. However, if the individual is capable of a lengthier period of memory such that all practicable steps can still assist the individual in making his decisions, the court will be less inclined to find that the individual is lacking of capacity. In this manner, the *severity* and *symptoms* of the impairment become important factors to consider when determining the *functional component* of the test.

The Senior District Judge's decision

85 From the above discussion, it would appear that the Senior District Judge's findings can be "separated" into at least two categories – findings pertaining to the *clinical component* of the test, and findings pertaining to the *functional component* of the test. The Senior District Judge did not explicitly carry out the separate analysis, and understandably so, because in reality it would be difficult to neatly categorise such findings so precisely. I state this at the outset because it will become apparent later that many of the Senior District Judge's findings generally show that the *clinical component* of the test had been met. However, whether or not the *functional component* of the test was met is another question. As stated above, this must be answered with due consideration to the principles of the MCA.

86 In addition, I had also observed that the Senior District Judge went on to make certain factual findings which did not necessarily pertain to either component. This was most apparent when she considered the second thread of contemporaneous events. To give an example, after considering a trust set up by [BKR] (the [xxx] Trust) and the purchase of a good class bungalow in Singapore by [AUT] (at [107] to [111] of her GD), the Senior District Judge made a factual finding that "[t]here

could also be some leakage of the funds in the trust to persons other than [BKR]" because of certain provisions in the trust documents. As I had observed earlier (at [62(b)] and [63] above), whether or not there could be a leakage of funds has no bearing on either the *clinical component* or the *functional component* of the test. This reinforces my finding that the Senior District Judge clearly erred in this regard.

87 While the Appeals concern all three "categories" of the Senior District Judge's findings, the central focus under this issue is really the mental capacity of [BKR]. Therefore, it is only the Senior District Judge's findings with regard to either the clinical or functional component of the test which are directly relevant for this court's consideration. Bearing this in mind, I now set out my views on the Senior District Judge's findings based on the evidence adduced before her.

The Senior District Judge's findings

88 There was a wealth of evidence before the Senior District Judge and as stated at [134] of her GD, she had only elaborated on details at the level she considered "sufficient to address and meet the issues raised by the defendants". The voluminous records of appeal reveal the enormity of her task. I see no need to dwell on issues irrelevant to determining the mental capacity of [BKR], as it distracts this court from its task of determining the merits of the Appeals.

89 After reviewing the evidence, the Senior District Judge arrived at her conclusions at [127] to [134] of her GD. In summary, the Senior District Judge concluded that [BKR]:

(a) had extremely poor memory, faced significant difficulties with orientation as to the day and date, and had difficulty with calculation, focusing and concentration;

(b) had an unrealistic perception of the value of her property and assets, and her estimated monthly expenditure;

(c) at the very least had mild dementia and Alzheimer's Disease combined with vascular dementia with very poor short-, mid- and long-term memory;

(d) was able to comprehend what was said to her and seemingly respond, but was unable to retain relevant information long enough to weigh and assess that information in context with other relevant information to appreciate the consequences and implications;

(e) had extreme memory deficits and a lack of ability to understand and appreciate the implications of her actions, as well as a lack of executive function to enable her to decide;

(f) was vulnerable and susceptible to undue influence and manipulation; and

(g) did not have the capacity to litigate.

90 The Senior District Judge stated that [BKR] was subject to confabulation, and demonstrated symptoms of masking (when she did not know how to answer a question).

91 The Senior District Judge also concluded that [AUT] knew and understood [BKR], and was influencing and causing [BKR] to act in a manner contrary to [BKR]'s best interests. [AUT] was also selectively providing important information on [BKR]'s mental health and treatment.

92 The Senior District Judge then dealt with the following categories of evidence in coming to her decision:

(a) medical reports and test results of [BKR], performed by both her Hong Kong and Singapore doctors starting from 2005 onwards;

(b) clinical interviews conducted by [BKR]'s experts in Singapore;

(c) MRI and PET scans carried out on [BKR];

(d) [BKR]'s oral testimony in court from 12 to 21 February 2012 (resulting in the conclusion that [BKR] confabulates and masks);

(e) evidence of the bankers who dealt with [BKR] from mid-2009 until end-2010; and

(f) evidence from [BKR]'s family members.

93 The Senior District Judge had also considered a "second thread" of intra-family matters. The matters were:

(a) events pre-October/November 2010;

(b) letters sent by [BKR] to [AUT];

(c) a request for [BKR]'s Hong Kong medical reports;

(d) the purchase of a good class bungalow by [AUT];

(e) the series of conflicting instructions given by [BKR] to UBS bank to transfer her assets to DBS Bank;

(f) [BKR]'s isolation from her family members; and

(g) "the third trust".

94 After considering the arguments and counter-arguments of the parties, I am of the opinion that the *clinical component* of the test had been fulfilled. The evidence clearly shows that [BKR] is suffering from an impairment of the mind (although the degree of impairment is disputed). However, I am of the view that the *functional component* of the test was not met. In this connection, the Senior District Judge erred by misapplying the principles of the MCA in deciding that [BKR] was unable to make decisions.

Evidence that the clinical component is met

95 At the trial below, the medical experts of [BKR] submitted that [BKR] was suffering from either Mild Cognitive Impairment ("MCI") or, at worst, mild dementia. On the other hand, the respondents' experts concluded that [BKR] was suffering from at least Stage 4 (Mild Dementia) and probably progressing to Stage 5 (Moderate Dementia) on the Global Deterioration Scale ("GDS"). Although the Senior District Judge did not make a conclusive finding as to exactly which stage of impairment [BKR] suffered from, counsel for [BKR] submitted before me that the views of [BKR]'s medical experts should be preferred (*ie*, that at the most [BKR] was suffering from MCI or mild dementia).

96 While there is no need for me to decide conclusively the degree of impairment, I do not think there is any doubt that [BKR] does suffer from an impairment of the mind. This is evidenced by the

medical evidence and tests, the clinical interviews, her performance in court, and from the evidence of her bankers. I also had the opportunity to review the videos of the clinical interviews during the course of the Appeals. I shall now make some general observations on the cognitive impairment of [BKR].

97 In 2005, a report by one Dr [HS] suggested that [BKR]'s memory was starting to suffer, perhaps attributable to a dementing process. Dr [HS] had observed [BKR] on two occasions, once in 2005 and the second time in 2010, where she had administered, *inter alia*, the Rey-Osterrieth Complex Figure Test. While there was some dispute as to the opinions proffered by the medical experts, I am of the view that the test being "bizarre" and "meaningless" is with reference to the figures used in the test rather than the test itself (meaning that the figure was designed to look bizarre without a certain meaning, rather than the test being bizarre and meaningless). [BKR] scored less than perfect in those tests. Notes of a clinical interview by Professor [LE] ("Prof [LE]") produced in the course of the Appeals also showed that [BKR] has been taking medication to aid her memory.

98 In 2011, [BKR] went through a number of tests and clinical interviews. The Senior District Judge observed that [BKR] had a poor orientation to time, and generally had difficulty remembering the day, date, month and year. [BKR] also did not do well on the serial sevens test (although I note that she fared better in spelling "WORLD" backwards, which is an accepted alternative for the serial sevens test). All in all, her Singapore doctors had scored [BKR] an average of 23.5/30 or 22/28 for the Mini-Mental State Examination, which I accept is lower than the average score of someone of similar background to [BKR]. While the errors were not particularly significant, [BKR]'s score on the Clock Drawing Test was also less than perfect.

99 Having viewed the interview videos, I also found that [BKR], while able to answer questions when asked directly and when guided, sometimes tended to misunderstand questions and gave irrelevant or incorrect answers. There are clear gaps in her memory. For example, [BKR] had mentioned that she had looked after [CY] (the second plaintiff) during the Japanese Occupation, but [CY] was only born after the Second World War. [BKR] could not recall when she had stopped work for Malayan Banking Bhd in Kuala Lumpur. I also note the Senior District Judge's observations as to how [BKR] at times struggled to grasp monetary values (see [59] and [60] of her GD).

100 [BKR] demonstrated certain difficulties during her cross-examination. I accept the Senior District Judge's findings that she had trouble remembering certain dates and/or grasping legal applications. Although she "generally" knew what questions were posed to her, she had difficulty reading and understanding documents, and took a long time to read and re-read documents. There were also instances where she could not recall certain documents that she had read or things she had mentioned earlier. [BKR]'s struggle with numerical figures was also apparent when she could not answer how many years there were within the period 1966 to 2007, when she stayed in Kuala Lumpur.

101 I also note the evidence of [BKR]'s bankers who had expressed concern about [BKR]'s memory lapses. Suffice it to say, while each individual instance cited above may not conclusively point to an impairment of the mind, the totality of the evidence showed beyond doubt that [BKR] suffered from certain memory deficiencies.

Specific clinical findings

102 One of the issues that arose in the Appeals was whether the Senior District Judge made too broad a finding when she found that [BKR] suffered from "very poor short, mid and long term-memory". In my opinion, this statement required some clarification. Undoubtedly, [BKR] suffered/suffers from at least mid-term to long-term memory *deficiencies*. This is evidenced by the

fact that she could not recall the length of her stay in Kuala Lumpur, and certain factual inaccuracies revealed during the clinical interviews. Indeed, counsel for the respondents pointed out numerous instances where [BKR] could not recall her assets or properties to any certain extent. All this pointed to [BKR]'s mid- to long-term memory deficiencies. The Senior District Judge also found that [BKR] had short-term memory loss, based on her observations of [BKR] when [BKR] gave evidence in court. In fact, it was common ground between the parties that [BKR] has very imperfect short-term memory.

103 While there may have been instances of some form of short-term memory loss on the part of [BKR] as evidenced by her inability to recall certain documents during her cross-examination, this must also be seen in the light of other evidence, such as [BKR]'s ability to carry on a normal conversation during her clinical interviews. On the whole, while there is no exact time-frame which defines what is to be considered "short-term" or "mid-term", what is clear to this court is that [BKR] does not suffer from severe short-term memory loss such that it cripples her mental capacity. Likewise, while there are certain gaps in her mid- and long-term memory, at the end of the day, the legal inquiry is to decide whether it is so impaired that it affects [BKR]'s ability to make decisions. This is the *functional* component of the test, which is further elaborated on below.

104 The Senior District Judge had found that there was coarsening of [BKR]'s emotions, based on the fact that [BKR] had accused one of her daughters of stealing some of her items, and [BKR]'s views on her grandchildren being nice to her only because she was funding their education. From the videos of the clinical interviews that were played in court, I note that [BKR] displayed a range of emotions and views over various issues, including expressing her personal opinions on a number of family members. Her emotional demeanour was consistent with the views she had expressed, be it the activities she had enjoyed or the persons whom she trusted.

105 During cross-examination, [BKR] was able to respond to personal questions in an appropriate manner, and could even express her dissatisfaction at times (including a number of adverse comments directed to opposing counsel). When questioned about her feelings towards [AI], [BKR] was reluctant to express her views when he was around as she was mindful of not wanting to hurt the feelings of her son-in-law. Therefore, while [BKR] may hold certain paranoid views, it is more likely than not that those were one-off instances. There is no doubt that such views may persist or increase if and when her condition worsens, but in her current condition at this point in time, I find that there was no coarsening of emotions.

106 As mentioned above, it is not for this court to decide conclusively the degree of impairment that [BKR] is facing. However, given my above observations, as well as having afforded due consideration to the extensive submissions of her counsel and the respondents' counsel, it appears less likely that [BKR] suffers from Stage 4 (Mild Dementia) progressing to Stage 5 (Moderate Dementia) on the GDS. [BKR] is not prone to coarsening her emotions, and on the whole she does not display the severity of dementia often associated with patients at that degree of impairment.

107 Nevertheless, it is clear that [BKR] suffers from some memory deficiencies and an impairment of the mind, and therefore the *clinical component* of the test is satisfied.

Evidence suggesting that functional component of the test is not met

108 Despite my finding that the *clinical component* of the test is met, after considering the totality of the evidence I am of the opinion that the *functional* component of the test is not met – [BKR] is *not* unable to make a decision according to the principles of the MCA. Before addressing certain findings of the Senior District Judge, it is important at this juncture to discuss the weight that is to be accorded to various types of evidence in determining this functional component.

109 The experts from both sides agreed that an expert's observations during clinical interviews involving interaction with a person should be accorded more weight than screening tests (and other forms of "assessment"). Indeed, this was noted and accepted by the Senior District Judge (see [57] of her GD). In this regard, counsel for [BKR] had submitted that, ultimately, capacity is a "clinical judgement and assessment". I cannot agree with this submission. While due regard must be given to such clinical interviews, it is important to note that whether or not the functional component of the test is met is ultimately a legal inquiry.

110 At the forefront of this inquiry are the core principles of the MCA which determine exactly when a person is "unable to make a decision". It is an assessment of the individual as a whole person, and ultimately requires a certain degree of judgment in deciding whether the individual has mental capacity. Therefore, all forms of evidence, including clinical interviews, must be taken into consideration in determining this factor.

Important factual findings pertaining to the functional component

111 Before examining in detail the Senior District Judge's findings regarding the functional component of the test, there are two factual findings the Senior District Judge made which merit some discussion. The first pertains to a "medical report" by Prof [LE] and the alleged non-production of this report by [AUT] and [AI]. As stated above, [BKR] saw a number of doctors both in Hong Kong and in Singapore, and those medical reports from 2005 onwards were presented during the trial. The medical report in question referred to a review by Prof [LE] of the condition of [BKR] on 27 August 2010. The court was invited to draw an adverse inference against [AUT] and [AI] because of the initial non-production of the medical report. The Senior District Judge concluded (at [46] of her GD) that:

> [T]he non-production of Prof [LE]'s report was deliberate and that if his report and evidence were made available, it could be damaging to [AUT] and [AI] and [BKR]'s case.

112 At [47] of her GD, after considering the fact that [AUT] had instead chosen Dr [HM] to give a report on [BKR], the Senior District Judge also reached the conclusion that Prof [LE] 's report "could be damaging to [AUT] and [AI]'s case and [BKR]'s case".

113 In the Appeals, the appellants explained why the medical report from Prof [LE] was not produced. I am satisfied that no adverse inference should be drawn on the initial non-production of his medical report. In any case, the medical notes were eventually produced by [AUT] and [AI] in the course of the hearing and their innocuous contents contained nothing damaging to their case. At best, the notes revealed that [BKR] had been taking medication to aid her memory and that she was facing some problems with her memory; her memory loss was never denied by the appellants from the very beginning.

114 The Senior District Judge's second finding referred broadly to the clinical interviews which [BKR] underwent. In the trial below, there were suggestions that [BKR]'s experts were biased. The Senior District Judge at [61] of her GD also concluded that their evidence was "less than objective". At the hearing, counsel for the respondents sought to persuade this court to view the experts' testimony in the same light, giving no less than 19 detailed reasons. Those reasons ranged from the manner in which the interviews were conducted and the specific questions that were asked to the manner of scoring for the various tests that the experts had administered.

115 I was mindful of counsel's arguments when viewing the videos and considering the test results; I will address a number of them in the discussion below at [123] on the clinical interviews. However, I

found the allegation that [BKR]'s experts started with a "flawed premise" baseless. In the course of the Appeals, counsel for the respondents had suggested that the reports of [BKR]'s Singapore experts were "biased" as they were influenced by the Hong Kong reports (which were similarly assumed to be biased). Yet in the next breath, when insufficient background knowledge of [BKR]'s condition was given, counsel criticised her experts as not having a longitudinal view of [BKR]. The fact that "they knew from the outset that [BKR] had come to see them because her capacity had been challenged" also does not lead to the conclusion that they must have started off from that flawed premise. I will further address this point when considering the "style" of the clinical interviews, but will briefly mention that the objective behind a clinical interview is both diagnostic and facilitative – at the end of the day, the objective is neither to prove or to disprove mental capacity, but really to analyse the patient in totality in coming up with a medical opinion as to the patient's mental capacity.

116 The allegation that the evidence of the experts of [BKR] was unreliable because they stood to "gain financially" was also speculative. It is common sense that no party would call an expert to testify against its own case (see *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 at [23]). While the experts may (not must) stand to gain financially by being paid a fee, without further substantive proof, this allegation remains a mere assertion. I am mindful that the experts consulted by [BKR] are some of the leading medical luminaries in Singapore. I do not believe that they would lightly compromise their integrity and professionalism in exchange for fee payments.

117 There was also a further suggestion by the plaintiffs that [BKR] could have been "coached" or "primed" for the interviews and tests that she underwent. Indeed, the Senior District Judge took heed of and accepted this allegation (see [50] of her GD). With respect to the Senior District Judge, there was no factual basis for her finding. It is a contradiction in terms that the respondents should assert on the one hand that [BKR] lacked mental capacity and suffered from severe memory loss, and on the other hand contend that she could have been coached or primed for her medical tests.

118 I recognise that medical literature indicates that there can be a small "practice effect" for patients who take such tests repeatedly. However, there is a quantum leap in logic to then draw the conclusion that [BKR] was probably coached and primed because of her fluctuating medical scores. To draw such a conclusion is to start on the premise that [BKR] must have already been suffering certain memory deficits in the first place. On the other hand, the conclusion that she simply scored better is equally plausible. Therefore, without more cogent evidence, this allegation is pure speculation.

119 The Senior District Judge's findings were important as they affected the weight to be given to the evidence (in particular, that of [BKR]'s Singapore medical experts). While not explicitly stated, those findings suggested that the Senior District Judge had placed much less weight on the evidence of the medical experts of [BKR] concerning her mental capacity. With the MCA principles in mind, I now set out my observations of the findings of the Senior District Judge pertaining to the *functional component* of the test.

The Senior District Judge applied the MCA principles wrongly

120 To recapitulate [69] to [72] above, the *functional component* of the test pertains to whether the individual is able or unable to make a decision. A person must be able to understand, retain, and weigh the relevant information, and then communicate his decision if he is to be found able to make a decision. As stated earlier, it is clear that [BKR] has problems with her memory, which pertains to her ability of retention. Her problems with her memory, as compared to her ability to understand, weigh, or communicate her decision, appeared to have been the Senior District Judge's main concern. The Senior District Judge had concluded at [128] of her GD:

> Whilst she seems to be able, at a certain level, to comprehend what is said and to seemingly respond, she is unable to retain relevant information long enough to weigh and assess that information in context with other relevant information to appreciate the consequences and implications and decide on her property and affairs. As she has serious memory problems, she is unable to understand or appreciate the nature of a situation or problem presenting itself …

121 The Senior District Judge drew a causative link between [BKR]'s inability to "weigh and assess" the information and her inability to retain the relevant information, *ie*, that the inability to weigh and assess was more because of her deficiency of *memory* rather than her deficiency of *logic*. However, at [76] of her GD, after reviewing [BKR]'s testimony in court, the Senior District Judge concluded that "[BKR]'s performance in court was far worse than can be explained by *pure memory impairment* alone" [emphasis added], suggesting that based on [BKR]'s performance in court, the Senior District Judge had also drawn the conclusion that [BKR] faced problems with comprehension (understanding the information) and logic (weighing and assessing the information) as well.

122 Consequently, I am of the view that the Senior District Judge had erred in applying the principles of the MCA in finding that [BKR] was unable to make decisions. It seemed to me that the Senior District Judge did not consider the principle (cited repeatedly by counsel for [BKR]) that all practicable help should be given to an individual before determining whether the individual lacks capacity. This can be seen from the manner in which the Senior District Judge analysed the evidence in coming to her conclusion.

(A) Clinical interviews

123 The first area was in the Senior District Judge's criticisms of the clinical interviews. In discussing the conclusions of [BKR]'s experts after her clinical interviews, the Senior District Judge stated that:

> (a) she had expected [BKR] to be subjected to a more rigorous and probing examination, albeit gently and with due consideration, with more focused and detailed questions to go beyond merely accepting [BKR]'s statements and her efforts at masking her deficiencies by giving generalised or evasive answers;
>
> (b) instead of that, the interviews seemed more like a deferential social conversation with [BKR] holding court with her views;
>
> (c) questions were not asked to probe the rationality or consistency of [BKR]'s answers; and
>
> (d) [BKR]'s experts were trying to help [BKR] "retain" her autonomy and obviate a possible adverse finding by the court.

Because of these observations, the Senior District Judge did not take note of the fact that [BKR]'s experts found that [BKR] possessed mental capacity.

124 With respect, the above criticisms by the Senior District Judge were unwarranted. First, during the clinical interviews, I note that the experts did indeed ask follow-up and probing questions in order to test [BKR]'s views. [BKR] was asked for her views on, *inter alia*, her investment strategies, her family members and friends, and what she wished to do with her money in the future. Some of the questions were asked more than once, and follow-up questions testing the logic or the rationale of her decisions were also asked. One example is found during the March 2011 interview by Dr [ON], when [BKR] discussed her view that she wanted to give part of her wealth to charity:

Dr [ON]:But will people criticise you or not for – for giving to charity? Will people criticise you?

[BKR]:And it's money from my father to me, so it's my own money already. I can do what I like with it, isn't it?

Dr [ON]:But what if [CK] feels that – or your – some children feel that you should give it to them instead of chari – to charity?

[BKR]:What right have they? What right have they? They have – have enough already. Once you have a roof – a property over your head, you don't have to pay mortgage –

…

[BKR]:So I went beyond that duty. I think it's enough already. I think there's more to do to help the – the needy –

Dr [ON]Mm.

[BKR]:– the old folks, ah, who had all been deserted. I feel the new society is all after themselves, looking after themselves. It's a western society.

125 As can be seen, the answers that [BKR] gave were perfectly logical and lucid. Dr [ON] repeated his first question about people criticising her again during the latter part of the interview, and [BKR] repeated her answer that it was her money, and therefore she could choose to do what she wanted to do with it. During the interviews, [BKR] was also asked on how she felt if her children were to be angry when they found out that the trust she had constituted would not benefit them. In reply, [BKR] repeated her answer that she had given them enough already, and therefore had done enough for the family. These are but two of the many examples extracted from the clinical interviews. It appears to me that the experts had done their part in probing and examining the internal *consistency* and *logic* of [BKR]'s answers. To this end, the Senior District Judge's criticisms of the interviews being too "deferential" or not being probing enough are unjustified.

126 Second, the Senior District Judge's criticisms which pertained generally to the style of how the interviews were to be conducted seemed to suggest that the Senior District Judge did not have the MCA principles in mind in coming to her decision. In summary, the Senior District Judge found that the interview was too much like a "deferential social conversation", without the proper rigour an "examination" should have. Without belabouring the point, it bears repeating that assistance must be rendered before it is decided that an individual lacks capacity (see [122] above). The form of assistance can be in a multitude of ways and the measure of assistance given must be as far as practicably possible. Therefore, the aim is *indeed*, to use the phrase loosely, to "enhance and retain" capacity as far as possible.

127 Through the interviews of [BKR], it is not disputed that at times the interviewers had to "guide" or to "prompt" [BKR] in certain ways, but this was not often or excessively done such that it would render the diagnostic value of the interviews nugatory. While I agree with the Senior District Judge that the interviews at times resembled a "social conversation", I see no reason why that alone should lead to the Senior District Judge's conclusion that the interviews had little value in deciding [BKR]'s mental capacity. Indeed, without stepping into the shoes of a medical expert, I would think that the ability to hold conversations would be extremely telling of an individual's mental capacity.

128 Third, the Senior District Judge's observations of the clinical interviews also suggested that she

had failed to recognise that the value of the clinical interviews was really the chance to observe [BKR] in totality and to make an assessment of her as a whole person. The Senior District Judge had pointed out a number of mistakes [BKR] made during the interview, for example, her flawed perception of monetary value (see [59] to [60] of her GD), the incorrect value of her flat, and her amount of inheritance. While I have no doubt that the Senior District Judge did not specifically focus on a singular mistake but considered all the mistakes cumulatively, those mistakes must be balanced against the performance of [BKR] during the clinical interviews as a whole. Although she did make the mistakes, as observed earlier [BKR] was able to engage in a normal conversation, able to reflect her views in a consistent manner, and able to hold her own in the conversation. Her command of English was respectable, and she could even switch between English and Cantonese. After viewing the clinical interviews and considering the opinions of the medical experts, I am of the view that looking at [BKR] holistically, the clinical interviews strongly suggest that [BKR] had mental capacity.

(B) Evidence of [BKR] in Court

129 At [64] to [69] of her GD, the Senior District Judge discussed her observations of [BKR] during her cross-examination. Amidst many others, a few of the observations were that:

(a) [BKR] would resort to "masking" at times;

(b) [BKR] took a longer time to give evidence because she had to read and re-read documents. Generally, she had difficulty reading and understanding documents;

(c) [BKR] could not remember the events before and following upon the MCA application; and

(d) [BKR] did not know what the legal proceedings entailed and was confused as to who the parties to the action were.

The Senior District Judge eventually concluded at [69] of her GD that "it is clear that [BKR]'s performance in court demonstrates that she lacks capacity to make decisions on and handle her property and affairs".

130 Counsel for the respondents submitted that [BKR]'s performance in court was a proper basis for drawing conclusions on her capacity as she was cross-examined at length and more thoroughly than any time she spent with her medical experts. According to them, this made her cross-examination "a far more reliable and more comprehensive source for observations to found the evaluation by the medical experts and the Court".

131 I disagree. First, as elaborated above, the MCA regime was designed to help the individual retain his autonomy as far as possible. In this light, all practicable steps must be given to an individual before determining his mental capacity. While the court can take note of an individual's performance in cross-examination, the adversarial nature of cross-examination is generally inconsistent with the principles enshrined in the MCA. Apart from any stress or lack of privacy in the courtroom setting, the function of cross-examination is really for opposing counsel to prove his case. As was admitted by opposing counsel to [BKR] in this case, his cross-examination was designed to show that [BKR] lacked capacity. Ultimately, given the lack of assistance, the adversarial nature, the interrogative form of dialogue and the general atmosphere and spirit behind cross-examination, this would mean that the individual is not performing at his best, and therefore a certain amount of circumspection should be exercised in considering the evidence to decide any loss in mental capacity.

132 My observations are corroborated by the opinion of the medical experts in the trial below.

There is little dispute between the medical experts that capacity should be assessed at the highest level of function, and as far as possible, within an optimum environment. Critically, I note that the respondents' experts had themselves also accepted that cross-examination may not be the best form of assessment of a person at his highest level of function. This surfaced during the expert witnesses' conferencing done at the trial below:

> Mr Yeo:… Would you accept that the clinical assessment in a doctor/patient scenario is the best tool to assess the capacity of the patient?
>
> Prof [AK]:You're right, Mr Alvin Yeo.
>
> Mr Yeo:Thank you. Would you agree, doctor---I'm sorry, Prof [AK], that capacity should be assessed at the highest level of function?
>
> Prof [AK]:You are right again---
>
> …
>
> Mr Yeo:… Would you accept that a cross-examiner---I'm sorry, a counsel for party – and let me make this clear, there's nothing improper about a counsel acting in this way – comes to Court trying to prove or establish his client's case, and that is something fundamentally different from what a clinician would do.
>
> Prof [AK]:I'm afraid you are right.

Prof [AK] later agreed that the approach taken in cross-examination differs from the approach taken when trying to establish whether someone has capacity. In the latter, one would take an open and neutral approach, and *not* ask questions *designed to show a lack of capacity*.

133 Therefore, while I have no doubt (and as observed by the Senior District Judge) that counsel had extended the appropriate courtesies to [BKR] throughout her cross-examination and that [BKR] might have generally appeared not to be tense, any observations of [BKR] must be considered in the light of the fact that almost no assistance was provided to her. In fact, there were also times when [BKR] felt distressed and undermined, and in response she had told counsel to give her time (to understand and read the document) instead of pressing her for answers. To this, counsel would point out there had been a pause, as if to put further pressure or to point out to the court that [BKR] took a longer time than usual to answer. I also note that [BKR] at one point in time felt "bullied", so much so as to mention that:

> I don't like to be bullied. He's looking at me in such a very way, very condescending. I've done nothing wrong.

134 I was also not impressed that on one occasion, counsel had asked a question pertaining to [BKR]'s banking instructions (and the subsequent revoking of them) to UBS bank and DBS Bank a total of 21 times within less than half an hour. He was in essence testing [BKR]'s memory – the MCA does not prescribe memory tests to determine a person's mental capacity, much less so in the environment of cross-examination.

135 In summary, I disagree with the perspective the Senior District Judge took when evaluating [BKR]'s evidence in court. In coming to my decision, I have considered [BKR]'s answers through her seven and a half days of cross-examination in the light of the principles explained above.

(C) The incorrect application of "executive function"

136 There is one final point to be made which reinforces the fact that mental capacity is not to "pegged" to an unreasonably high level of functioning. In the Appeals (and in the trial below), counsel for the respondents submitted that executive function was of high relevance as a *prerequisite* in determining mental capacity. The Senior District Judge seemed to accept this, stating that she "focused on executive functioning" in "considering [BKR]'s mental capacity" (see [36] of her GD).

137 As was elaborated in the first joint report of the respondents' experts dated 14 March 2012, executive function comprised six steps: (a) analyse a task; (b) plan how to address the task; (c) organise the steps needed to carry out the task; (d) develop timeliness for completing the task; (e) adjust or shift the steps, if needed to complete the task; and (f) complete the task in a timely way. Even if it is true, I accept the argument of counsel for [BKR] that this does not translate to some high-end type of function "exercised by CEO-types". Instead, it would relate to basic down to earth everyday tasks. This could include routine and mundane tasks such as getting ready for an appointment and selecting what clothes to wear.

138 Counsel for the respondents had submitted various instances which demonstrated [BKR]'s lack of executive function. I have considered them, and will deal with them below when elaborating on why I am of the view that [BKR] possessed mental capacity.

Evidence suggesting [BKR] is able to make a decision

139 In coming to my decision that the *functional component* of the test was not fulfilled, I bore in mind the principles of the MCA, my comments on the Senior District Judge's findings and the arguments of counsel. I took into consideration two main "balances" in assessing [BKR]'s ability of *memory* and her ability of *logic*.

140 **Ability of memory.** The first balance I took into consideration was that of [BKR]'s failure of memory (which has been pointed out earlier) as compared to her answers and demeanour as a person holistically. As elaborated above, [BKR] suffers from memory loss, and this appears not only in cross-examination but also during the clinical interviews, which provided a far more optimum environment for assessment. Like the Senior District Judge, I accept the respondents' evidence that the bankers would have a longitudinal view of [BKR]'s mental capacity, and were in a good position to notice any changes in her condition and to form a view on whether she was suffering from a deteriorating capacity. The evidence of the bankers included instances of [BKR] changing certain banking instructions, forgetting her previous instructions or repeating her instructions in a short time interval, as well as their concerns that [BKR] was showing signs indicating that she might not be suitable for more complex products. No doubt [BKR] was suffering from deteriorating mental capacity. However, given my earlier findings as to the clinical interviews (at [123]–[128] above), I was not convinced that [BKR] did suffer from such severe memory retention as to render her unable to make decisions.

141 Without gazing into the crystal ball as to her mental capacity in the future, at this point in time, [BKR] retains a sufficient level of executive function and, with the proper assistance afforded to her, is able to overcome her memory problems.

142 **Ability of logic.** The second balance I took into consideration was that of [BKR]'s instances of misjudgement or misunderstandings of various "categories" of decisions as compared to the fact that [BKR] had generally consistent themes and views. Counsel for the respondents had raised several instances of this "misjudgement", and for purposes of illustration, I refer generally to [BKR]'s "misjudgements" regarding her monetary wealth, as they seem to form the bulk of those instances. In

support of the respondents' contention that [BKR] lacked executive function, pertaining specifically to financial decisions, it was argued, *inter alia*, that [BKR]:

(a) was unable to elaborate on the pros and cons before entering into a relationship with UBS bank;

(b) was unable to state what she would realistically do with HK$200,000;

(c) was unable to show how she weighed the pros and cons to decide whether to give away her money by will or by trust; and

(d) was unable to weigh or state the pros and cons before signing a letter asking for *all* her assets at UBS bank to be moved to a secret trust account at DBS Bank.

143 Given that a number of the instances surfaced during cross-examination, they must be re-considered in the light of my observations of the suitability of cross-examination in assessing mental capacity. Even then, I found that [BKR] was generally consistent in her views as to how she wanted to manage her wealth. While unable to explain a number of things as stated above, [BKR] was clear that she wanted to invest with DBS Bank because it was a steady bank, was happy with its services, and she felt safer as it was a government bank. [BKR] wanted Ms Tan Su Shan (of DBS Bank) as her banker as she felt she could trust her (although it *may* be true that her fears towards her other previous bankers were unwarranted). [BKR] consistently expressed her views that she wanted to invest in low-risk investments because she did not think she could manage high-risk investments.

144 As observed above, [BKR] was clear in wanting to donate her wealth to charity, since she thought that she had provided enough for her children. Those instances demonstrate to me that in general, while [BKR] could not articulate nor perhaps fully appreciate the pros and cons of her decisions by herself, [BKR] retained a sufficient ability of logic to link her motivations with her eventual decision. In any case, the MCA allows an individual to receive assistance on the pros and cons of a decision, and does not mandate that an individual must be able to *state* those pros and cons. All that is required is that after being assisted, the individual must be able to *weigh* those pros and cons and come to a decision.

145 A final point to note is that [BKR] has been receiving, and can continue to receive, assistance to aid her in making her decisions. Importantly, [BKR] herself recognised that she does face certain problems and requires assistance in certain areas. Given her wealth, almost anyone in her position would require some form of assistance. [BKR] had always been used to getting assistance regarding her property, either from her late husband when he was alive or later from her sister [AUR].

146 It is also telling that the respondents themselves have at one point or another suggested that if [BKR] received the proper assistance, she would be able to make the right decisions. At one point during cross-examination, [AUR] had stated the following:

Q: Your concern was not that she could not understand what she was doing but she needed someone to explain this to her so she could understand what was being done?

A: Yes.

Q: And if it was just [AUT] and a legal adviser who purported to be independent, then there wouldn't be a fair explanation being given; right?

A: Yes.

…

Q: Indeed…Mr [CK] [is] expressing the same concern as you that in the right environment, given the right explanations, [BKR] can make the right decisions?

A: Yes.

147 Given [BKR]'s ability of logic as seen in the evidence, I am convinced that with the proper assistance, [BKR] will be able to weigh the pros and cons of her decisions.

Summary of Issue 2

148 I briefly summarise my main findings for Issue 2:

(a) First, I find that the clinical component of the test was met. The instances of memory loss showed that [BKR] suffered from an impairment of the mind.

(b) Second, I find that the functional component of the test was not met. The Senior District Judge had misapplied the principles of the MCA, in particular, that she had omitted to consider that all practicable assistance must be given before a person is to be found lacking capacity under the MCA. The result of this misapplication meant that too much weight had been accorded to [BKR]'s performance in court and too little weight had been accorded to the results of the clinical interviews.

(c) After considering [BKR] as a whole person and that she had generally consistent views that were supported by understandable reasons, I found that [BKR] would be able to make decisions if practicable assistance was given.

Issue 3 – Did the Senior District Judge err in law in her declaration of incapacity, the appointment of deputies and the scope of the powers granted?

149 The third and final issue to be addressed in the Appeals concerns the appointment of the deputies and the powers granted to them. This issue becomes relevant only if I am wrong in both of my conclusions on Issue 1 (that the Senior District Judge did not have the jurisdiction to entertain the application) and Issue 2 (that [BKR] possesses mental capacity as adjudged under the MCA).

The applicable law

150 I first set out the general law regarding the court's power to declare the incapacity of an individual, to appoint deputies, and to grant these deputies certain powers to execute their duty.

151 Section 19 of the MCA sets out the court's power to make declarations. It provides that:

Power to make declarations

19.—(1) The court may make declarations as to —

(*a*) whether a person has or lacks capacity to make a decision specified in the declaration;

(*b*) whether a person has or lacks capacity to make decisions on such matters as are

described in the declaration;

(*c*) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.

(2) In subsection (1)(*c*), "act" includes an omission and a course of conduct.

152 The power of the court to appoint deputies is found in ss 20(1) and 20(2) of the MCA, which provide that:

Powers to make decisions and appoint deputies: general

20.—(1) This section applies if a person ("P") lacks capacity in relation to a matter or matters concerning —

(*a*) P's personal welfare; or

(*b*) P's property and affairs.

(2) The court may —

(*a*) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters; or

(*b*) appoint a person (a "deputy") to make decisions on P's behalf in relation to the matter or matters.

153 Importantly, ss 20(3) and 20(4) makes it clear that the appointment of the deputies are subject to the MCA principles (found in s 3 of the MCA) and the best interests of the individual (s 6 of the MCA). Section 20(4)(*b*) states that that the powers conferred on a deputy should be *as limited in scope and duration* as reasonably practicable:

20.—(3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 3 (the principles) and 6 (best interests).

(4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 6) to the principles that —

(*a*) a decision by the court is to be preferred to the appointment of a deputy to make a decision; and

(*b*) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

154 The reason for limiting the powers of the deputy as much as possible is explained at para 3.103 of *Blackstone's Guide*:

The objective here is to minimize the scope and duration of control: specific decisions of the court are to be preferred to the ongoing appointment of a deputy; and when a deputy must be appointed, it is to be for the narrowest scope and shortest time reasonably practicable.

155 Section 6 of the MCA mandates that the best interests of the individual must always be

considered in making any decision. Of particular importance is ss 6(2), 6(4) and 6(7):

> **6.**—(2) The person making the determination must consider all the relevant circumstances and, in particular, take the steps specified in subsections (3) to (8).
>
> …
>
> (4) He must, so far as is 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.
>
> …
>
> (7) 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.

156 As can be seen, both the individual's past and present wishes and feelings must be taken into consideration. As *Blackstone's Guide* clarifies (at para 3.35):

> The enumerated substantive criteria combine three different broad sets of factors into the best interests determination, which may be summarized as follows:
>
> - protecting P's position, in the event that P is likely to regain capacity;
> - considering the wishes, feelings, values and beliefs P had when competent, or would have now if P were competent;
> - considering P's current, incompetent, wishes and feelings, and notwithstanding the incapacity, involving P in the decision-making.
>
> These approaches may be in conflict, and the section establishes no priority between them. *Best interests will in this sense be a balancing act* based on the facts of the individual situation.
>
> [emphasis added]

157 Later at para 3.38, *Blackstone's Guide* further elaborates on the possible tension between the individual's past and present wishes, and explains why it is perhaps as important to consider the individual's present wishes despite the lack of capacity:

> The provision makes it clear that account is to be taken not merely of past competent views, but also of P's current wishes and feelings. On one level, this just reflects common humanity. *People without capacity experience fear and joy as much as the rest of us do, and it would be inhuman to ignore those factors in determining best interests*. It is also one of the ways the statute takes into account the fact that while in law responsibility for decision must be clearly defined with capacity as a dividing line, in practice abilities vary in an infinite number of ways. [emphasis

added]

158 With these legal principles in mind, I now turn to analyse the appellants' arguments against the order made by the Senior District Judge.

Application of the law

159 The Senior District Judge's order can be found at [135] of her GD, and I highlight the content and scope of the order:

(a) That [BKR] was unable to make decisions for herself in relation to matters concerning her property and affairs because of an impairment or a disturbance in the functioning of her mind or brain.

(b) That [AUR] and [CY] be appointed as deputies of [BKR] to make all decisions on behalf of [BKR] in relation to her property and affairs.

(c) That the deputies be granted *general authority* to take possession or control of the property and affairs of [BKR] and to exercise the same powers of management and investment as she had as beneficial owner, subject to the terms and conditions set out in the order.

(d) That the deputies be authorised generally *to do all such acts and things* as may be necessary or expedient in connection with the control and management of all or any of [BKR]'s property and affairs as fully and effectively in all respects as she could do as beneficial owner and in compliance with the MCA.

(e) That the deputies be authorised generally *to do all other ancillary, incidental and/or further acts and things* as may be necessary or expedient in connection with the management of the property and affairs of [BKR] as fully and effectively in all respects as [BKR] herself could.

160 The Senior District Judge also stated in her order that "[t]he purpose for which the order to be made hereon is needed cannot be as effectively achieved in a way that is less restrictive of [BKR]'s rights and freedom of action". For precision, it must be noted that the Senior District Judge had also included in her order that the relevant restrictions and safeguards of the MCA would apply where appropriate.

161 The appellants' contentions can be divided into two broad arguments. First, the appellants contended that the Senior District Judge did not consider the best interests of [BKR] when she appointed [AUR] and [CY] as her deputies. Second, the appellants contended that the Senior District Judge's declaration of [BKR]'s incapacity was too broad. They pointed out that the Senior District Judge had made a general finding of incapacity, whereas instead she should have considered what specific decisions [BKR] was required to make in order to decide very specifically whether [BKR] had capacity to make those decisions. Consequently, the appellants also contended that the powers granted to the deputies were too broad, as they were granted very general powers to manage her property and affairs.

162 I now consider these two arguments.

Was the declaration of incapacity, and consequently, the powers granted to the deputies too broad?

163 In declaring the mental capacity of an individual, the appellants argued that the court is

required to consider what *specific decisions* the person needs to make, in order to decide whether the person has capacity to make those decisions. They contended that it would be *unjust* to conclude that a person was incapable of making decisions in relation to *all* matters, just because he was found incapable in connection with *some* matters/decisions.

164 Framed thus, there are two ways to address the appellants' contention. First, as a matter of law, is the court compelled to state *specific decisions* in declaring the mental (in)capacity of an individual? Second, as a matter of fact, specific to this case did the Senior District Judge err in failing to declare the specific decisions that [BKR] lacked mental capacity to decide?

165 First, as a matter of law, I note that s 19 of the MCA indeed states that the court is empowered to make a declaration of an individual's capacity "to make *a decision specified* in the declaration" [emphasis added], or of the individual's capacity to "make decisions on such matters as are described". I accept the argument that, consistent with the principles which the MCA enshrines, a declaration of incapacity should be as narrow as possible in order to preserve the autonomy of the individual as much as possible. Furthermore, at the bottom of almost every page in the COP, it is written that "Mental Capacity is the ability of the person to make a *specific decision* at a particular time" [emphasis added].

166 A survey of case law shows that the courts have consistently stated that the MCA takes an "issue-specific" approach in the declaration of incapacity.

167 In the decision of *In re S and another (Protected Persons)* [2010] 1 WLR 1082, Judge Hazel Marshall QC (at [51] to [53]) discussed this "issue-specific" approach of the UK Mental Capacity Act 2005:

> 51 What is apparent from that account is that there has been a whole sea change in the attitude of the law to persons whose mental capacity is impaired. The former approach was based on a stark division between those who had capacity to manage their own affairs, and those who did not. The former took their own decisions for better or worse, and the latter fell under a regime in which decisions were made for them, perhaps with a generous, and in some cases patronising, token nod to their feelings by asking them what they wanted, and then deciding what none the less was objectively "best" for them.
>
> 52 This is no longer appropriate. The statute now embodies the recognition that it is the basic right of any adult to be free to take and implement decisions affecting his own life and living, and that a person who lacks mental capacity should not be deprived of that right except in so far as is absolutely necessary in his best interests.
>
> 53 Two major changes are therefore embodied in the statute. The first is official recognition that *capacity is not a blunt "all or nothing" condition*, but is more complex, and *is to be treated as being issue-specific*. *A person may not have sufficient capacity to be able to make complex, refined or major decisions but may still have the capacity to make simpler or less momentous ones*, or to hold genuine views as to what he wants to be the outcome of more complex decisions or situations.
>
> [emphasis added]

168 Likewise, in the case of *In re P (Statutory Will)* [2010] 2 WLR 253, in discussing the general philosophy of the UK Mental Capacity Act 2005 the court (at [36]) commented that:

> [T]he test of incapacity is finely calibrated. The Act recognises that the test of capacity is issue specific. A person ("P") may well have capacity in relation to some matters (e g what to wear or what to eat), while lacking capacity as regards others (e g what to do with his savings or whether to undergo an operation).

169 Although the above two cases advocate such an approach, I note that the disputes in those cases concerned not so much the mental capacity of an individual, but on matters connected therewith. Therefore, the court in those cases did not have to state conclusively the "issues" on which the individual was deemed to lack capacity.

170 The issue-specific approach however has been most often applied in cases involving sexual relations. For example in *D Borough Council v B* [2011] 3 WLR 1257, the court made it clear that in determining the mental capacity for sexual relations, the test was "act-specific" (the act of entering into sexual relations) rather than "partner-specific". At [19], it affirmed the position of Munby J in *X City Council v MB* [2006] 2 FLR 968, who (at [85]) had intimated that:

> I should add just one observation. *Questions of capacity are always 'issue-specific'*: Sheffield City Council v E [2005] Fam 326. *The question of whether someone has capacity to marry is not the same as the question whether that person has capacity to consent to sexual relations*. The two questions have to be considered separately. [emphasis added]

The court then found that even though Munby J had decided this case before the UK Mental Capacity Act 2005 came into force, the test would still apply. That said, the dispute there was whether capacity to sexual relations was act-specific or partner-specific. This was following the suggestion that the House of Lords in *R v Cooper (Gary Anthony)* [2009] 1 WLR 1786 had made, that, in certain cases, it could even be "situation-specific". While there is no need to for this court to decide on this matter, what is clear is that the line of cases strongly advocates an issue-specific approach under the MCA.

171 In fact, even before the advent of the UK Mental Capacity Act 2005, the common law already followed an issue-specific approach. In *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2003] 1 WLR 1511, Chadwick LJ (at [62]) stated that:

> 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 Kennedy LJ 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.

172 Discussing the test applicable in deciding whether an individual had capacity to marry, the court in *Sheffield City Council v E and another* [2005] 2 WLR 953 ("*Sheffield City*") (at [49] and [105]) also made similar remarks as to the issue-specific approach of the test:

> 49 … The question, as we have seen, is always issue-specific. There may be different answers to the questions, Does this person have litigation capacity? and, Does this person have subject matter capacity? As Bracewell J said, it all depends on the circumstances. There is no principle, either of law or of medical science, which necessarily makes it impossible for someone who has litigation capacity at the same time to lack subject matter capacity. …
>
> …
>
> 105 Capacity to marry is not the same as capacity to look after oneself or one's property.

> Often, of course, someone who lacks the capacity to do the one will also lack the capacity to do the other. But not necessarily. As Chadwick LJ said in Masterman-Lister v Brutton XXX Co (No 1) [2003] 1 WLR 1511, para 74: "The test is issue-specific; and, when applied to different issues, it may yield different answers." The question is: does E have capacity to marry? If she does, it is not necessary to show that she also has capacity to take care of her own person and property.

173 Therefore, as a matter of law, I find that a declaration of incapacity under the MCA must follow an issue-specific approach. The court must bear this issue-specific approach in mind, and confine the declaration of mental (in)capacity as far as possible and reasonably practicable.

174 That said, how *specific* is a court expected to go? In arguing its position, the appellants seemed to be suggesting that the court had to enunciate the specific *decision* the individual would be taking. The survey of the case law above shows that in those factual scenarios, the court had the luxury of finely carving out a specific decision – for example, the capacity to marry or the capacity to have sexual relations. This may very well be the case for certain situations, and most of the time it will depend directly on the specific pleadings of the parties. However, parties must bear in mind that the detail of specificity must be circumscribed by what is "reasonably practicable" – at times, the facts of a case are such that a court may have difficulty in determining exactly the scope of the decision the individual is required to make. The court may on occasion have to err on the side of generality.

175 Therefore, to answer the first part of this inquiry, as a matter of law I find that the court is duty-bound to take an issue-specific approach when declaring the mental (in)capacity of an individual. In doing so, the court should strive to be as specific as reasonably practicable.

176 I now address the second part of this inquiry, which is whether the Senior District Judge failed to take an issue-specific approach in declaring the mental (in)capacity of [BKR], and consequently granted powers to the deputies which were too broad. As can be seen at [159] above, the Senior District Judge made a general broad finding of incapacity in relation to [BKR]'s ability to manage her property and affairs. In fact, she seemed to be cognizant of this, as she herself had specifically noted that "the purpose for which the order to be made hereon is needed cannot be as effectively achieved in a way that is less restrictive". Counsel for [BKR] had argued that if indeed a finding of incapacity had to made, it should be based on the specific decisions of [BKR] which the respondents had challenged. These would include, for example, her decision to move her monies into DBS Bank, her choice of banker, and her desire to donate her wealth to charity. Instead of dealing with those decisions individually and directly, the Senior District Judge, in a broad brush approach, found that [BKR] generally lacked mental capacity to deal with her property and affairs, and granted the deputies the powers required to handle them.

177 At the end of the day, the question therefore is: could the Senior District Judge have been more specific in declaring her findings of incapacity?

178 The underlying rationale for being specific is because, and I can do no better than to quote Munby J in *Sheffield City* ([172] *supra*) (at [105]), "when applied to different issues, *it may yield different answers*" [emphasis added]. The only reason why it may yield different answers is that there must be some form of differentia between the type of issue, each requiring perhaps a different "type" of mental capacity. At this point of time, at least two differentiae can be identified.

179 The first differentia would be the nature of the act. The example quoted in *In re P (Statutory Will)* [2010] 2 WLR 253 ([168] *supra*) makes this obvious – the choice of what to wear or what to eat is clearly of a different nature from the choice of what to do with one's savings or whether to

undergo an operation. Following the cases cited above, it is also clear that the capacity to marry is not the same as capacity to look after oneself or one's property. Likewise, the capacity to have sexual relations and the capacity to marry are also different. This is because the evaluation of capacity, while guided by the general principles of the MCA, is subject to different considerations when applied to acts of different natures. For example, in analysing the individual's capacity to have sexual relations, the court in *D Borough Council v B* [2011] 3 WLR 1257 (at [42]) stated that capacity:

> [R]equires an understanding and awareness of: the mechanics of the act; that there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infection; that sex between a man and a woman may result in the woman becoming pregnant.

Clearly, the considerations would be different when considering the capacity to manage one's property.

180 The second possible differentia would be the complexity of the act. This differentia would in general be more applicable to acts of the same nature. For example, in the handling of money, it is possible that a person may not possess the capacity to engage in exchange-traded funds or credit swap derivatives, but have the capacity to engage in day-to-day transactions in shares. A person may not possess the capacity to decide whether or not to undergo a surgery, but may possess the capacity to decide on certain basic medication or health products he is desirous of taking.

181 I return now to the question central to this discussion – could the Senior District Judge have been more specific in her declaration of incapacity? In answering this question, one must bear in mind that the respondents in the case below had asserted that [BKR] was suffering a relatively severe state of mental impairment. Ignoring the fact that those findings may have been incorrect (as discussed at Issue 2 above), the Senior District Judge found that [BKR] suffered from poor short-, mid-, and long-term memory. The Senior District Judge also noted that [BKR] suffered from various rather severe misconceptions of her wealth (see [128] above). All in all, the Senior District Judge's impression of [BKR] was that [BKR] suffered from a severe lack of executive functioning.

182 Given the Senior District Judge's findings on [BKR], one can therefore be sympathetic to the eventual wide and general declaration of incapacity that the Senior District Judge made. If [BKR] was indeed suffering from such a severe stage of metal impairment, it would be understandable that the declaration of incapacity would generally be of a wider scope. Furthermore, it is reasonable to see how the various decisions involved in managing one's properties and affairs would generally be of a similar nature, perhaps premised on an individual's ability to understand certain economic or financial concepts. Is the decision to create a trust fund and the decision to invest in certain financial instruments that different, with distinct enough considerations such that a test of capacity would "yield different answers"? Understandably, the answer is not as straightforward as the examples given above. In this manner, at the very most, the Senior District Judge could have relied on the second differentia, which is to distinguish decisions of varying complexities in declaring the mental (in)capacity of [BKR]. Even then, one can easily see the challenge in trying to benchmark a level of complexity to differentiate various decisions.

183 At the end of the day, the responsibility falls upon the shoulders of parties in particularising their case for a showing of mental (in)capacity. In line with the principles of the MCA, parties should strive as far as possible to maintain, preserve, and protect the autonomy of the individual in question. Unless the evidence clearly calls for it, parties should be slow to ask for such wide declarations of incapacity, and, if possible, should refine their cases to address specific transactions. Sections 22 and 23 of the MCA for example, very helpfully state a non-exhaustive list of "actions" that parties can

take guidance from when framing their cases. The best interests of an individual, which include protecting the autonomy of the individual, must be at the forefront of the mind of parties in making any application under the MCA. The court has a duty to protect an individual's liberty and freedom to choose and act as he wishes as far as possible, and parties are reminded that they too likewise share this duty.

184 Therefore, to conclusively answer the second part of the inquiry, I find that the Senior District Judge could have been more specific in her declaration of incapacity with regard to different transactions of different complexities. I refrain from going into more detail as, given my finding that [BKR] does not lack mental capacity, it would be hypothesising to suggest *how* the orders could have been more specific. Consequentially, the scope of powers granted to the deputies could likewise have been more specific.

Whether the appointment of [AUR] and [CY] was in the best interests of [BKR]

185 As discussed above, the law requires that both [BKR]'s past and present wishes be taken into consideration when deciding what would be in her best interests. Therefore, [BKR]'s views as to whether [AUR] and [CY] should be appointed as her deputies, both in the past and present, must be taken into consideration. Exactly what the best interests of an individual are will in this sense be a balancing act based on the individual facts of each case.

186 However, even before engaging in this balancing act, existent in this framework is the possibility that [BKR] is found lacking in capacity such that it would affect her wishes as to who she would want her deputies to be. If there is to be a "balance" between the past and present wishes, it may have to be taken with the assumption that the "present" wishes of [BKR] have been affected by the loss of her capacity such that due weight cannot be given to it.

187 As observed above, even if [BKR] is said to lack capacity in managing her properties and affairs, it does not necessarily follow that she lacks capacity to decide who her deputies should be. Fundamentally, these decisions are clearly very different. Who [BKR] trusts, how she places her trust in someone, and how she evaluates or responds to someone is fundamentally different from a decision pertaining to her property and affairs. Nevertheless, I see no need to address this issue, and proceed on the basis that [BKR] does indeed lack the mental capacity to decide who she wants as her deputies.

188 On the one hand, the evidence before me suggests that [BKR]'s current wishes are that she would prefer not to have [AUR] and [CY] to be her deputies. For example during her cross-examination on 15 February 2012, [BKR] had stated that:

> I just want to make it clear that I do not want my two sisters to take charge of my property. It's my final decision. … They only look after my son. … I am very sure. I don't want them to take charge.

189 This was consistent with her views during the clinical interviews as well. At the clinical interview on 5 February 2012, [BKR] was asked whether she wanted her sisters to help manage her monies. In reply, [BKR] stated:

> No, no, I have enough because they are siding [CK]. This they are – they are siding my son, [CK] and [NG], against me, so how can I trust them? … As you know there's the fight, you know, [t]hen [AUR] and [CY], both are lawyers and they are siding [CK].

190 Likewise, [BKR] also maintained that she did not want deputies during the clinical interview on 23 February 2012. When asked who she would prefer to have appointed as her deputies if so decided, [BKR] then stated:

> I don't trust [AUR] any more, I cannot trust her. She is on [CK]'s side completely. … [CY] has her own problem – own problem, her husband was a bankrupt. She got her own problems.

191 Without the need to cite further examples, it was generally clear to me that [BKR] found [AUR] (whether rightly or wrongly) at times over-assertive, meddlesome; [BKR] felt pressured by her, and had to "keep quiet" with her sometimes.

192 For completeness, I also take note of the appellants' arguments that the views of [AUR] and [CY] as to [BKR]'s wealth and donations to charity may be different from those of [BKR] herself. The appellants' argument was that since they shared different values regarding this issue, the court should be slow to appoint [AUR] and [CY] as deputies since the management of property and affairs directly concerns the management of [BKR]'s wealth. Hints of this disagreement in views were also somewhat supported by the fact that when the court inquired of counsel for the respondents whether [BKR] could leave her money to charity if she so desired, his telling reply was that she could, provided her deputies thought it was the right decision.

193 Before I consider the other side's arguments, I wish to address two points made by the respondents in trying to convince the court to place lesser weight on [BKR]'s current wishes. First, the respondents contended that [BKR] is no longer able to decide on who she trusts. Second, they also argued that [BKR] has an incorrect view of the role of deputies. Indeed, at a clinical interview, [BKR] had mentioned that "the deputies will do everything, decide on…behalf of me, everything. I got no say at all". Taking the respondents' case at its highest and assuming that their arguments are correct, the court nevertheless must still give due consideration to the present wishes of [BKR]. As discussed above, the fears and opinions of the individual, regardless of whether they are irrational or unfounded, are still the fears and opinions held by the individual. Therefore, the individual's sentiments must still be considered in addressing that individual's best interests.

194 Returning to the issue, I note that [BKR] used to turn to [AUR] and [CY] for advice on her property and investments. At one point in time, [AUR] even held [BKR]'s ATM card, and would withdraw money for her. [AUR] also assisted [BKR] to operate the Chubb safe in the latter's apartment. Assuming that the respondents' fears are right for the moment, given the extended time that [BKR] has spent in Hong Kong with [AUT] and [AI], I am also aware of the warnings found at para 6.5.2(b) of the COP, which states that:

> It is important that other individuals, such as relatives and friends, do not try to influence or apply pressure on the person to express views which are not the person's own.

195 Given such factors, it is understandable why the Senior District Judge might have had difficulty in choosing the deputies for [BKR]. While this may be true, it is clear to this court that [BKR] at her present state is strongly against her sisters being her deputies. While they may have had some history of managing [BKR]'s wealth for her, it is my opinion that parties could have spent more time searching for a deputy or deputies that [BKR] would be more amenable to. One such person might have been [AY] (who is the sister-in-law of [BKR]), someone whom [BKR] had continually mentioned that she trusted. Another possibility was the third party named in the third defendant's application at [5] above. In any case, there is no need for me to come to a conclusive finding as to whether the appointment of the respondents as her deputies was in the best interests of [BKR], except to observe that it would appear that the Senior District Judge could have given more thought to the present

wishes of [BKR].

Conclusion

196 This was a case which should never have come to court. It is unfortunate that at the centre of the whole dispute is an individual who in the twilight of her years has to be embroiled in litigation contesting her very own mental capacity. Sadder still is the discord that has been sown between [BKR] and her siblings, and between [BKR] and her own children. Indeed, the parties' choice to turn to legal avenues for redress is testimony of such discord.

197 Unfortunately, since the case came before the court, a decision had to be made based on its merits. In so determining I have confined my decision to the legal inquiries relevant to the MCA. Apart from certain passing observations (which were necessary), I make no conclusive findings as to the factual disputes between the parties as I see no need to drive a further wedge of acrimony between the parties. It is my hope that with time wounds will heal, and that all parties involved will move on with their lives and reconcile in due course.

198 For the reasons set out earlier which essentially pertained to the Senior District Judge's error in taking irrelevant findings and factors into consideration in arriving at her conclusion that [BKR] lacked mental capacity under the MCA, I will allow the Appeals. The decision of the Senior District Judge is set aside together with her orders for costs, which costs are now to be reversed in the appellants' favour. All three appellants shall have their costs of the Appeals, to be taxed on a standard basis unless otherwise agreed.

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