Neutral Citation Number: [2014] EWHC 1528 (Admin)

Case No. CO/17731/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Tuesday, 14 January 2014

B e f o r e:

MRS JUSTICE CARR

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Between:

	THE QUEEN ON THE APPLICATION OF AB	**Claimant**
	v	
	HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY	**Defendant**

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Mr R Alomo (instructed by Crowther Solicitors) appeared on behalf of the **Claimant**
Miss K Gallafent (instructed by Morgan Cole, Cardiff) appeared on behalf of the **Defendant**

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J U D G M E N T1. MRS JUSTICE CARR: On the evening of Christmas Eve 2013, Globe J heard an urgent telephone application on behalf of the Claimant in this matter for interim relief. I have made an anonymity order in respect of the Claimant, who is to be described as "AB", and her partner, who is also now joined as an interested party to this claim as "P". The Defendant ("the Authority") is the statutory body responsible for, amongst other things, making provision for the regulation of the procedures of human fertilisation and for the keeping and use of human embryos and

the storage and use of gametes.

2. The urgent application sought the following relief: firstly, an order permitting the hospital in question ("the Hospital") to retrieve P's gametes on the instructions of AB and, secondly, an order requiring the authority to issue a special direction to the hospital authorising the hospital to keep the gametes from P ancillary to and pending the outcome of this claim.

3. At the stage of this application the named Defendants were the Hospital and the Authority only. The circumstances leading to the application were as follows. AB is the Canadian common-law wife of P. It is said that they have been in a relation since 2006. They are not married under English law but it is said that in October 2013 P proposed marriage to AB with a ring which proposal was accepted. On 2 December 2013, P sadly suffered a cardiac arrest. He was at the time of the application in December in the intensive care unit of the Hospital. The Court was at the time of the urgent application informed that those in charge of P's treatment and care had advised AB that he was then in a permanent vegetative state, although he was out of a coma with a tracheotomy. The Court was told that P might pass away at any moment.

4. On 4 December 2013 AB enquired about the possibility of retrieving gametes so that she should use them to conceive and bear P's children. There was and never has been any suggestion that P has ever in terms agreed to this, but it is said, and was said on behalf of AB, that she was in no doubt that it is what he would have wanted had he known that he would be in his current state. AB was advised that a court order would be required before there could be any retrieval and storage of gametes from P. She was told this was possible in the absence of consent from P with a court order.

5. On 23 December 2013 AB instructed solicitors who, on the same day, sought a special direction from the Authority. On 24 December 2013 the Authority refused to issue such a special direction authorising the retrieval and storage of gametes from P. It referred to various documents in its refusal, stating in terms that the Authority had no power to issue the special direction sought. In particular, gametes could only be stored if effective consent exists for such storage. Gametes could only be harvested in circumstances where they could lawfully be stored and the Hospital in question was not appropriately licensed.

6. Hence the application in the evening of 24 December 2013. On that occasion, Globe J was informed that P had suffered four cardiac arrests since 1 December 2013 and that the Hospital had directed that P was not to be resuscitated in the event of any further cardiac arrest. Globe J made an order as follows:

> 1. That the Hospital be permitted on the instructions of AB to retrieve gametes from P provided that in so doing all due respect and dignity was afforded to P and provided that the procedure was carried out by a consultant or such other medical professional or clinician with experience of relevant procedures and who would be able to ensure the future viability of the gametes retrieved.
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> 2. The Authority should forthwith on service of the order issue a special direction to the Hospital authorising the latter to keep the gametes so

retrieved ancillary to and pending a decision on this claim.

7. On 30 December 2013 AB issued a claim form and a formal application for the relief in fact already obtained from Globe J, that latter application being effectively redundant. The claim form seeks to challenge the Authority's decision of 24 December 2013. On 2 January 2014, pursuant to the liberty to apply for a provision in the order, the Authority applied to discharge or vary paragraph 2 of the order in particular on the following grounds. Firstly, under section 4.1(a) of the Human Fertilisation and Embryology Act 1990, gametes may only be stored in pursuance of a license and in accordance with the requirements for effective consent. Secondly, there was no effective consent. Thirdly, the Authority had no power to issue a special direction authorising storage pending an application. Fourthly, the Hospital was not licensed as necessary.

8. Although the Authority's challenge is only to paragraph 2 of the order, the Authority submits that, in reality, both limbs of the order would fall to be discharged because without storage, retrieval is no use and because it would be unlawful to retrieve gametes if they could not lawfully be stored. The Authority's position, in my judgment correctly, identifies that discrete issues of lawfulness relate to paragraph 1 arising out of P's position under the Mental Capacity Act 2005.

9. It appears from a witness statement from AB's solicitor dated 10 January 2014 that, despite the order of 24 December, no gametes have yet been retrieved from P. Two clinical issues arose: firstly, diagnostic tests were necessary to make sure, amongst other things, that P was free from CJD; and, secondly, the absence of a licence on the part of the hospital. The tests have now been carried out and have come back clear. As for licensing, it is said that an alternative hospital has offered its services and has expressed itself as willing to store the gametes upon an order of the court, or satisfaction from the Authority that no criticism would be made of it if it so did.

10. Regrettably in my judgment, the witness statement lodged for this latest hearing on behalf of AB, did not update the court as to P's latest medical position. There has in fact been a material alteration and, happily, stabilisation of P's condition. For AB it is said that attempts have been made on her behalf to obtain information from the hospital, but as will become apparent, some of the updating information must have been within the knowledge of AB herself. It was quite wrong for the court, through AB herself, not to be updated as to P's medical condition.

11. It is only from the Authority's skeleton argument received after 4.00 pm yesterday afternoon that the Court was apprised of the latest position in relation to P. P has been transferred from the intensive care unit, and was so transferred, during the week of 30 December. He was transferred to a medical ward at the hospital. His condition is now said to be stable although there are still some issues as to care. He remains with a tracheotomy and self-ventilating and is being fed through the nose with a gastric tube. The "do not resuscitate" order has been lifted until the outcome of this claim. Moreover, it is planned to site a gastric tube for longer-term feeding on P when he will be discharged to longer-term nursing care. The results of the tests demonstrate that that is a step that can now be taken. It is also apparent that, as would be obvious in any event, in broad terms it is probably in P's best interests for a decision on this claim to be made as

soon as possible.

12. The distance between the parties is now restricted to a disagreement as to whether the interim relief ordered by Globe J on 24 December should be discharged outright or simply made the subject of a stay, pending the outcome of a full hearing which I have just directed in a previous ruling, should be the subject of a rolled-up expedited hearing to take place in the week commencing 3 February 2014.

13. I have reached the clear conclusion that the interim relief ordered by Globe J should be discharged outright and I have reached that conclusion for the following reasons. Firstly, in my judgment, that the interim relief sought was not interim relief or an order which ought to have been sought from the court as a matter of urgent interim relief or otherwise. Firstly, it is common ground that the first step that ought to have been taken was consideration of P's best interests in the obtaining of an order from the Court of Protection. As I have said, it is now common ground that for any judicial review claim in relation to the decision of 24 December 2013 properly to arise, an order from the Court of Protection is a necessary step.

14. The second reason why I have reached the conclusion that there should be a discharge and not a stay is because the premise of the order of 24 December 2013 has altered and altered materially. The urgency that was present then does not appear any longer to exist. As I have identified, it appears that P's condition has now stabilised, whilst no doubt the position is still grave and P remains extremely ill. The lifting of the "do not resuscitate" order in particular means that the absolute urgency that presented itself on 24 September no longer exists.

15. Thirdly, the order in place as I have identified in any event cannot stand given the unlicensed status of the hospital. The order would need to have been varied in any event to another hospital.

16. Fourthly, as the distance between the parties reflects, it is common ground that nothing should happen as matters currently stand in relation either to the retrieval of storage of gametes from P in any event, pending the outcome of the expedited hearing to take place. Therefore, there is no question of an order for discharge, frustrating or defeating in some way, AB's claim for judicial review.

17. Fifthly, discharge of the interim relief order on 24 December does not in any way prevent AB from applying for urgent interim relief or any other relief in the event that P's condition or other events take place which mean that urgent interim relief is justified. There is in my judgment no real difference of any distinction between an application to lift a stay and an application from ab initio to secure urgent interim relief.

18. Finally, I should record that the court has had the benefit of the assistance of Mr Pitblado, the Official Solicitor. He has attended at the Court's request on an informal basis at very short notice. He has been of enormous assistance in clarifying the position for the parties and assisting the Court as to the best way forward.

19. For all these reasons I discharge the order made by Globe J on 24 December 2013.

Ruling on Application for Protective Costs Order

20. MRS JUSTICE CARR: I now have before me an application on behalf of the AB for a protective costs order. It appears that the order that is sought is either that AB should have no liability for the Defendant's costs or liability capped at an amount suggested for the first time today in the sum of £7,500, or thereabouts. The Authority opposes the application. Protective costs orders are about ensuring access to justice. They can be made in respect of judicial review claims where issues of general public importance are raised where those issues are ones where it is in the public interest should be determined but which would otherwise be stifled by a lack of means.

21. The relevant principles were recently and conveniently summarised and considered in R(on the application of Plantaganet Alliance Ltd) v Secretary of State for Justice and others [2013] EWHC 3164 (Admin). In particular the law is summarised at paragraph 17 to 19 of that judgment by reference to the Corner House principles. I read into the transcript paragraph 17 to 19 that of judgment:

> "The Corner House principles (2005)
>
> The general principles governing Protective Costs Ordered were restated by the Court of Appeal in R (Corner House) v Secretary of State for Trade and Industry [2005] 1 WLR 2600 (CA) at [74] as follows (see also The White Book at paragraph 48.15.7):
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> "(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
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> (i) the issues raised are of general public importance;
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> (ii) the public interest requires that those issues should be resolved;
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> (iii) the applicant has no private interest in the outcome of the case;
>
> (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
>
> (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
>
> (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.
>
> (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

A PCO can take a number of different forms and the choice of the form of the order is an important aspect of the discretion exercised by the judge (Corner House, ibid, at [75]). There is room for considerable variation, depending on what is "appropriate and fair" in each of the rare cases in which the question of a PCO may arise (Corner House, ibid, at [76]).

The Court of Appeal in Corner House said that the earlier guidance in the case of King v Telegraph Group Ltd [2004] EWCA Civ 613 at [101-2] (a defamation case) will "always" be applicable, but rephrased the King guidance in the present context as follows (Corner House, ibid, at [76]):

> (1) When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability.
>
> (2) The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest.
>
> (3) The overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly."

22. Subsequent cases have emphasised the need for flexibility in the consideration of the making of protective costs orders, particularly in relation to the requirement that a Claimant should have no private interest in the outcome of the case. The presence of a private interest is merely a factor to consider and in this regard the Claimant relies, amongst other things, on the case of R(on the application of Compton) v Wiltshire Primary Care Trust [2008] EWCA Civ 749. The position was also summarised in this regard in the decision of Litvinenko v Secretary of State for Home Department (Court of Appeal, 4 October 2013). There, the Court of Appeal stated as follows: firstly, the starting point was a protective costs order ("PCO"), would not be made unless (a) there was a real prospect of success in the judicial review proceedings, (b) the issues raised were of general public importance, and (c) there was a compelling public interest for them to be resolved. Secondly, a private interest in the judicial review claim is not fatal

to the application for a PCO. Subsequent cases have emphasised the need for flexibility when considering the requirement in Corner House that an applicant should have no private interest in the claim. The correct approach was that an applicant's private interest was merely a factor to consider when balancing against the other elements of the Corner House guidance. Thirdly, in that case, Mrs Litvinenko's liquid assets outweighed the Secretary of State's estimated costs and she had greater means than many other litigants. She had the financial means to bring proceedings if she chose to and it would not be fair or just to make a PCO, nor was it an exceptional case for the Corner House principles to apply.

23. In the light of the authorities the question for me to consider is whether or not it is fair and just in the light of the following considerations to make a protective costs order. Firstly, are there issues raised of general public importance? Secondly, does public interest require that those issues should be resolved? Thirdly, does AB have a private interest in the outcome of the case. Fourthly, having regard to the financial resources of AB and the Authority and to the amount of costs that are likely to be involved, is it fair and just to make the order? Fifthly, if the order is not made will AB probably discontinue and will she be acting reasonably in so doing?

24. I am not persuaded that it is fair and just by reference to those factors as a matter of my discretion to make a protective costs order in this case. I state at the outset the application is made on very limited evidence. It is a sparse application. It is said simply that issues of general public importance are raised and some details of AB's alleged financial position are given.

25. I accept of course that the question of the proper scope of section 24 of the Human Embryology and Fertilisation Act 1990 is a question of general public importance. But it seems to me that there are three reasons in particular why a protective costs order should not be made. Firstly, that whilst the presence of a private interest is by no means fatal to the making of an order, in this particular case it seems to me that AB's private interest is overriding and overwhelming. Many private cases are brought which have a point of general public importance arising. Here the essence of AB's application is not for the benefit of the public interest as a whole but for her own personal benefit. Secondly, the information advanced as to AB's assets is wholly inadequate to justify the making of an order. The evidence in support of the application as to AB's financial resources is noted in the following paragraphs, and I read from paragraph 18 of the witness statement of AB's solicitor dated 10 January 2014:

> "The Claimant is of limited means. She is currently unemployed. Her assets are as follows: her late mother has left the family home for her and her father to be shared equally. Her father lives in the property and she doesn't. There is a family business that pays her about £300 a month. She jointly holds with patient P a Coutts Bank account with about £15,000 in it."

That information is demonstrably incomplete even by reference to the documents before the Court. As is pointed out by the Authority, the Statutory Declaration of Common Law Union in Canada between AB and P reveals, firstly, that AB is said to be the beneficiary to 80 per cent of

P's estate through his will and trust. According to medical records, P has at some time been a wealthy man, having made a great deal of money in investment banking before his retirement some 15 years ago. Perhaps more importantly the Statutory Declaration of Common Law Union reveals that AB and P jointly own property other than their main residence. There is no reference in the evidence on behalf of AB to this property. I am not satisfied that proper and complete details of AB's assets have been advanced, nor am I persuaded even on the evidence that is advanced that AB will not necessarily be able to pay any adverse costs in this action against her.

26. Finally, I am not persuaded to grant the order because there is no suggestion, by reference to Corner House principles, that AB will probably discontinue this claim, let alone act reasonably in so doing were no protective costs order made. This requirement goes wholly unaddressed both evidentially and in submissions before the Court. As I have said, given that the rationale for the making of a protective costs order is access to justice, that in my judgment is another reason why this application for a protective costs order fails.

27. I think that disposes of everything for today's purposes subject to a member of the press wishing to express an interest in access to certain documents. Is that right, Mr Alomo, is there anything else from your side?

28. MR ALOMO: My Lady, that's correct.

29. MRS JUSTICE CARR: Thank you very much for your helpful submissions. Miss Gallafent, is there anything else?

30. MISS GALLAFENT: Nothing from me.

31. MRS JUSTICE CARR: Please get on with the drafting of the order as soon as possible and in any event get it to me by 4.00 pm tomorrow as indicated.

32. Sir, do you have an outstanding submission to make?

33. MEMBER OF THE PRESS: My Lady, most of the ground was covered in your judgment, the background was very helpful.

34. MRS JUSTICE CARR: Good, I hope that disposes of the need to see any information further at this stage.

35. MEMBER OF THE PRESS: It would be very helpful just to see the grounds of claim just to have a note. In the interests of a fair and accurate report of what has happened today that would be very helpful.

36. MRS JUSTICE CARR: What is the position in relation to an application? Is a document of public record available for inspection on the court file? Let us start with Mr Alomo, it is his document.

37. MEMBER OF THE PRESS: Bearing in mind of course anonymity would be respected.

38. MRS JUSTICE CARR: Obviously, and there would be absolutely no question of any

breach of my anonymity order. I take that as read. It seems to me Mr Alomo, do tell me if I am wrong, but if it is a public document on the court records subject to the anonymity orders, I am not sure I need to make any order.

39. MR ALOMO: My Lady, that is correct, save I am just conscious that my client was very keen for obvious reasons not to have her position (Inaudible). I appreciate of course the court has made an order protecting that particular aspect. But what we have not spoken to her about, and we cannot do that now, is really what her thoughts and views are in relation to these documents.

40. MRS JUSTICE CARR: Yes. I am not going to make any formal direction because as you have rightly pointed out, the background to these matters is now relatively fully set out in my judgment. It seems to me that it may be possible, Mr Alomo for you to provide the gentleman with a redacted copy of the claim form amending the heading to reflect AB and the like. But I am not going to make any formal order, I do not think it is in my jurisdiction to make any formal order in this regard. The request has been made and there may be avenues that can be pursued so far as is necessary, but I am not going to make any formal order. Perhaps a redacted copy could be provided. It does not seem to me that a claim form adds in any event at all to what has been heard today in open court.

41. MR ALOMO: Yes.

42. MRS JUSTICE CARR: Thank you.

43. MEMBER OF THE PRESS: Just to emphasise to the parties, the reason why it is good to see these sort of things at this stage is because in the past we have had misinterpretations appearing in the press on various high profile cases which have led to problems that have to be corrected at a later date so the more information the better.

44. MRS JUSTICE CARR: I understand and the parties will have heard that helpful comment. Thank you very much indeed. Thank you both very much for your assistance. The Court expresses its thanks.