

CARDIFF REGIONAL COURT

Between:

CARDIFF COUNTY COUNCIL Applicant

and

**PEGGY ELIZABETH ROSS First Respondent
(by her litigation friend the Official Solicitor)**

and

NORMAN DAVIES Second Respondent

J U D G M E N T

The issues

1 This was an application by the Local Authority for determination of two questions in respect of a protected person, Mrs Ross, currently residing in one of their care homes in the City. The first question was whether Mrs Ross had the capacity to decide for herself whether she embarked on a 16 day cruise in the Mediterranean starting from Southampton on 31st October 2011; the second was whether such a cruise was in her best interests.

The hearing

2 The matter came before the court at a very late juncture (in fact on the friday before the monday embarkation date) and was listed for two hours. Submissions were completed by 1.30 pm and a short judgment delivered at 2.30 pm. as the parties required an immediate decision. I reserved the question of whether Mrs Ross had the necessary capacity in order to give myself more time for reflection, but proceeded on the assumption that she lacked capacity and gave short reasons why I considered it was in her best interests to go.

The background

3 The background to this application is that Mrs Ross, who is 82 but in physically good health, was admitted to the care home on 14th July 2011 following an 18 month history of memory difficulties which led to a CT scan apparently showing a severe degree of microvascular disease and bilateral hippocampal atrophy indicative of a mixed dementia. For the past 20 years or so Mrs Ross has been in a close relationship with Mr Norman Davies, who is 81 and still fit and active, and they have spent these years alternating between their two homes. Additionally they have been able to enjoy numerous cruise holidays together for most of those years, around 50 Mr

Davies says. The last was in December 2010 at which point they made the mutual decision to book, and pay for, the cruise the subject of these proceedings.

4 Prior to moving to the care home Mrs Ross had a spell in hospital due to Mr Davies himself requiring hospital in-patient treatment for an ulcerated foot. Before they could resume their former pattern of life Mrs Ross moved to the care home. After her move Mr Davies recovered his mobility and it was agreed that Mrs Ross would resume spending time with him at weekends. Mr Davies collects her and she stays with, and is cared for by, him for a couple of days at a time.

5 The question of her capacity to make this decision first raised its head when Mr Davies notified Mrs Ross's carers of the cruise booking – he says in January but the carers say in July 2011. In fact it is the Applicant's case that in July they were given to understand that the holiday had been cancelled and that they did not become aware that it was going ahead until early September. Whatever the true facts are, the issue had by then become an urgent one.

The assessment of capacity

6 Mrs Ross's social worker and the manager of the residential home together undertook an assessment of Mrs Ross's capacity on 23rd September 2011. In her statement in these proceedings the social worker says:

“Mrs Ross was found to lack capacity to make a decision about going on the said cruise. She has a severe degree of microvascular disease as previously stated. Mrs Ross was able to understand the concept of cruising to some degree as she has cruised for many years. She was able to retain the information for long enough to make the said decision, but was not able to weigh the relevant information as part of the decision making process as her ideas/beliefs are not based in reality and she has no insight into her need. At the point of this assessment Mrs Ross advised that she wasn't really bothered about attending the cruise. Mrs Ross does not believe that she needs any support and talked about her fear of being left alone when away from home”.

In her CoP3 ‘Assessment of Capacity’ the social worker reveals that it was in fact she who explained to Mrs Ross her concern for her should she be left alone for any length of time when on the holiday because of her previous history of wandering. She set out her reasons for concluding that Mrs Ross could not (to use the wording of s 3(1) **Mental Capacity Act 2005** – “the Act”) ‘use or weigh the relevant information as part of the process of making the decision’ as follows. Mrs Ross said she was afraid of being left alone ‘if Norman goes for a smoke or a pint’ (Mr Davies neither smokes nor drinks). She said she would contemplate going on deck alone (which the social worker felt was unsafe). She said that Mr Davies either cooks on board ship or they go for a meal. She denied that she required prompts and supervision with all aspects of daily activities and personal care throughout the day and night (which in practice she does) although Mrs Ross is independently mobile. Mrs Ross told the social worker ‘I don't particularly want to go but Norman is bent on it so I would go’ but that she found going abroad stressful and she would tell Mr Davies that she did not want to go.

7 Mrs Ross was said to be ‘disorientated in time and place and there is evidence to suggest she is living in the past by her references to being at work and reference to her previous husband’s habits’ (apparently she believes she works at the home, rather than being a resident, although the fact is that until her retirement she did work in a residential home).

8 Following this, on 6th October 2011, Mrs Ross was examined by an Associate Specialist Psychiatrist who concluded that:

“She was disorientated in time, place and person. She sometimes appeared confused. She showed significant decline in her cognitive function. I did not elicit any symptoms suggestive of acute mental illness that warrant her detention under the Mental Health Act 1983. In terms of her capacity, due to a decline in her cognitive function she is unable to make informed consent regarding a cruise holiday. She can understand she is going on a cruise holiday but cannot retain this information and does not have the ability to weigh up this information to make an informed decision”.

This was, I believe, the first time this particular Psychiatrist had met or assessed Mrs Ross. I query whether he was fully apprised of the comparatively simple nature of the decision Mrs Ross was asked to make and of her experience of undergoing such cruises with Mr Davies in the past.

9 Mr Norman Davies filed a statement in which he challenged the view that she lacked capacity to make this decision. He does however accept that it is in her best interests to reside at the residential home although he considers he is capable of attending to her needs when she visits him at weekends. He says ‘we thoroughly enjoy our weekends together and it feels like old times. We go shopping...go out for lunch, visit garden centres, meet friends and generally make the most of our weekends...Peggy’s communication skills are still excellent, she is able to chat face to face with strangers and friends and family alike. Peggy is able to communicate excellently on the telephone with my daughter and grandson. Peggy likes to choose from the TV pages what she wishes to watch on TV whilst at my home’. He goes on to describe other aspects of normal life in which Mrs Ross is able to participate and expresses the view that her condition has remained stable over the last 18 months.

The principles to be applied

10 On this evidence and the submissions I heard the following principles apply. Firstly it is a fundamental principle of the Act that a person is assumed to have capacity unless the contrary is established. The lack of capacity must be established on the balance of probabilities. The lack of capacity must relate to the specific issue under consideration, in this case whether she is capable of deciding if she should go on the cruise. Even if others believe that to decide to go on this cruise is an unwise decision, that in itself is insufficient to demonstrate that she is unable to make the decision. Given that there can be no doubt that Mrs Ross suffers from an impairment of, or a disturbance in the functioning of, the mind or brain, s 2 of the Act provides that a person is only unable to make a decision for herself if she cannot understand the information relevant to the decision, retain that information, use or weigh that information as part of the process of making the decision or communicate her decision.

Conclusion

11 As already described, Mrs Ross was said by her social worker to be able to retain the information about the cruise long enough to be able to make her decision, although her decision wavered in that on a couple of occasions she said that she wanted to go and on another that she was indifferent. She is a person with extensive experience of cruise holidays and her reported replies suggest strongly that she was aware of the nature of what she was deciding. The doubts arise over whether she had the capacity to weigh up all the information in the sense of the reasonably foreseeable consequences of deciding one way or the other. Those consequences are, presumably, whether she will be safe and properly cared for during the holiday and whether the effect of the holiday will be to cause her distress by taking her out of the environment to which she has now become accustomed.

12 It seems to me to be a reasonable inference that if Mrs Ross was able to grasp that she would be going on a cruise and the concept of what that involves, as her social worker records, she would have the residual memory that it was something she had enjoyed doing many times in the past. That would also chime with Mr Davies' evidence of her apparent capacity to make this decision. One must not forget that this is not a life-changing decision, or a choice between two evils or a decision over which an elderly person without Mrs Ross's impairment would be likely to agonise. It is a choice of whether to go on holiday or not, in familiar circumstances, with one's companion of the past two decades. In these circumstances I find myself unpersuaded that Mrs Ross, whatever her limitations, can be shown on the balance of probabilities to have lacked capacity to make this particular decision.

The best interests decision

13 Whether that conclusion is right or wrong, it has no effect on the decision already made as to whether it was in Mrs Ross's best interests to go on this cruise. The view of the professionals concerned seemed to be unanimous that it was not. That is understandable. They have the direct experience of dealing with Mrs Ross's daily care needs, of prompting her to take her medication (she is diabetic) and to attend to her other needs, and ensuring her safety and well-being. My strong impression is that her social worker and the staff at the home want to do the right thing for her but are focussed on her safety and are acutely aware of things that might go wrong. Perhaps the prime example of this was the concern that Mrs Ross might 'wander' (as she undoubtedly has in the past when living alone) on the ship and go over the side. It was suggested, not without some force in my view, that this smacked of saying that her best interests were best served by taking every precaution to avoid any possible danger without carrying out the balancing exercise of considering the benefit to Mrs Ross of what, sadly, may be her last opportunity to enjoy such a holiday with Mr Davies. This led, in my view, to trying to find reasons why Mrs Ross should not go on this holiday rather than finding reasons why she should.

14 **S 4** of the Act sets out the principles on which such a decision must be made. Consideration must be given, amongst other things, to Mrs Ross's past and present wishes and feelings, the beliefs and values that would be likely to influence her decision if she had capacity, the other factors that she would be likely to consider if

she were able to do so, and – significantly – the views of Mr Davies as the donee of an Enduring Power of Attorney (albeit limited to her property and affairs). Indeed, all the relevant circumstances have to be taken into account.

15 On the evidence put before me I concluded that:

(a) Mrs Ross was, on balance, at the very least willing to go on this cruise despite her somewhat ambiguous utterances.

(b) If one ‘re-winds’ to a year ago, and for many years before that, it was part of Mrs Ross’s lifestyle to take cruises on a regular basis each year in Mr Davies’s company from which it must be inferred that she was happy to do so. Without the intervention of her dementia the probability is that she would have wanted to go on this cruise.

(c) Mr Davies, who knows her well, supports this view.

(d) As already mentioned, this could be their last opportunity to extract enjoyment from such a holiday.

(e) Looked at in a positive light, the concerns about her safety on board appear to have been given disproportionate emphasis. Mr Davies, who has proved able to care for Mrs Ross at weekends, will be with her for the duration of the cruise, sharing her cabin and in a position to keep a watchful eye on her and attend to her needs.

(f) Concerns about her ‘wandering’ are largely, if not wholly, met by the fact that a cruise ship is a ‘confined space’ such that she cannot wander far. During the night Mr Davies has formulated strategies to ensure she does not leave the cabin without him becoming aware.

(g) The suggestion of a carer to accompany the couple was put forward but is unnecessary, too costly and impractical. It is difficult to see how a carer could do any more than Mr Davies can do.

(h) Lastly, Mrs Ross is familiar with the pattern of life on a cruise ship, has travelled on this particular ship in the past and will be with Mr Davies who has her best interests at heart, such that the fears that Mrs Ross might find the new environment disruptive and therefore distressing are seemingly allayed.

16 For these primary reasons I concluded that it was in Mrs Ross’s best interests to embark on this cruise.

17 There is one other aspect of the case that requires short comment. Following the negative assessment of Mrs Ross’s capacity to make this particular decision the Applicant Local Authority, aware that their view was controversial and that Mr Davies planned to go ahead with the holiday, aware also that preventing her going on the cruise would be a deprivation of her liberty, sought and obtained a standard authorisation under **Schedule A1** of the Act to legitimate their intention. This came into force on 13th October and was to last until 26th October. On 24th October the Applicant applied without notice to the Court of Protection in London for interim declarations that Mrs Ross lacked the capacity to litigate, to decide where she should

live and to make decisions about her care. Interim declarations were made and the matter immediately transferred to this regional court for hearing on notice on 28th October. Mr Davies then immediately issued his application to challenge those interim orders. It was submitted that there was procedural unfairness in the Local Authority adopting these measures and as a matter of principle the Standard Authorisation procedure should not have been used but instead the known dispute should have been brought to the Court of Protection for resolution. In the event this particular issue did not need to be argued, nor was there sufficient time, so I merely record the facts for completeness, although my preliminary view is that the submission on behalf of Mr Davies is correct.

18 It should also be recorded that the court gave permission for an accredited member of the media (ITV Wales) to be present and, at the conclusion of proceedings and after argument, gave permission for reporting restrictions to be lifted to the extent that the identities of Mrs Ross and Mr Davies could be reported. The determinative reason for this was that the court was told that Mr Davies and Mrs Ross had already voluntarily participated in a filmed interview, without anonymity, by ITV Wales for a forthcoming programme about the very issues that have been raised during this case.

19 In conclusion the court makes the order that was helpfully drafted and handed in by Counsel and which has already been issued.

His Honour Judge Masterman

2nd November 2011