IN THE FAMILY JUSTICE COURTS OF THE REPUBLIC OF SINGAPORE

[2018] SGHCF 21

Originating Summons (Family) No 46 of 2016 (Registrar's Appeal No 13 of 2017)

Between

(1) TWD
(2) TWE

… *Appellants*

And

UQE

… *Respondent*

JUDGMENT

[Family Law] — [Procedure]

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v
UQE

[2018] SGHCF 21

High Court — Originating Summons (Family) No 46 of 2016 (Registrar's Appeal No 13 of 2017)
Tan Puay Boon JC
12 July, 8 November 2018

21 December 2018 Judgment reserved.

Tan Puay Boon JC:

1 A person is injured in an accident. Members of his family apply to be appointed as his deputies, on the basis that he lacks capacity in relation to certain matters. The person who is alleged to be liable in tort for causing the accident applies to be joined as a party to the deputy application, in order to adduce evidence on the victim's capacity. Should the court join the alleged tortfeasor as a party to the deputy application? That is the issue in this appeal.

Facts

The parties and the Accident

2 The appellants are respectively the mother and sister of the person who was alleged to lack capacity in this matter ("P").[1] P is a male Singaporean who

[1] Medical report dated 17 January 2018 at paras 7 and 8: Record of Appeal ("RA") in

is presently 27 years old.[2]

3 The respondent was the driver of a car that collided into P, who was a pedestrian at the material time, in an accident on 3 April 2015.[3] At the time of the accident, P was a 23-year-old polytechnic student.[4] As a result of the accident, P suffered multiple injuries including severe traumatic brain injury.[5]

The Deputy and Joinder Applications

4 On 2 March 2016, the appellants filed an application in the Family Courts under s 20 of the Mental Capacity Act (Cap 177A, 2010 Rev Ed) ("the MCA") to be appointed as deputies for P to make decisions on his behalf relating to his personal welfare and property and affairs ("the Deputy Application").[6]

5 The Deputy Application was supported by an affidavit of one Dr Chan Lai Gwen ("Dr Chan"), a Consultant in the Department of Psychological Medicine in Tan Tock Seng Hospital,[7] which enclosed a medical report dated 2 December 2015 ("Dr Chan's 1st Report") based on Dr Chan's examination of P on 20 November 2015.[8] In the report, Dr Chan stated the following:[9]

(a) P was diagnosed to have "[c]ognitive impairment due to severe Traumatic Brain Injury".

HCF/RAS 13/2017 ("RAS 13") at p 44.

2 Memo dated 13 May 2015: RA in HCF/RAS 32/2016 ("RAS 32") at p 236.

3 Affidavit of 2nd appellant dated 13 May 2016 at para 6: RA in RAS 32 at p 165.

4 Medical report dated 17 January 2018 at para 9: RA in RAS 13 at p 44.

5 Medical report dated 2 December 2015: RA in RAS 32 at p 100.

6 FC/OSM 46/2016 ("OS") at prayer 4a: RA in RAS 32 at p 92.

7 Medical report dated 2 December 2015: RA in RAS 32 at p 103.

8 Medical report dated 2 December 2015: RA in RAS 32 at p 100.

9 Medical report dated 2 December 2015: RA in RAS 32 at pp 101–103.

(b) P did not have mental capacity in relation to his personal welfare and property and affairs.

(c) However, P was "still recovering neurologically and [was] expected to improve further over the next [two] years". Further, P was "likely to regain mental capacity".

6 By a letter dated 18 March 2016, the respondent's solicitors (who are also the solicitors for the respondent's insurers) stated that their clients were an interested party in the Deputy Application and that they would attend a hearing of the same fixed for 22 March 2016.[10]

7 On 22 March 2016, the parties attended a Case Conference for the Deputy Application, where the respondent's solicitors stated that the respondent intended to apply to be joined as a party to the Deputy Application.[11]

8 By a letter dated 22 March 2016, the appellants' solicitors informed the respondent's solicitors that they disagreed that the respondent and his insurer were interested parties in the Deputy Application, unless they conceded liability. Nonetheless, for the purposes of resolving the issue of P's capacity, the appellants' solicitors were "prepared to take the Court's suggestion and advise [P] to attend a medical re-examination conducted by [the respondent's] expert to determine whether [P] lacks mental capacity".[12]

9 In reply, the respondent's solicitors reiterated in a letter dated 25 March 2016 that their clients were interested parties in the Deputy Application. They

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10 Letter dated 18 March 2016: RA in RAS 32 at pp 171–172.

11 Respondent's skeletal submissions for FC/SUM 1340/2016 at para 4: RA in RAS 32 at p 180.

12 Letter dated 22 March 2016: RA in RAS 32 at p 173.

added they were prepared to arrange for P to be re-examined by their clients' doctors, but that an application for the respondent to be joined as a party to the Deputy Application was "unavoidable" since "either party [would] be instructed to challenge the outcome of the medical re-examination irrespective of the results".[13]

10 On 25 April 2016, the respondent applied to be joined as a party to and be heard in the Deputy Application ("the Joinder Application").[14] In an affidavit supporting the Joinder Application, his then solicitor stated the following:[15]

> (a) There was evidence from surveillance carried out on P that raised issues regarding the extent of his incapacity. In this regard, the affidavit enclosed a report dated 27 October 2015 ("the 1st PI Report") by AJAX Investigation & Security Services Pte Ltd ("AJAX") detailing surveillance carried out on P from September to October 2015,[16] which was carried out on the instructions of the respondent's insurers.[17] According to the report, P was able to ambulate without aid, had a good range of movement in respect of his neck, could bend his back and sit without difficulty and could climb and descend stairs with assistance. He was also observed to have been carrying out daily activities accompanied by his family members.[18]

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13 Letter dated 25 March 2016: RA in RAS 32 at pp 174–175.

14 FC/SUM 1340/2016 in OS: RA in RAS 32 at pp 108–109.

15 Affidavit of Nicholas Yong Yoong Han dated 25 April 2016 at paras 11–14: RA in RAS 32 at pp 113–115.

16 1st PI Report at paras 7–11: RA in RAS 32 at pp 123–125.

17 1st PI Report at paras 1 and 3: RA in RAS 32 at p 122.

18 1st PI Report at paras 14–16: RA in RAS 32 at p 126.

(b) If the respondent was not joined as a party to the Deputy Application, he would not be able to adduce evidence that might assist the court in "clarifying the issue of P's mental incapacity". In those circumstances, if the court granted the Deputy Application, the respondent would be prejudiced in any subsequent legal action by P or his deputies against him (because the fact that deputies were appointed for P would be evidence of the severity of the injuries suffered by him).

(c) If the respondent was joined as a party, he had no objections to his involvement being limited to the issue of P's mental incapacity.

11 The second appellant filed an affidavit dated 13 May 2016 in reply to the Joinder Application. In brief, she averred that there was no basis for the respondent to be joined to the Deputy Application and stated the following:[19]

(a) Granting the Deputy Application would not prejudice the respondent or his insurers because they would be able to contest the issue of P's capacity in the civil suit which P intended to commence against the respondent ("the Civil Suit").

(b) Granting the Joinder Application would only increase the costs and delay in relation to the Deputy Application.

(c) The 1st PI Report, which was not a medical report, did not raise any issues in relation to P's mental capacity.

12 The second appellant's affidavit exhibited a Financial Counselling Form dated 14 April 2016 ("the Form") that was signed by P in the presence of his

[19] Affidavit of 2nd appellant dated 13 May 2016 at paras 12, 14–15 and 20: RA in RAS 32 at pp 166–167.

father, to acknowledge that he "[had] undergone financial counselling … and irrevocably agree[d] and under[took] to pay in full the final hospital charges".[20]

Procedural history and subsequent events

13 On 31 May 2016, the District Judge ('the DJ") heard the parties on the Joinder Application. The next day, he informed the parties that he would defer his decision on the Joinder Application for four weeks. In the interim, the appellants were to obtain a clarification medical report on P's capacity, while the respondent was to obtain a separate report on P's capacity.[21]

14 On 7 June 2016, the appellants' solicitors wrote to the court to request further arguments on the DJ's direction to the respondent to obtain a medical report on P's capacity. They submitted that the court had effected a "backdoor joinder" in making this direction. The DJ had no jurisdiction to direct P to be examined by a non-party to the proceedings. Instead, the court should first decide whether the respondent should be joined to the Deputy Application. It was only if the respondent was made a party to the Deputy Application that he could then apply for a further medical examination of P. If the court had doubts regarding P's capacity, it should "direct the necessary questions to P's doctor(s) and/or appoint a Court expert to assess P's mental capacity".[22]

15 From 15 to 23 June 2016, AJAX conducted further surveillance on P on the instructions of the respondent's insurer,[23] and prepared a further report dated 10 July 2016 ("the 2nd PI Report"). I note the following regarding this report:

20 Affidavit of 2nd appellant dated 13 May 2016 at NABML-1: RA in RAS 32 at pp 177–178.

21 Notes of Evidence dated 1 June 2016: RA in RAS 32 at p 21.

22 Letter dated 7 June 2016 at paras 3, 5 and 7–8: RA in RAS 32 at pp 197–198.

23 Affidavit of Nicholas Yong Yoong Han dated 15 July 2016 at para 6: RA in RAS 32 at p 204.

(a) First, the report contained "video recording printouts" of P in his home.[24]

(b) Second, the report stated that the investigators had engaged P in a conversation on the pretext of carrying out a "survey" and recorded this conversation. They had gleaned from the conversation that P could recall details regarding his primary school and polytechnic. P had also suggested enhancements to the neighbourhood.[25]

(c) Third, according to the report, P had commuted on his own by public transport and ascended and descended stairs without difficulty.[26]

16 The respondent's solicitors subsequently applied for the 2nd PI Report to be placed before the court.[27]

17 Dr Chan prepared a clarification medical report on P dated 8 July 2016. In this report, Dr Chan stated the following:[28]

(a) She had reassessed P on 5 July 2016 in an outpatient clinic and interviewed his parents and sister individually.

(b) Despite "good recovery of physical abilities", P continued to suffer from "significant impairments of his behaviour, personality and cognitive functioning". These impairments were only apparent upon regular interaction with him – they "would not be apparent on distant

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24 2nd PI Report at Appendix B: RA in RAS 32 at pp 231–232.

25 2nd PI Report at para 16: RA in RAS 32 at p 214.

26 2nd PI Report at para 15: RA in RAS 32 at p 214.

27 Affidavit of Nicholas Yong Yoong Han dated 15 July 2016 at para 3: RA in RAS 32 at p 203.

28 Medical report dated 8 July 2016: RA in RAS 32 at pp 200–201.

observation or snapshots taken at a cross-section in time". They included "poor recall of information, poor recall and understanding of his own medical condition, poor mental arithmetic ability, poor knowledge and understanding of financial management, and lack of insight into his current impairments". P was also vulnerable to abuse and exploitation: he had authorised transactions of a three-digit sum on two occasions, and could not recall the details of these transactions.

(c) Dr Chan reiterated her opinion that P lacked capacity in relation to his personal welfare and his property and affairs.

18 On 18 July 2016, the DJ heard further arguments (see [14] above) on his earlier directions. He then varied his directions, ordering as follows:[29]

(a) P was to be examined by an independent doctor appointed by the court (rather than by a doctor appointed by the respondent).

(b) Counsel for the appellants and the respondent were to propose doctors whom the court might appoint as an independent expert.

(c) The court-appointed doctor was to be given a copy of both the 1st and the 2nd PI Reports ("the PI Reports") (the appellants had submitted that the 2nd PI Report should not be given to the doctor).

(d) The appellants would be permitted to file an affidavit in reply to the 2nd PI Report, and furnish the same to the court-appointed doctor.

19 However, the DJ did not accede to the request of the appellants' counsel ("Ms Sandhu") to make a decision on the Joinder Application. He explained this in his written grounds of decision as follows:[30]

[29] GD dated 28 December 2016 at paras 56 and 66: RA in RAS 32 at pp 85 and 89.

(a) His initial inclination had been to make a decision on the Joinder Application. However, Ms Sandhu had pointed out that joinder might lead to confidential information regarding P's assets and family matters being disclosed to the respondent. Further, P might suffer prejudice in the Civil Suit if the respondent was able to access confidential or privileged information in the eLitigation case file for the Deputy Application, upon being joined as a defendant thereto.

(b) The DJ thus considered whether there was another option, apart from joinder, that would enable the respondent to challenge P's capacity, without affording the respondent access to confidential material. In the light of the "judge-led approach" prescribed under r 22 of the Family Justice Rules 2014 (S 813/2014) ("the FJR"), the DJ initially decided to allow the respondent's insurer's doctor to examine P. He reasoned that if the doctor agreed with Dr Chan that P lacked capacity, the basis of the Joinder Application would fall away. On the other hand, if the doctor considered that P had capacity, there would be a triable issue and the court would have to consider how to address P's concerns as to confidentiality and privileged information.

(c) Having heard the further arguments, the DJ considered that he should still adopt the same broad approach, *ie*, to have P examined by another doctor before he decided on the Joinder Application (albeit this doctor would be appointed by the court, not by the respondent's insurer).

20 The appellants appealed against the DJ's decision in Registrar's Appeal No 32 of 2016 ("RAS 32"). On 24 April 2017, Chua Lee Ming J heard the appeal

[30] GD dated 28 December 2016 at paras 40–42, 46–48 and 55–56: RA in RAS 32 at pp 81–85.

and affirmed the DJ's orders that P was to be examined by a court-appointed independent doctor, and that both of the PI Reports were to be made available to the doctor. But Chua J allowed the appeal to the extent that he ruled that the DJ should not have invited the respondent to submit names of doctors to the court, since he had not been joined as a party to the Deputy Application. Chua J also indicated that the DJ should decide the Joinder Application, so that the issue of whether the respondent was entitled to attend the hearings of the Deputy Application could be dealt with.[31]

21 On 1 August 2017, after hearing the parties, the DJ granted leave to the respondent to be joined as a party to and heard in the Deputy Application, albeit that he limited the respondent's right to be heard to the issue of whether P lacked capacity ("the Joinder Decision"). On the same day, the DJ appointed Dr Calvin Fones ("Dr Fones") to assess P's capacity.[32]

22 On 14 August 2017, the appellants filed this appeal against the Joinder Decision.[33]

23 Dr Fones subsequently prepared a report on P dated 17 January 2018. In this report, Dr Fones stated, among other things, the following:[34]

(a) P was suffering from "Major Neurocognitive Disorder due to Traumatic Brain Injury". This condition was now permanent and P's cognitive disability was likely to remain the same over time.

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31 Notes of Argument in RAS 32 dated 24 April 2017 at p 4.

32 Certified Transcript dated 1 August 2017 in OS at pp 25 and 37.

33 Notice of Appeal: RA in RAS 13 at pp 1–3.

34 Medical report dated 17 January 2018 at paras 35, 37, 39, 41 and 45: RA in RAS 13 at pp 50–52.

(b) P lacked capacity as defined by the MCA with regard to his personal welfare and his property and affairs. In particular, P did not have the capacity to manage sums of money exceeding $100.

24 On 5 March 2018, the DJ granted the Deputy Application, appointing the appellants as P's deputies (albeit ordering, in line with Dr Fones' report, that the appellants had no authority to make decisions on P's behalf in respect of financial transactions involving less than $100).[35] The minutes of the hearing on 5 March 2018 show that the respondent's counsel contested some orders sought by the appellants, in relation to their authority to decide both where and with whom P should live and the arrangements for P's care. I return to this below.

The decision below

25 The DJ issued written grounds of decision for the Joinder Decision: see *TWD v TWE* [2018] SGFC 6 ("the GD").

26 He began his analysis by stating that he arrived at the view, based on Dr Chan's 1st Report, the PI Reports and the Form, that there were "serious questions about the extent of P's lack of mental capacity" (see the GD at [10]). He detailed these three pieces of evidence and explained why, in his view, they raised questions as to the extent of P's capacity (see the GD at [14]–[29]). He then recounted his previous decision to appoint an independent medical expert and his reasons for doing so, as well as the outcome of RAS 32 (see the GD at [30]–[35] and [40]–[43]).

27 The DJ proceeded to set out the parties' submissions on the Joinder Application, his views on those submissions and other points he considered in arriving at the Joinder Decision. In summary, he reasoned as follows:

[35] Order of Court dated 8 March 2018 in OS at Orders 3a and 6h.

(a) It was clear from r 178(2) of the FJR that the court had a broad discretion in deciding whether to order a person to be joined as a party to an application under the MCA. The issue was "not whether it could be done but whether it ought to be done" (see the GD at [69]–[70]).

(b) The principles regarding joinder laid down in other cases, which had dealt with joinder pursuant to O 15 r 6(2)(*b*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules of Court"), "would apply equally" to joinder under r 178(2) (see the GD at [72]).

(c) One aim of joinder provisions was "to prevent the same or substantially the same questions or issues being tried twice with possibly different results": see *Syed Ahmad Jamal Alsagoff (administrator of the estates of Syed Mohamad bin Hashim bin Mohamad Alhabshi and others) and others v Harun bin Syed Hussain Aljunied and others* [2017] 5 SLR 299 ("*Alsagoff*") at [23] and *Abdul Gaffar bin Fathil v Chua Kwang Yong* [1994] 2 SLR(R) 99 ("*Abdul Gaffar*") at [53(b)]. If the Deputy Application proceeded without the respondent being joined as a party, with the respondent left to contest P's capacity only in the Civil Suit, this could lead to the same issue, P's capacity, being tried twice with possibly different results (see the GD at [71]–[75]).

(d) Furthermore, a finding in the Deputy Application that P lacked capacity could potentially affect the respondent legally or financially, because the appellants could rely on this finding in the Civil Suit (see the GD at [48] and [77]). The DJ noted that the potential impact on a non-party's interests was considered a salient factor in *Abdul Gaffar*. He also referred to the English case of *Gurtner v Circuit* [1968] 2 QB 587 ("*Gurtner*"), where the Motor Insurers' Bureau ("the MIB") was added as a defendant to a personal injury action brought by a pedestrian against

an insured motorist on the basis that the determination of the action would directly affect the MIB's rights, since the MIB was bound to pay the judgment sum to the plaintiff. The DJ considered that *Gurtner* "bore a certain similarity to the position in this case" (see the GD at [46]).

(e) The DJ also emphasised that it was the responsibility of the court hearing the Deputy Application to determine whether P lacked capacity and it would be wrong for the court to disregard evidence that might show that P did not lack capacity (see the GD at [50]).

The parties' arguments

28 The appellants make the following submissions:

(a) First, the DJ applied the wrong principles in making the Joinder Decision. The principles articulated in *Alsagoff* and *Abdul Gaffar*, which the DJ relied on (see [27(b)]–[27(d)] above), do not apply to joinder under r 178(2) of the FJR.[36] The applicable principles are those set out in *Re SK* [2012] EWCOP 1990 ("*Re SK*") and applying those principles, the respondent should not have been joined to the Deputy Application.[37]

(b) Second, *Gurtner* is distinguishable, and the principles in *Alsagoff* and *Abdul Gaffar* do not support the Joinder Decision.[38]

(c) Third, the respondent would not suffer prejudice if he was not joined to the Deputy Application and, in any event, the key inquiry is whether joinder was in P's best interests. Here, the Joinder Decision was

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36 Appellants' Case at paras 39–41.

37 Appellants' Case at para 57.

38 Appellants' Case at paras 37 and 42–45.

not in P's best interests. It had caused P to suffer real prejudice because, among other things, it had delayed commencement of the Civil Suit.[39]

29 The respondent makes the following submissions:

(a) First, the DJ was entitled to "invite any evidence or join any party he deemed necessary" in arriving at a decision on P's capacity, because r 22(1) of the FJR requires the court to take a judge-led approach. Further, the court should be apprised of all relevant evidence in a Deputy Application, because it should not lightly find that a person lacks capacity, and the DJ had a broad discretion under r 178(2) of the FJR to order the respondent to be joined as a party to the Deputy Application.[40]

(b) Second, Dr Chan's 1st Report, the PI Reports and the Form raised serious questions regarding P's capacity.[41] Thus, the Joinder Application was meritorious because:

(i) the respondent had a "moral duty" to intervene in the Deputy Application in the interest of P;[42]

(ii) he would be financially affected by a finding of mental incapacity in the Deputy Application, and this financial interest should not be a bar to joinder;[43] and

(iii) joinder would not give him two bites of the cherry on the issue of P's mental incapacity, since he would not be challenging the findings of the court that decided the Deputy Application.[44]

39 Appellants' Case at paras 58–63.

40 Respondent's Case at paras 29, 32 and 45–46.

41 Respondent's Case at paras 34–41.

42 Respondent's Case at paras 50–54 and 82.

43 Respondent's Case at paras 55–62.

(c) Third, any complexity and delay in the Deputy Application was due to the appellants' litigiousness.[45]

The YAC's submissions and the parties' further submissions

30 Given the novelty and importance of the issue at hand, I appointed a young *amicus curiae*, Mr Chia Huai Yuan ("Mr Chia"), to address me on the following two questions:[46]

(a) Question 1: In an application for deputyship of a person, what considerations should guide the court in determining whether it is desirable to permit the joinder of a non-party who is or is alleged to be liable in tort for causing the person's loss of capacity?

(b) Question 2: Assuming that the non-party is not to be joined, should he nevertheless be permitted to adduce evidence which may be relevant to the court's decision in the deputy application? If so, what is the capacity in which he is allowed to admit such evidence?

31 Mr Chia made the following submissions in response to these questions:

(a) Question 1: The court has a broad discretion under r 178(2) of the FJR to add a person as a party to a deputy application.[47] However, the court should exercise this power with regard to the following:[48]

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44 Respondent's Case at paras 68.

45 Respondent's Case at paras 76–79.

46 Letter from the Family Justice Courts dated 23 July 2018.

47 YAC's brief at para 7.

48 YAC's brief at paras 9–16.

(i) First, the court should bear in mind that exercise of the power of joinder may encroach upon the privacy of the person alleged to lack capacity and his family, and enable the applicant for joinder to obtain a collateral advantage (such as access to documents that may be used in later litigation). In this light, the power of joinder should not be an "open door" to persons who may wish to intervene in deputy applications.

(ii) Second, the court should be circumspect in evaluating the reasons given by the applicant for joinder, particularly where the latter has no real interest in the well-being of the person alleged to lack capacity.

(iii) Third, the court should consider whether the applicant for joinder will offer real assistance to the court. Where the applicant alleges that he has evidence which may assist the court, the court should first evaluate the cogency of the evidence.

(iv) Fourth, the court should bear in mind the need to ensure that deputy applications are dealt with expeditiously and without the incurrence of unnecessary costs and resources.

(v) Fifth, the court should consider whether there may be less intrusive means of achieving the aim of joinder, and possible limitations on the scope of the joined party's participation and access to documents or information in the proceedings.

(b) Question 2: As an alternative to joinder, the court may call a non-party as a witness to give and/or adduce evidence pursuant to rr 22(3)(*b*) and 22(3)(g) of the FJR. This could ensure that all relevant material is

before the court, while safeguarding the privacy of the person alleged to lack capacity and that of his family.[49]

32 The parties filed further submissions addressing Mr Chia's submissions, in which they advance the following points:

(a) The appellants agree that the court should account for the five considerations highlighted by Mr Chia (see [31(a)(i)]–[31(a)(v)] above) in deciding whether to join a non-party to a deputy application. They submit that in view of those considerations, the respondent should not have been joined as a party to the Deputy Application.[50]

(b) The respondent submits that the court should consider three main factors in deciding whether to join a non-party to a deputy application: the interest of the applicant for joinder, the extent to which the latter may contribute to the proceedings, and the potential prejudice to him or her if the application for joinder is refused. The respondent argues that applying these factors, the DJ did not err in ordering the joinder.[51]

The issue

33 The sole issue in this appeal, broadly stated, is whether the DJ erred in making the Joinder Decision. The DJ relied on r 178(2) of the FJR in making the Joinder Decision (see [27(a)] above) and on appeal, the respondent has confirmed that this was the legal basis of the Joinder Application.[52] Therefore,

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49 YAC's brief at paras 18–24.

50 Appellants' further submissions dated 28 September 2018.

51 Respondent's further submissions dated 28 September 2018.

52 Respondent's Case at paras 42–48.

the narrow issue for me to determine is whether the Joinder Decision amounted to an erroneous exercise of the DJ's discretion under r 178(2) of the FJR.

My decision

The standard of review

34 I begin with the applicable standard of review. In *TDA v TCZ and others* [2016] 3 SLR 329 ("*TDA*"), which was also an appeal against the decision of a court hearing proceedings under the MCA (a "MCA court") that involved the exercise of the court's discretion, Judith Prakash J (as she then was) stated at [25] that "the standard for overturning a judge's exercise of discretion is a high one". Prakash J also observed at [22] that in the light of the "expanded role" of a MCA court in directing proceedings under the MCA, a MCA court "should be accorded a greater degree of discretion than a judge hearing an ordinary civil matter …". I agree with and endorse these views.

35 In what circumstances should the appellate court interfere with the MCA court's exercise of its discretion? In *TDA*, Prakash J indicated at [23] that "the general position on appellate interference with a first instance court's exercise of discretion" would apply, citing the test stated in *Tay Beng Chuan v Official Receiver and Liquidator of Kie Hock Shipping (1971) Pte Ltd* [1987] SLR(R) 123 at [16], which is whether the decision "was wrong so as to defeat the rights of the parties altogether and would be an injustice to one or other of the parties".

36 I agree that the general principles governing appellate interference with a first instance court's exercise of discretion apply in an appeal against the MCA court's exercise of its discretion. In *Warner-Lambert Company LLC v Novartis (Singapore) Pte Ltd* [2017] 2 SLR 707, which was decided after *TDA*, the Court

of Appeal reaffirmed at [38] the test stated in *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 1 SLR(R) 1053 at [34], which is as follows:

> It is trite law that an appeal against the exercise of a judge's discretion will not be entertained unless it be shown that he exercised his discretion under *a mistake of law, in disregard of principle, under a misapprehension as to the facts, or that he took account of irrelevant matters, or the decision reached was "outside the generous ambit within which a reasonable disagreement is possible*". [emphasis added]

37 Thus, the appellate court may interfere with the MCA court's exercise of its discretion if it is shown that the discretion was exercised under a mistake of law, in disregard of principle, under a misapprehension as to the facts, or if the court took account of irrelevant matters, or if the decision was "outside the generous ambit within which a reasonable disagreement is possible".

38 With these principles in mind, I turn to analyse r 178(2) of the FJR.

Rule 178(2) and the joinder of (alleged) tortfeasors

39 Rule 178 of the FJR states:

> **Parties to proceedings**
>
> **178.**—(1) Unless the Court otherwise orders, the parties to any proceedings under the [MCA] are —
>
> (*a*) the plaintiff or applicant; and
>
> (*b*) any person who is named as a defendant in the proceedings.
>
> (2) The Court may order that a person be joined as a party, *if the Court considers that it is desirable to do so.*
>
> …
>
> [emphasis added]

40 This appears to be the first case in which the Singapore courts have had the occasion to consider r 178(2).

41 According to the Table of Derivations accompanying the FJR, r 178(2) of the FJR derives from the now-repealed O 99 r 4(2) of the Rules of Court, which was identical to r 178(2). Order 99 of the Rules of Court was introduced after the enactment of the first version of the MCA in 2008. Mr Chia submits, and I accept, that O 99 r 4(2) in turn derives from r 73(2) of the England and Wales Court of Protection Rules 2007 (SI 2007 No 1744) (UK) ("the COPR"). Rule 73(2), which is now reflected in r 9.13(2) of the England and Wales Court of Protection Rules 2017 (SI 2017 No 1035) (UK), stated:

> (2) The court may order a person to be joined as a party if it considers that it is *desirable to do so for the purpose of dealing with the application*. [emphasis added]

42 I now discuss the English cases which have examined r 73(2).

The foreign authorities

43 The leading case is the decision of the Court of Protection in *Re SK*. The case concerned a mentally incapacitated adult ("SK") who suffered serious injuries in an accident involving a bus. SK commenced a personal injury action against the bus company ("GA") through his brother ("CK"), who acted as his litigation friend in those proceedings, and obtained interim judgment for 60% of the damages to be assessed. Separate proceedings were initiated in the Court of Protection where SK was represented by the Official Solicitor, and was found to lack capacity to make almost all decisions for himself. An issue then arose as to the type of home in which SK should be placed. CK contended that the home should be one with an intensive rehabilitation regime, and obtained an expert opinion in support of his position. SK's wife took the same view. By contrast, the other parties in the Court of Protection proceedings, the joint expert therein, and GA's expert considered that SK should be placed in a home with modest

rehabilitation. Both CK and GA then applied to be joined as parties to the Court of Protection proceedings.

44 Bodey J allowed CK's application and dismissed GA's application. In reaching his decision, he analysed the two conditions laid down by the COPR for a person to be joined as a party to Court of Protection proceedings. First, under r 75(1) of the COPR, the applicant had to have "sufficient interest" in the proceedings. Bodey J opined at [41] that this required the applicant to have an interest "distinct from some commercial interest" in the proceedings, albeit that one would have a "sufficient interest" if one's liability would "effectively be determined once and for all in the Court of Protection proceedings". CK fulfilled the "sufficient interest" condition in his capacity as SK's brother. By contrast, GA did not satisfy this condition. Notably, there does not seem to be a provision equivalent to r 75(1) of the COPR in the FJR.

45 More pertinently for present purposes, Bodey J then turned to consider the second requirement for joinder laid down by the COPR, namely, the test set out in r 73(2) of the COPR. He made the following remarks at [42]–[43]:

> 42 … the court may join a new party if it considers that it is "…desirable to do so for the purpose of dealing with the application." The clear import of that wording is that the joinder of such an applicant would be *to enable the court better to deal with the substantive application* (for example, by its being able to take into account and test the views of a close relative who knew the incapacitated person and was familiar with his wishes, feelings and preferences before he became incapacitated). …
>
> 43 The word "desirable" *necessarily imports a judicial discretion as regards balancing the pros and cons of the particular joinder sought in the particular circumstances of the case*. …
>
> [emphasis added]

46 In sum, Bodey J held that in determining whether joinder was desirable under r 73(2), the court was to balance the advantages and disadvantages of the joinder sought on the facts of the case before it. And since r 73(2) required the court to consider whether it was desirable to join the non-party "for the purpose of dealing with the [substantive] application", the advantages and disadvantages which the court had to consider were those which joinder would bring to the court's disposition of the substantive application at hand. I note here that under r 178(2) of the FJR, by contrast to r 73(2) of the COPR, there is no requirement that joinder must be desirable "for the purpose of dealing with the [substantive] application". The test is simply that of whether joinder is desirable.

47 Applying these principles, Bodey J decided that it was not desirable to join GA as a party for the purpose of dealing with the application before him. First, in terms of the advantages of joinder, joining GA would not substantially assist the court in deciding whether SK should undergo intensive or moderate rehabilitation, because "the two sides of the issue (intensive rehabilitation or modest rehabilitation) are well-evidenced anyway by the competing experts" and GA would "add nothing to the debate about SK's best interests", except in relation to an issue of funding (whether there was a realistic prospect of funding for the options the court was considering): see *Re SK* at [42]. Second, in terms of the disadvantages of joinder, joining GA would lead to greater cost and delay in the Court of Protection proceedings. Such cost and delay was unwarranted, especially because if GA was not a party to the Court of Protection proceedings, it would not be bound by any finding by the Court of Protection as to SK's best interests in the personal injury action brought by SK: see *Re SK* at [37]–[39].

48 The principles laid down in *Re SK* were endorsed by Sir James Munby, the President of the Court of Protection, in *Re G (Adult)* [2014] EWCOP 1361 ("*Re G*") at [50]. There, an issue had arisen in Court of Protection proceedings

as to whether the incapacitated person ("G") had the capacity to communicate with the media. The publishers of the Daily Mail applied to be joined as a party to the proceedings. Munby P dismissed the application. He reasoned that the applicant did not have a sufficient interest in the Court of Protection proceedings and in any event, joinder would not be "desirable". In this regard, Munby P made the following pertinent observations at [51]:

> … it would be highly undesirable for [the applicant] to be joined, because as a party *it would be entitled to access to all the documents in the proceedings unless some good reason could be shown why it should not, and the grounds for restricting a party's access to the documents are very narrowly circumscribed* … [emphasis added]

49 In other words, joinder would not be desirable because it would likely enable the publishers to access all the documents filed in the proceedings in their capacity as a party thereto. It seems that Munby J was concerned with protecting G's privacy and the confidentiality of information disclosed in the proceedings.

50 Another instructive case is the recent decision of *Re Z* [2018] EWHC 1488 (Ch) ("*Re Z*"). In that case, the wife of a person ("Z") commenced Court of Protection proceedings for the court to determine, among other things, Z's capacity to manage his property and affairs. Subsequently, the son of one of Z's brothers applied to be joined as a party to the Court of Protection proceedings, claiming that as a member of Z's family, he had spent much time with Z and that Z had, among other things, promised to pay a sum to him. The applicant also resisted any limitation on his participation in the proceedings.

51 Having endorsed the principles set out in *Re SK* (at [17]–[18]), Norris J refused the joinder application, but directed that the witness statements filed by

the applicant in support of the application would stand as evidence in the Court of Protection proceedings. He gave the following reasons for this decision:

(a) First, it was of "utmost importance that the [Court of Protection proceedings] be resolved speedily" and anything that had the potential to delay or prolong the resolution of those proceedings had to be avoided. In *Re Z*, the applicant resisted any limits on his participation in the Court of Protection proceedings. Adding him as a party would therefore amount to "incurring an undesirable risk": see *Re Z* at [21].

(b) Second, although the applicant had a "sufficient interest" in the Court of Protection proceedings in his capacity as a family member, that did not give him a right to be joined as a party. While it was "important that all of the [applicant's] relevant and helpful evidence [was] before the Court" and tested, it was not necessary for the applicant to become a party for that purpose: see *Re Z* at [22].

(c) Third, adding the applicant as a party might give his commercial interest prominence in the Court of Protection proceedings. This would not help the resolution of issues in those proceedings: see *Re Z* at [23].

(d) Fourth, there was a "complete unity of view" between one of Z's brothers, who was a party to the Court of Protection proceedings, and the applicant. Hence, the court "[did] not see what of value [could] be added to the debate on the issues in the [Court of Protection proceedings] by [the] separately represented [applicant]": see *Re Z* at [24]–[25].

52 Apart from the aforementioned English authorities, I also drew guidance from *Re DNS* [2016] NSWCATGD 6 ("*Re DNS*"), a decision of the New South Wales Civil and Administrative Tribunal which Mr Chia drew to my attention.

In that case, a guardianship order had been made over a woman who suffered from dementia ("DNS"). Subsequently, one of DNS's sons applied to be joined as a party to the guardianship proceedings to advance his position that he should be granted access to his mother under the guardianship order. In support of his application, the applicant provided the Tribunal with two videos.

53 The Tribunal first ruled that the videos were not relevant to the issues in the guardianship proceedings. The videos only showed an unidentified woman making two telephone calls in the presence of a male person who was filming her, and it was unclear what the caller was saying, what the recipient was saying, and who the recipients of the calls were. Thus, the Tribunal decided not to admit the videos as evidence: see *Re DNS* at [19].

54 The Tribunal then turned to consider the joinder application. It began by noting that the relevant legislative provision empowered the Tribunal to join a person as a party "if, in the opinion of the Tribunal, the person should be a party to the proceedings …". The Tribunal noted that the general practice of the Tribunal was "to place a practical limit on the number of parties to any proceedings", and explained at [27] that this was justified on three grounds:

> (a) First, guardianship proceedings often involved the production of private or confidential material, such as material pertaining to the mental health, cognitive ability and treatment of the subject person. Protecting the privacy of the subject person was a "significant factor", because the applicable legislation required the Tribunal to give paramount weight to the welfare and interests of the subject person. In many cases, it would not be consistent with this for private and confidential information about the subject person to be distributed to the applicant for joinder.

(b) Second, the applicable legislation also required the Tribunal to facilitate the just, quick and cheap resolution of proceedings. In many cases, this principle would lead the Tribunal to refuse a joinder request.

(c) Third, there might not be any real advantages in joining a non-party to proceedings given that in certain circumstances, the Tribunal would grant non-parties certain rights enjoyed by parties to guardianship proceedings, such as the right to be present and heard.

55 Having reviewed the relevant authorities, I now turn to the interpretation of r 178(2) of the FJR, and the more specific issue of whether the court hearing a deputy application concerning a person should permit the (alleged) tortfeasor claimed to be liable to the person to be joined as a party to the application.

The applicable principles

56 In my view, under r 178(2) of the FJR, the court has a broad discretion to order that a person be joined as a party to proceedings under the MCA. This coheres with the judge-led approach to family disputes mandated by r 22 of the FJR, and the inquisitorial nature of proceedings under the MCA: see *Re BKR* [2015] 4 SLR 81 at [214]. In exercising its discretion, the court should consider the advantages and disadvantages of joinder on the facts of the case at hand to determine whether joinder is "desirable". Since r 178(2), unlike r 73(2) of the COPR, does not require joinder to be desirable "for the purpose of dealing with the [substantive] application" (see [46] above), it is not *strictly* necessary that joinder would aid the court in dealing with that application. The advantages of joinder must simply outweigh its disadvantages for joinder to be ordered.

57 I now consider the factual matrix of this case in the light of these general principles. In my judgment, where a deputy application is made in respect of a

person ("X"), and the person who is or is alleged to be liable in tort to X applies to be joined to the application to adduce evidence on X's capacity, it would generally *not* be desirable for the (alleged) tortfeasor to be joined as a party to the deputy application. I have arrived at this view for the following reasons.

58 I begin with the disadvantages of joinder. First, joinder of the (alleged) tortfeasor would inevitably delay the disposition of the deputy application and increase the related costs. I note that the courts in *Re SK* and *Re Z* emphasised this factor in dismissing the joinder applications in those cases (see [47] and [51(a)] above). As a party to the deputy application, the (alleged) tortfeasor would be entitled, at the very least, to introduce evidence and make submissions on X's capacity. Satellite issues flowing from that issue such as those arising in this case, *eg*, whether X should be examined by a doctor appointed by the (alleged) tortfeasor and/or a court-appointed expert, might also arise. All this would delay the resolution of deputy applications, which would also become more expensive. The delay and expense would only increase if the involvement of the (alleged) tortfeasor was not restricted to the issue of whether X lacked capacity, or if the (alleged) tortfeasor contested such a restriction. In this regard, I note that although the respondent's right to be heard in the Deputy Application was ostensibly limited to the issue of whether P lacked capacity (see [21] above), the DJ also heard him on the terms of the deputyship (see [24] above).

59 In my judgment, such delay and expense would generally not be in X's best interests and would therefore be undesirable. For example, the appellants submitted that the delay in the resolution of the Deputy Application had delayed the commencement of the Civil Suit (the appellants could only commence it on P's behalf once they had been appointed as his deputies) (see [28(c)] above).[53]

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[53] Appellants' Case at para 63(a).

60 Second, a key concern with allowing the (alleged) tortfeasor to be joined as party to the deputy application is that joinder would probably afford the latter access to private and confidential information about X (and possibly X's family, if X's family members were applying to be appointed as X's deputies). This point was noted in *Re G* and *Re DNS* (see [49] and [54(a)] above). The concern arises because, as Munby P noted in *Re G*, a party to proceedings is generally entitled to all of the documents filed in those proceedings. I note that this point led the DJ to initially defer his decision on the Joinder Application. The DJ was concerned that if the respondent became a party to the Deputy Application, he would be able to access the eLitigation case file for that application and thereby obtain confidential or privileged information (see [19(a)] above). In my view, the DJ was correct to recognise that joinder carried this drawback. It is difficult to see why the (alleged) tortfeasor should have access to private and potentially sensitive information about X in connection with a deputy application. It seems that he should only be entitled to access such information, if at all, through the discovery process in a civil suit commenced by X against him.

61 Third, allowing joinder of the (alleged) tortfeasor would likely make the proceedings more adversarial, because the latter would seek to protect his interests or at least be perceived to be doing so. The present case illustrates this. The parties disputed many issues, including the relatively minor one of whether the respondent should have been allowed to suggest names of doctors whom might be appointed as the court-appointed expert. In my judgment, it would not conduce to the just, expeditious and economical determination of deputy applications (the goal envisioned under r 22 of the FJR) for such proceedings to take on an adversarial tone. A similar view was taken in *Re Z,* where the court noted that giving prominence to the applicant's commercial interest would not aid the resolution of Court of Protection proceedings (see [51(c)] above).

62 I now turn to the advantages that joinder of the (alleged) tortfeasor may offer. In my view, the key advantage of joinder is that it may enable the (alleged) tortfeasor to place relevant evidence regarding X's capacity before the court. Such evidence might not be introduced by the applicants in a deputy application, and might assist the court to determine the extent of X's capacity.

63 Nonetheless, in my judgment, this factor does not establish a compelling case for joinder. Critically, joinder is not the only means by which the (alleged) tortfeasor may place relevant evidence regarding X's capacity before the court. Mr Chia submitted that, as an alternative to joinder, the court could call a non-party as a witness to give and/or adduce evidence under rr 22(3)(*b*) and 22(3)(*g*) of the FJR (see [31(b)] above). Rule 22(3) of the FJR states:

> (3) The directions that the Court may give … *include* directions on one or more of the following matters:
>
> …
>
> (*b*) subject to any written law relating to the admissibility of evidence, that *a party or witness adduce any evidence relevant to the proceedings*;
>
> …
>
> (g) *the calling of a witness to give evidence with a view to assisting in the resolution or disposal of a cause or matter, whether or not any party to the proceedings will be calling that witness to give evidence for that party*;
>
> …
>
> [emphasis added]

64 I accept Mr Chia's submission that rr 22(3)(*b*) and 22(3)(*g*) of the FJR provide a mechanism by which evidence on X's capacity, which is not adduced by the applicants in a deputy application, may be introduced in that application. For example, since the DJ considered that the PI Reports raised questions regarding P's capacity, he could have called the relevant AJAX representatives as witnesses in the Deputy Application under r 22(3)(*g*). He could then have

directed the witnesses to adduce the PI Reports under r 22(3)(*b*). The PI Reports could thus have been introduced into the evidence.

65 In sum, the existence of a mechanism besides joinder, by which evidence on X's capacity may be introduced, undercuts the case for joinder. Similar views were expressed in *Re Z* and *Re DNS* (see [51(b)] and [54(c)] above).

66 During the hearing, however, counsel for the respondent ("Mr Wee") raised doubts about the efficacy of such a mechanism. Mr Wee pointed out that the court would only be able to make directions under rr 22(3)(*b*) and 22(3)(*g*) of the FJR if it was aware of the relevant evidence. I agree. Yet it is not necessary for the (alleged) tortfeasor to bring a joinder application to bring the evidence to the court's attention. I will elaborate on the process that should apply below.

67 I now consider whether joinder would bring any other advantages apart from allowing relevant evidence to be introduced into a deputy application.

68 The respondent submits that joinder would afford the court the opportunity to hear submissions on X's capacity by a party independent from the applicants bringing the deputy application, namely, the (alleged) tortfeasor. By contrast, a mere witness would not be entitled to make submissions. The respondent emphasised that submissions might be of considerable assistance to the court where the deputy application was uncontested, or where the evidence indicated that there was fraud or other forms of abuse.[54]

69 I accept that the opportunity of hearing submissions from the (alleged) tortfeasor may be an advantage of joinder. Yet in my judgment, leaving aside

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[54] Respondent's further submissions dated 28 September 2018 at para 22.

perhaps cases of fraud or other forms of abuse, it would generally not outweigh the disadvantages noted above. This is because the court's conclusion on the extent of X's capacity, and the consequential orders in the deputy application, would, by and large, turn on the medical evidence and, in particular, the doctors' opinions on the extent of X's capacity. This point is illustrated by the DJ's orders in this case, which tracked the views expressed by Dr Fones in his report (see [23]–[24] above). It is therefore unclear that the court would be greatly assisted in most cases by the submissions of the (alleged) tortfeasor. What is critical is that all relevant and material *evidence* regarding X's mental incapacity is put before the court. Once that is achieved, it is not obvious that submissions by the (alleged) tortfeasor would generally add significant value. My views in this regard are consistent with the position taken by the respondent. At the hearing, Mr Wee submitted that the respondent's participation "was no longer relevant" once the evidence his clients sought to introduce was admitted.

70 I now address the reasons given by the DJ for the Joinder Decision. The DJ did not expressly balance the advantages of joinder against its disadvantages. Instead, he applied the principles governing joinder under O 15 r 6(2)(*b*) of the Rules of Court – I will return to this point below. Nonetheless, the DJ essentially considered that joinder would yield two main advantages (see [27(c)]–[27(d)] above). First, it would prevent the issue of P's alleged lack of capacity being tried twice with possibly different results. Second, absent joinder, a finding that P lacked capacity could potentially affect the respondent legally or financially and joinder was desirable in those circumstances.

71 I start with the DJ's second point. In making this point, the DJ relied on the English case of *Gurtner* (see [27(d)] above). In *Gurtner*, the plaintiff was injured by a motorcycle which the defendant was riding. The plaintiff sued the defendant in tort for negligence claiming damages for his personal injuries.

However, by the time the writ was issued, the defendant had left England and his insurers could not be traced either. The plaintiff then obtained an order for substituted service of the writ on an insurance company which the MIB had asked to act on its behalf. The MIB applied to be added as a party to the action, on the basis that it would be liable to satisfy any damages awarded to the plaintiff in the action, pursuant to an agreement it had entered into with the Minister of Transport to satisfy unsatisfied judgments obtained by injured persons against motorists.

72 The Court of Appeal allowed the MIB's appeal against the decision of the court below, ordering that the MIB be joined as a party to the action. Lord Denning MR explained this at 595D–596E as follows:

> … when two parties are in dispute in an action at law, *and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill,* then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. …
>
> I would apply this proposition to the present case. If the [MIB] are not allowed to come in as defendants what will happen? The order for substituted service will go unchallenged. The service on the defendant Circuit will be good, even though he knows nothing of the proceedings. He will not enter an appearance. The plaintiff will sign judgment in default of appearance. The judgment will be for damages to be assessed. The master will assess the damages with no one to oppose. The judgment will be completed for the ascertained sum. The defendant will not pay it. Then the plaintiff will be able to come down on the [MIB] and call upon them to pay …
>
> It is thus apparent that the [MIB] are vitally concerned in the outcome of the action. *They are directly affected, not only in their legal rights, but also in their pocket. They ought to be allowed to come in as defendants. It would be most unjust if they were bound to stand idly by watching the plaintiff get judgment against the defendant without saying a word when they are the people who have to foot the bill. …*
>
> [emphasis added]

73 Diplock LJ made the following remarks at 602G–603E:

> *Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff upon the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. …*
>
> So long as [a judgment] is legally enforceable against [a] person … the court has jurisdiction to add that person as a party and ought normally to exercise its discretion by granting his application to be added. I think, therefore, that the [MIB] is entitled to be added as a party to the present action …
>
> [emphasis added]

74 In short, in *Gurtner*, joinder of the MIB was desirable because the MIB would have been *directly* affected by the result of the plaintiff's action, in that it would have been liable to pay the damages awarded to the plaintiff *even if it was not joined to the action*. In those circumstances, natural justice required that the MIB be joined to the action so that it would have an opportunity to be heard.

75 On one view, the factual matrix at hand is similar to that in *Gurtner*. The respondent argues that where a MCA court appoints a deputy to make decisions on a person's behalf, this would be premised on a finding that the person lacks capacity as to certain matters, and this finding, which concerns the status of the person, would be a judgment *in rem* that binds the world.[55] If this is correct, then as was the case in *Gurtner*, a non-party (here, the respondent) could be bound by findings made by a court in proceedings that it was not party to.

76 However, in my view, *Gurtner* is distinguishable from the factual matrix under consideration. Even if a MCA court's finding that a person lacks capacity binds the world, such that the (alleged) tortfeasor may not dispute X's *status* as a person who lacks capacity, it would still be open to the (alleged) tortfeasor to

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[55] Respondent's further submissions dated 28 September 2018 at para 11.

dispute, at least, the *extent* to which X lacks capacity. I have arrived at this view, which the respondent accepts,[56] for the following reasons.

77 A person's capacity is a dynamic attribute. It may improve or deteriorate over time. A deputy application and a related tort action may be commenced at different points in time and, indeed, the former will often precede the latter because the decision to sue will often have to be made by the deputies. It follows from this that findings made by a MCA court in a deputy application as to X's capacity may be overtaken by changes in X's condition. By the time the related tort action is brought, the earlier findings may not reflect X's true condition. In those circumstances, it is difficult to accept that the (alleged) tortfeasor would be precluded from adducing evidence of those changes in the related tort action.

78 If, as I have concluded, it is open to the (alleged) tortfeasor to dispute, at least, the *extent* to which X lacks capacity in the tort action, then the reasons of natural justice which called for joinder in *Gurtner* do not apply. The (alleged) tortfeasor's legal rights and financial interest would not be substantially affected by findings he had no opportunity to be heard on, because *it is the substantive aspects in which X lacks capacity, rather than X's bare status as a person who lacks capacity, that will determine the (alleged) tortfeasor's liability (if any) to X, and the (alleged) tortfeasor will be entitled to be heard on those issues*. Thus, in my view, the second point made by the DJ in favour of joinder falls away.

79 Further, it follows from the above analysis that the first benefit of joinder perceived by the DJ also falls away. The DJ seems to have reasoned that if the (alleged) tortfeasor *was* joined as a party to the deputy application, he would be bound by findings as to X's capacity made therein and thus, joinder could

[56] Respondent's further submissions dated 28 September 2018 at para 13.

prevent the issue of X's capacity being tried twice. However, for the reasons given above, in my view, joinder would not prevent the issue of (the extent of) X's capacity being considered afresh by the court hearing the tort action. It can then decide on the damages to be awarded based on its findings on the extent of X's capacity. However, even if it finds that X has regained full mental capacity, X's status will still remain until revised by the appropriate forum.

80 I conclude that the disadvantages of joining the (alleged) tortfeasor to a deputy application concerning X would generally outweigh the advantages of joinder. Therefore, joinder of the (alleged) tortfeasor would generally not be "desirable" and should generally not be permitted under r 178(2) of the FJR. It may be that in some exceptional cases, joinder of the (alleged) tortfeasor would be desirable. However, such cases would likely be few and far between.

81 I now return to the question of how the (alleged) tortfeasor might place evidence regarding X's capacity before the court hearing the deputy application (see [66] above). In my judgment, the following procedure should apply:

(a) The (alleged) tortfeasor should write to the court to inform the court of the evidence in his possession. The letter should set out details regarding the nature of the evidence, and explain its relevance to the deputy application. The letter should also generally enclose a copy of the evidence. A copy of the letter and its enclosures should be sent to the applicant who has brought the deputy application.

(b) The applicant bringing the deputy application should then have the opportunity to respond to the (alleged) tortfeasor's letter, by letter to the court. The applicant should state his position on the relevance of the evidence and whether he consents to the admission of the evidence. The

applicant's reply to the court should be copied to the (alleged) tortfeasor.

(c) The court should then consider whether the evidence is relevant to the issues to be determined in the deputy application.

(i) If the court is satisfied that the evidence is irrelevant, as was the case in *Re DNS* (see [53] above), the court should inform the applicant and the (alleged) tortfeasor of this. The (alleged) tortfeasor may then seek to raise the evidence in the separate tort action (if any) brought by X against him.

(ii) If the court is satisfied that the evidence may be relevant, then it may introduce the evidence into the deputy application of its own motion pursuant to rr 22(3)(*b*) and 22(3)(*g*) of the FJR as noted in [64] above. The court may then make consequential orders, *eg*, directing a court-appointed medical expert or the parties' medical experts to provide further medical reports which address the new evidence.

82 I now turn to consider the outcome of this appeal.

The outcome of the appeal

83 The DJ proceeded on the basis that the principles regarding joinder laid down in cases relating to O 15 r 6(2)(*b*) of the Rules of Court "would apply equally" to joinder under r 178(2) of the FJR (see [27(b)] above). He therefore analysed the issue of joinder through the prism of those principles. In my view, this was an error of law and/or principle warranting appellate intervention with the DJ's exercise of his discretion. I have set out the principles applicable to

joinder under r 178(2) above, and they are not the same as those which apply to joinder under O 15 r 6(2)(*b*) of the Rules of Court.

84 Moreover, in my view, the Joinder Decision was "outside the generous ambit within which a reasonable disagreement is possible". As I have explained, the disadvantages of joinder of the (alleged) tortfeasor to the deputy application would generally outweigh the advantages of joinder, and I am satisfied that this was the case here. Furthermore, there are no exceptional reasons arising from the facts of this case which support the Joinder Decision.

85 I conclude that the appeal should be allowed on these two grounds.

Conclusion

86 For the above reasons, I allow the appeal.

87 I record my appreciation to Mr Chia for his submissions which greatly assisted me in arriving at my decision in this matter.

88 I will hear the parties on costs.

Tan Puay Boon
Judicial Commissioner

Viviene Kaur Sandhu and Gabriel Choo (Clifford Law LLP) for the appellants;
Anthony Wee and Manoj Belani (United Legal Alliance LLC) for the respondent;
Chia Huai Yuan (Dentons Rodyk & Davidson LLP) as young *amicus curiae*.
