Case No: B2/2010/0551(B)

Neutral Citation Number: [2011] EWCA Civ 115
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WARRINGTON COUNTY COURT
(HER HONOUR JUDGE CASE)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 25 January 2011

Before:

LORD JUSTICE MAURICE KAY
LORD JUSTICE THOMAS
and
LORD JUSTICE ETHERTON

- -

Between:

MASSIE	**Respondent/ Claimant**
- and -	
H	**Appellant/ First Defendant**
- and -	
M	**Interested Party/ Second Defendant**

- -

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Mr Matthew Stockwell (instructed by Messrs RNMJ Mental Health Solicitors) appeared on behalf of the **Appellant**.
The Respondent did not appear and was not represented.

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Judgment

(As Approved by the Court)

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Lord Justice Maurice Kay:

1. This case illustrates a difficulty arising under the Access to Justice 1999 (Destination of Appeals) Order 2000 ("the Order") of which practitioners should be made aware or reminded.

2. The underlying proceedings were proceedings in the Warrington County Court in which Scott Massie, an approved mental health professional, commenced proceedings under section 29 of the Mental Health Act 1983 seeking an order that the functions of the nearest relative of a patient under that Act should be exercisable by a person other than the one then appearing to be the nearest relative.

3. As this case concerns mental health issues, we shall anonymise the original interested party, who was the person with mental health difficulties, and the current appellant, who was previously the nearest relative. We shall refer to the former as "M" and the latter as "H".

4. It is not necessary in this judgment to say anything at all about the background facts. It is sufficient to relate that proceedings were appropriately commenced by the approved mental health professional in proceedings taken under part 8 of the Civil Procedure Rules. The proceedings were instituted in the Warrington County Court, which was the appropriate venue under section 29 of the Mental Health Act. The matter came before Her Honour Judge Case in that court on two occasions. On the first occasion she made an order effectively adjourning the matter. That was an order dated 22 January 2010. The adjournment was specific that the return date was to be 29 January 2010, with a time estimate of 30 minutes. The reason for the adjournment was to enable H to obtain legal representation and to enable M to be legally represented by her solicitors, who were already acting. When the matter returned to court, in fact not on 29 January but on 28 January 2010, after a short hearing the judge acceded to the application made on behalf of the applicant and ruled that the function of nearest relative be transferred from H so as to be exercisable by the Director of Adult Services of Halton Borough Council.

5. The appeal to this court was intended to be an appeal against that decision on the merits. It became apparent at an early stage following the filing of the appellant's notice that there was a jurisdictional issue. This was brought to the attention of the parties. In a nutshell the question was whether an appeal from the circuit judge in the county court in this case properly lay to this court rather than to a High Court judge. In the event Mr Stockwell concedes that this court does not have the appropriate jurisdiction and that the appeal should have gone to a High Court judge. It is necessary to say a little more about that in the hope that by so doing we can prevent or at least reduce the number of occasions when appeals are inappropriately commenced in this court. It is a fact that some of the qualified legal staff in the office of the Civil Appeals Office have to spend a great deal of time explaining to people, many of them legal practitioners, that they are seeking to present their appeals in the wrong court. It of course behoves practitioners in particular to ensure that they are

commencing their appeals before the correct tribunal.

6. As I have said, the proceedings were instituted pursuant to part 8 of the Civil Procedure Rules. That was a correct course because by CPR 8.1(6)(a) it is envisaged that a rule or practice direction may, in relation to a specified type of proceedings, require or permit the use of the part 8 procedure. In fact the practice direction under part 8 specifically requires that proceedings under section 29 of the Mental Health Act are commenced under part 8 (see Practice Direction 8, paragraphs 9.1 and 18, particularly at 18.3).

7. The Order dealing with the destination of appeals contains provisions on this point, which are quite unequivocal. The general rule provided in Article 3 is:

> "Subject to Articles 4 and 5 and to paragraph 2, an appeal shall lie from a decision of a county court to the High Court."

8. Paragraph 2 deals with the situation where the original decision was made by a district judge or deputy district judge and so has no bearing on the present case. The important provision then is Article 4, which provides:

> " An appeal shall lie to the Court of Appeal where the decision to be appealed is a final decision -
>
> (a) in a claim made under Part 7 of the Civil Procedure Rules 1998 and allocated to the multi-track under those Rules"

9. At one point it was being suggested that the present case in effect fell under that provision. However, self-evidently it does not because the claim was never made under part 7, it ought never to have been made under part 7 and it was always correctly made under part 8. Accordingly, it was not only not made under part 7, nor was it such a claim that had been "allocated" by direction to the multitrack. This being the case, the general provision in Article 3 was always in play and the correct appellate route was to the High Court judge. It follows that this court, the jurisdiction of which is defined by statute, lacks jurisdiction in this case.

10. At an early stage of the proceedings in this court, in circumstances we do not need to describe in detail, an order was made by Master Hendy in these terms:

> "Upon reading the request for dismissal of the application notice and the papers put before the court,
>
> By consent it is ordered that

> the application notice be dismissed with no order for costs, save detailed assessment of the Community Legal Services funding costs of the appellant and interested party."

10. There is a continuing issue about that order, assuming it to have been properly made. There is a dispute as to whether the consent to which it refers was in fact genuinely forthcoming. Again, we do not need to go into the details of that or into the detailed evidence about conversations that took place between H's solicitor and members of the Civil Appeals Office. Suffice it to say that on any basis, as this court lacks jurisdiction in this appeal, it lacked jurisdiction to make the order to which I have just referred. In these circumstances it will become appropriate to declare that that consent order is a nullity.

11. The question then arises as to what should happen next. Orthodoxy might result in our abandoning the matter at this stage, or at least simply transferring it to the High Court and not addressing it further today. However, in view of the passage of time and the costs involved, the pragmatic solution, and one favoured by Mr Stockwell, would be for one of us to sit as a High Court judge here and now and to consider the question of permission to appeal. What we shall do, therefore, is to declare our lack of jurisdiction and the fact of nullity of the consent order, transfer the matter to the High Court and one of us will then continue to deal with it in that capacity, if my Lords are content with such a course.

Lord Justice Thomas:
12. I agree.

Lord Justice Etherton:
13. I also agree.

Order: No jurisdiction