B1104/10

JUDGMENT
OF
SHERIFF PRINCIPAL
JAMES A TAYLOR
in the cause
JG
APPELLANT
against

Mental Health Tribunal for Scotland
RESPONDENTS

GLASGOW, 14 October 2010.

The Sheriff Principal, having resumed consideration of the appeal, Refuses the appeal; Adheres to the decisions of the Mental Health Tribunal dated 23 April 2010 and 13 May 2010; Finds the appellant liable to the respondents in the expenses of the appeal as these might be taxed; Allows an account thereof to be given in and remits same, when lodged, to the auditor of court to tax and to report.

NOTE:−

[1] This is an appeal under Section 320 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (hereinafter "the Act"). Sections 57(1) and 60(1) are in the following terms:−

> "Where subsections (2) to (5) below apply in relation to a patient, a mental health officer shall apply to the Tribunal under section 63 of this Act for a compulsory treatment order in respect of that patient.
> (2) This subsection applies where two medical practitioners carry out medical examinations of the patient in accordance with the requirements of section 58 of this Act.

(3) This subsection applies where each of the medical practitioners who carries out a medical examination mentioned in subsection (2) above is satisfied −

(a) that the patient has a mental disorder;

(b) that medical treatment which would be likely to −

(i) prevent the mental disorder worsening; or

(ii) alleviate any of the symptoms, or effects, of the disorder, is available for the patient;

(c) that if the patient were not provided with such medical treatment there would be a significant risk −

(i) to the health, safety or welfare of the patient; or

(ii) to the safety of any other person;

(d) that because of the mental disorder the patient's ability to make decisions about the provision of such medical treatment is significantly impaired; and

(e) that the making of a compulsory treatment order is necessary."

60(1) − Where a mental health officer is required by section 57(1) of this Act to make an application under section 63 of the Act in respect of a patient, the mental health officer shall, as soon as practicable after the duty to make the application arises (and, in any event, before making the application) give notice that the application is to be made −

(a) subject to subsection (2) below, to the patient in respect of whom the application is to be made;

(b) to the patient's named person; and

(c) to the Commission.

[2] I did not understand there to be any dispute that on 13 April 2010 the mental health officer was in possession of a medical report which expressed the view that the appellant had a mental disorder such that an application to the Mental Health Tribunal under Section 63 of the Act was warranted. Prior to being in a position to make an application under Section 63, the mental health officer required to have two medical reports supporting the need for an application for a compulsory treatment order. Before he came into possession of a second report the mental health officer gave notice to the appellant of his intention to apply for a compulsory treatment order. The issue was whether the mental health officer had complied with the terms of Section 60 in that notice was given to the appellant before the duty to make an application to the Mental Health Tribunal, imposed by Section 63, had crystallised. The duty to make a compulsory treatment order did not arise until he was in receipt of the second medical report. It was further not in dispute that the compulsory treatment order pack (2/1 of process) contained a certificate signed by the mental health officer in following terms:−

> "I confirm that I notified the following parties that this compulsory treatment order application was to be made as soon as practicable after the duty to make the application arose."

[3] Two submissions were made to the respondents that the application made by the mental health officer in respect of the appellant for a compulsory treatment order was incompetent. The first submission was made when an application was heard for an interim compulsory treatment order on 23 April and subsequently when the application for a full compulsory treatment order was made on 13 May 2010. The respondents rejected the arguments advanced on behalf of the appellant regarding the competency of the applications and made the orders. Against those decisions the appellant appealed.

[4] Mr McLaughlin, for the appellant, submitted that it was only when the mental health officer came under a duty to make an application for a compulsory treatment order that he could give notification of his intention to apply. This was reinforced by the terms of the Mental Health (Care and Treatment) (Scotland) Act 2003 Code of Practice Volume 2 at page 73. There was prejudice to the appellant by virtue of the notification having been given to him prematurely. As a consequence of the application being made he had been detained for six months. It was submitted that the issue was partly one of confidence in a patient being able to rely upon what a mental health officer said. If a mental health officer notifies a patient, the patient's named person or the Mental Health Commission that he is to make an application, the patient was entitled to assume that there was a basis for such an application to be made. The relationship between a mental health officer and the patient was important. Accordingly, the court should be reluctant to endorse a position where a mental health officer could undermine the confidence which a patient was entitled to have in the mental health officer/patient relationship. If subsequently the mental health officer did not obtain the requisite two medical reports to enable an application for a compulsory treatment order to be made, distress would have been occasioned to the patient and potentially the patient's named person. It would also have resulted in an unnecessary intimation to the Mental Welfare Commission. It was further submitted that the appellant was, at the time when notification was made to him that there was to be an application for a compulsory treatment order, a patient by virtue of having been detained on a short−term detention certificate. Thus, it was submitted, one of the principles of the Act had been breached. Section 1(2) of the Act required that a person discharging a function in terms of the Act must have regard for *inter alia* "the need to ensure that, unless it can be shown that it is justified in the circumstances, the patient is not treated in a way that is less favourable than the way in which a person who is not a patient might be treated in a comparable situation." (Section 1(3)(g)). It was

submitted that by assuming he would obtain a second report the mental health officer had failed to take account of the foregoing principle.

[5] Ms Mays, for the respondents, explained that on 13 April 2010 when the mental health officer gave notice he had only one medical report. Two subsequent reports were required because by the time the second report had come into the mental health officer's possession, more than five days had elapsed from the date of the first medical examination and thus Section 58(3) had not been complied with. Ms Mays explained that it was quite common for the mental health officer to give notice in advance of being in possession of a second medical report. The purpose in so doing was to allow the patient more time in which to seek legal advice and to decide what approach to take when the application was eventually served, should that happen. Such a practice, it was said, was to give recognition to the principle set out in Section 1(3)(d) of the Act to the effect that it was important to provide such information and support to the patient as was necessary to enable the patient to participate in the proceedings. A balance had to be struck between causing distress to the patient, which it was accepted could be the case in the event that there was no subsequent application, and giving early notice and accordingly more time to prepare. It was explained that there was a tight timescale once the application was made. Ms Mays also referred to the Mental Health (Care and Treatment) (Scotland) Act 2003 Code of Practice where it was explained that the purpose in giving notice was to enable the "patient and the named person to take legal advice and prepare fully for the hearing." It was thus submitted that there was no breach of the Act.

[6] If, however, I came to the view that there had been a breach of the statutory provisions it was submitted by Ms Mays that the effect of the failure should not be to render null and void the subsequent proceedings and the making of the interim and full compulsory treatment orders. I was referred to the case of *R v Soneji* [2005] 3 WLR 303 as authority for the proposition that a distinction between mandatory and directory statutory provisions was no longer a useful analysis. I was referred in particular to paragraphs 14, 15 and 23 in Lord Steyn's speech. I was also referred to the decision of Sheriff Principal R A Dunlop QC in the case of *Paterson v Kent, The Mental Health Tribunal & Fife Health Board* , unreported, 17 May 2006. In *Paterson* , Sheriff Principal Dunlop had applied the dicta in *Soneji* . At the conclusion of her submission on this point, Ms Mays asked the rhetorical question "What purpose would it have served to notify the various parties all over again once the mental health officer came into possession of two medical reports?".

[7] In reply, Mr McLaughlin sought to distinguish *Soneji* on the basis that (a) it was an English decision and (b) it related to confiscation orders made under criminal legislation.

He accepted that in *Soneji* it would have been wrong to import public policy concerns into what had started as a criminal act. However we were here dealing with the care and treatment of patients with mental disorders. The Act was built on certain principles set out in Section 1 and accordingly the letter of the law required to be adhered to. The ascertainment of the purpose of the legislature should be construed in a manner most respectful to the patient's right to liberty. He submitted that it was difficult for there to be any middle ground where some premature notification might be deemed acceptable but other premature notifications might not be so treated. This would introduce uncertainty. He accepted that there was a benefit in having advance notification but such benefit had to be counterbalanced by the risk of distress and alarm being unnecessarily caused to patients.

[8] In my opinion the terms of Section 60 are quite clear. As soon as practicable after a mental health officer comes under a duty to make an application for a compulsory treatment order in terms of Section 63, he requires to give notice that an application is to be made. In this particular case it seems to me that it is not so much the fact that the mental health officer gave notice prematurely to the appellant that is in issue, it is whether he failed in the requirement to give notice when the duty to apply for the compulsory treatment order arose. That arose when the mental health officer came into possession for the first time of two medical reports which met the requirements of Sections 57 and 58 of the Act. The fact that premature intimation was given seems to me to be a matter of no consequence. Had a second notification been made to the patient at the time required by the statute there could have been no question concerning the validity of the interim compulsory treatment order made on 23 April and the full compulsory treatment order made on 13 May 2010. There can be little doubt that the mental health officer failed to obtemper the terms of the statute and accordingly notification was not given to the patient in strict compliance with the statutory provisions.

[9] The question which then falls to be answered is whether the notification, given by the mental health officer on 13 April 2010, of the application which was eventually submitted on 19 April 2010, should be treated as sufficient to meet the statutory obligation on the mental health officer. In his speech in *Soneji* , Lord Steyn sets out the speech of Lord Hailsham of St Marylebone in *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 at pages 189 to 190 which is in the following terms:−

> "When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal

consequence of non−compliance on the rights of the subject viewed in light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like 'mandatory,' 'directory,' 'void,' 'voidable,' 'nullity,' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non−compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind."

[10] In paragraph 19 of his speech Lord Steyn referred to the developments in the courts of New Zealand, Australia and Canada. He cited with approval the judgment of Cooke, J (subsequently Lord Cooke of Thorndon) in the case of *New Zealand Institute of Agriculture, Sciences Inc v Ellesmere County* [1976] 1 NZLR 630 where at page 636 Lord Cooke said:−

> "Whether non−compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree and seriousness of the non−compliance."

Having reviewed the various authorities Lord Steyn concluded:−

> "I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in Attorney General's Reference (No 3 of 1999) the emphasis ought to be on the consequences of non−compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity."

In his speech in *Soneji* , Lord Carswell discussed the dichotomy between mandatory and directory provisions. He said at paragraph 65 of his speech that the traditional consequence of finding that a provision was merely directory was that substantial performance would constitute a sufficient compliance with a statutory requirement. He went on to say:−

> "This concept can be more readily applied where a statute prescribes an exact method or sequence of carrying out specified acts or a time within which they are to be performed. A minor and insubstantial deviation from the requirements will not make the resulting proceedings invalid. A convenient example is to be found in *Foyle, Carlingford & Irish Lights Commission v McGillion* [2002] NI 86, in which it was held that an appellant's failure to serve a copy of a case stated upon the opposite party within the prescribed time was directory and that accordingly the late service did not bar his appeal.

In paragraph 67 he went on to say:−

> "I would suggest that one should ask if there has been substantial observance of the time limit. What will constitute substantial performance will depend on the facts of each case, and it will always be necessary to consider whether any prejudice has been caused or injustice done by regarding the act done out of time as valid."

[11] It seems to me that a consideration of Lord Carswell's speech would lead one to the view that the provisions of Section 60 with regard to notification are directory notwithstanding the use of the imperative "shall" in the Section. In the present case one is dealing with a statute which prescribes a sequence for carrying out acts and the deviation therefrom was not substantial. A similar approach open to the court would be that taken in *New Zealand Institute of Agriculture, Science Inc* . That approach would entitle the court to consider the procedural requirement to notify the patient in the whole scheme of the Act looked at in the context of the extent of the deviation. In so doing I come to the view that broadly speaking the purpose of the notification has been achieved. That purpose is set out in the Code of Practice to which I refer in paragraph 5 hereof and is to enable legal advice to be obtained as soon as possible. It also seems to me to be consistent with the principle set out in Section 1(3)(d) of the Act. The effect of the deviation was that the appellant received notification of the mental health officer's intention to apply for a compulsory treatment order some six days earlier than the Act required. Thus in my opinion the extent of the non−compliance cannot be said to be serious. Alternatively, one can look at the words adopted by Lord Hailsham in *London & Clydeside Estates Ltd* where he held that the jurisdiction of the court is inherently discretionary and one must look to see the extent of the defect in procedure which might range from the outrageous and flagrant to the nugatory or trivial. In my opinion even if I am wrong in considering the notification provisions in Section 60 to be directory, I am of the opinion that the consequence of the failure to notify the patient on a second occasion that it was the intention to apply for a compulsory treatment order, when notification had been given some six days earlier than the duty arose, is not sufficient to render the subsequent proceedings invalid. I do not see the patient having suffered any prejudice. Considerations of unnecessary anxiety which may have been caused to the patient by virtue of the premature application are not in my view relevant to the present proceedings. There is nothing in the Act which prevents a mental health officer giving advance notice to a patient that it is the mental health officer's intention to make an application under Section 63 for a compulsory treatment order. The real question is whether such premature notice might be sufficient for it to be concluded that the notification provisions of Section 60 have been complied with to a sufficient extent. That involves ascertaining whether the deviation was, to use Lord Hailsham's words, nugatory or trivial. In my opinion the deviation could be said to be nugatory. It must not be

forgotten that before determining the application for a compulsory treatment order a Mental Health Tribunal must afford the patient and the patient's named person an opportunity of making representations and of leading, or producing, evidence. (Section 64 of the Act). Thus the patient will be made aware of the application by the Mental Health Tribunal even if the mental health officer completely fails in his notification obligation set out in Section 60. In the present case there was not a complete failure. Notification was given to the patient, albeit some six days prior to the statutory requirement. In my opinion the appellant suffered no prejudice. It was submitted that he had been deprived of his liberty and thereby prejudiced. I cannot agree that he lost his liberty as a consequence of the premature notification. The compulsory treatment order was made because the evidence placed before the Tribunal persuaded the Tribunal that it was in the appellant's best interests that an order be made. It was not suggested that the appellant's case would have been conducted any differently or that further evidence would have been led if he had received further notification of the intention to apply to the Tribunal. It was not suggested as a matter of fact that the appellant's relationship with his mental health officer had been adversely affected by the early intimation. It was suggested only that such was a potential outcome. Even if there had been an adverse effect on the relationship, I would not have considered it to be of significance. As I have already stated, any mischief which there might have been was not that notice was given in advance of the statutory timetable. Nothing in the statute precludes a mental health officer from saying to a patient that he has obtained one medical report, which if corroborated, would require the mental health officer to make application for a compulsory treatment order. It would be a matter for the judgement of the mental health officer in each case what should be said to the patient. The patient will know that something is afoot because the doctor will almost certainly require to speak to the patient before a report can be submitted. It is significant that the Code of Practice emphasises that the mental health officer gives notice of the intention to apply as soon as practicable after the duty to make application arises in order that the patient and the named person can take legal advice and prepare fully for the subsequent hearing.

[12] Accordingly, this appeal fails. It was agreed that expenses would follow success and that is reflected in the interlocutor.