NEW SQUARE Chambers

LAND AND PROPERTY

MARCH 28, 2022

The Limits Of Applications To Remove Litigation Friends
Shirazi v Susa [2022] EWHC 477 (Ch)

BY JIAN JUN (JJ) LIEW

Introduction

Applications to the court for the removal of litigation friends under CPR 21.7 are a rare occurrence. Nevertheless, the court's judicial control over litigation friends represents a powerful weapon of unconstrained jurisdiction in the court's case management toolkit, to be exercised where the circumstances justify such intervention. This stands alongside other powers safeguarding protected parties (for instance, the requirement for the courts to approve settlements in CPR 21.10) when such persons, for better or for worse, face a need to navigate the judicial process in circumstances where the law deems them unable to do so themselves.

The case of Shirazi v Susa [2022] EWHC 477 (Ch) represents a significant retreat from such judicial control. From a practical perspective, the uncertainty, procedural difficulties, and likely costs risks involved now make bringing such an application almost foolhardy. As a result, the control of litigation friends, and the safeguarding of protected parties in such cases, vests increasingly in the hands of legal representatives and their ethical obligations.

The Facts

The application arose out of a family dispute to set aside conveyances of property made to companies owned by Babak Shirazi, one of the Claimant's sons. It was accepted by all parties that the Claimant lacked capacity as at the time of proceedings. The Claimant's wife, Mrs Shirazi, was appointed litigation friend by self-certification through her filing of a N235 certificate of suitability.

The Defendants applied to the court under CPR 21.7 to terminate Mrs Shirazi's appointment on the basis that (i) Mrs Shirazi was, contrary to CPR 21.4(3)(a), unable to fairly and competently conduct proceedings on behalf of the Claimant; (ii) alternatively, Mrs Shirazi was not acting in the Claimant's best interests, such that the court should exercise their unconstrained

jurisdiction to terminate her appointment. The following reasons were relied upon:

- She was mentally impaired and ill-suited to deal with the demands of litigation.
- She was thwarting settlement by refusing to mediate without good reason, such that she was not acting in the Claimant's best interests.
- She was being influenced by her other son, Borzou Shirazi, who was in practice controlling the present proceedings for his own purposes.

Decision and Comment

The Chief Mater dismissed the Application.

Legal Test

She considered that the starting point of the court is whether CPR 21.3(4) is satisfied, and this involved considerations of whether the litigation friend is acting in the "best interests" of the protected party. However, she also concluded that the meaning of this in civil proceedings was different from that in Court of Protection decisions. The latter was focused on "best interests" as defined in s.4 of the Mental Capacity Act 2005 and the former with obtaining the best possible outcome (of the proceedings) for the protected party. It was not explained how the two concepts differ in practical terms, nor is it necessarily clear how they would differ. Nevertheless, this change relegates the Court of Protection decisions (which represent the majority of successful challenges to litigation friends) to the status of guidance. The paring down of the authoritative backdrop, combined with the unclear scope of the "best interests" consideration, is likely to cause significant uncertainty in practice.

Unconstrained Jurisdiction

The court's unconstrained jurisdiction was also scaled back, with the Chief Master being unable to think of a practical example of when a court may intervene if CPR 21.3(4) was satisfied, aside from in support of the overriding objective. Given that the overriding objective includes dealing with disputes justly, especially with respect to vulnerable parties (e.g. PD1A), it could be contended that the unconstrained jurisdiction retains the same scope as before. However, this would be a most difficult interpretation of the Chief Master's comments in context. If so, this leaves open the question of what matters pertaining to the overriding objective a judge can legitimately take into account in deciding whether to exercise their unconstrained jurisdiction.

Evidential Difficulties

It is now clear that an applicant is faced with insurmountable barriers in establishing the facts necessary to show that CPR 21.3(4) is not satisfied. Given the court's reluctance to delve into contested factual allegations in an application hearing and given that a litigation friend's evidence cannot be tested through cross-examination, it is unlikely that an applicant can defeat a N235 certificate (signed with the usual statement of truth) supported by witness statements of their legal representatives (bearing in mind that those also cannot be tested through cross-examination). Indeed, in this case, the Chief Master afforded significant weight to the N235 and the witness statements produced by the Claimant's solicitors on matters such as influence and capacity.

Implications

The upshot of this case is that the safeguarding of protected parties now largely rests in the hands of legal representatives. Even where the legal representatives receive instructions from the litigation friend, they need to remain perceptive at each stage to ensure that the litigation friend complies with the provisions of CPR 21.3(4). This includes being aware of the risks of influence or matters of capacity in the circumstances and taking appropriate steps to satisfy themselves of suitability.

MAR 28, 2022

jj.liew@newsquarechambers.co.uk

+44 (0) 20 7419 8000

https://www.linkedin.com/in/jianjunliew