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IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
MR JUSTICE HAYDEN
VICE-PRESIDENT OF THE COURT OF PROTECTION
[2022] EWCOP 25

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 October 2022

Before :

LORD JUSTICE BAKER
LORD JUSTICE PHILLIPS
and
LORD JUSTICE NUGEE

- -

RE G (COURT OF PROTECTION: INJUNCTION)

- -
- -

Nicola Kohn (instructed by **Irwin Mitchell LLP**) for the **First Appellant**
John McKendrick KC (instructed by **Simpson Millar**) for the **Second Appellant**
Ian Brownhill (instructed by **MJC Law**) for the **Third Appellant**
Michael Mylonas KC and Olivia Kirkbride (instructed by **Hill Dickinson LLP**) for the **First and Second Respondents**
Sophia Roper KC and Benjamin Harrison (instructed by **the Official Solicitor**) for the **Third Respondent** (by her litigation friend, the Official Solicitor)

Hearing dates : 31 August and 1 September 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 11 October 2022.

LORD JUSTICE BAKER :

1. This is the judgment of the Court to which all members have contributed.

2. On 30 June 2022, Hayden J, sitting in the Court of Protection in proceedings under the Mental Capacity Act 2005 ("the 2005 Act") concerning a 27-year-old woman, G, made an injunctive order against three members of her family – her father, LF, mother, M and grandmother, N. Each of those three individuals filed a notice of appeal against the injunction. Permission to appeal was granted on 22 July 2022.

3. The appeals give rise to a legal issue of some importance – the legal test to be applied by the Court of Protection when considering an application for an injunction.

Background

4. G suffers from a serious degenerative neurological condition. From an early stage in her life, it became clear that she was not meeting developmental milestones, with significant limitations in her motor skills, coordination and expressive communication. She had difficulty feeding and at the age of 2 ½ a gastrostomy tube was inserted. Her head circumference failed to increase as it should have done with age. Brain scans and imaging revealed that white matter myelination, the development of sheaths around the nerves in the brain, was arrested at a primitive stage. The cause of these profound problems is unclear and there is no agreed diagnosis for G's condition. Despite these very serious difficulties, she was seen by all as a happy little girl who was a source of great delight to her parents.

5. At the age of thirteen, G was admitted to hospital with a significant chest infection. Whilst there she sustained a fractured femur. She was transferred to a paediatric intensive care unit at a hospital administered by the first respondent NHS Trust. The clinicians diagnosed osteosarcoma in the right leg and she underwent an amputation of the leg up to the hip. They also diagnosed her as suffering from osteopenia and osteoporosis and, as a result of this bone fragility, she then suffered a spontaneous fracture of the left femur.

6. Although she attained the age of majority over eight years ago, G has remained in the paediatric hospital. As Hayden J observed in an earlier judgment in December 2021 (reported at [2021] EWCOP 69) at paragraphs 15-16:

> "The reality therefore is that G has been in the hospital for the entirety of her adult life as well as a significant part of her childhood. This is an entirely unprecedented situation for the nurses, doctors and indeed for the lawyers. G is not a child, she is an adult with serious progressive disabilities …. it is axiomatic that this children's hospital, however great its resources and skills, is ill-equipped to meet the emotional, medical and physical needs of this young woman."

Although she received excellent care there, all parties agreed that it was inappropriate for her to remain in a facility intended and designed for children. There was, however, profound disagreement about what should happen next.

7. Throughout her time at the hospital, G's parents had been very closely involved in her care. They lived in accommodation provided by the hospital. Her father in particular visited G every day and took an intense interest in her condition and treatment. Unusually, but with the hospital's agreement, he took an active role in her clinical care, including her catheterisation. In contrast, her mother did not visit as regularly but with the father took G out of the hospital for several hours every day and took a particular interest in arranging activities and treats for her daughter. It was the parents' proposal that G be discharged from hospital directly back to their care at home. In 2013, a plan to discharge her home was formulated and progressed to the extent that some modifications were carried out to the parents' property. In the event, for reasons that are not agreed and were not resolved in this litigation, that plan was never put into effect.

8. There is no dispute that G lacks capacity to make decisions as to her residence, care and treatment within the meaning of s.2 of the 2005 Act. In 2017, the father filed an application under s.21A of the Act challenging a standard authorisation granted by the relevant local authority authorising the deprivation of her liberty. In the course of the hearing, it was identified that there was a dispute between the family and the Trust's clinicians as to whether, and if so how, G should be discharged into the community. The treating clinicians acknowledged that a return home should be the ultimate aim but were of the view that, as a first step, G should move to a residential unit. The proceedings continued as a "best interests" application under s.16 of the 2005 Act, with the Trust substituted as the applicant, the father becoming a respondent, and the Official Solicitor appointed as G's litigation friend. There was considerable delay in the proceedings while an appropriate independent medical expert was identified and options for a placement were explored. In December 2020, the Clinical Commissioning Group for the area where the hospital is located was joined as a party, having been identified as the public body responsible for funding any placement.

9. In about June 2021, recognising the difficulties G would face returning to the family home, the parents took out a lease on a bungalow not far from the hospital and proposed that on discharge G move there immediately. The Trust and CCG, on the other hand, maintained their position that there needed to be an intermediate residential placement, and to that end had identified a residential unit, known as "A House".

10. The hearing of this best interests application took place before Hayden J over five days in December 2021. In addition to the issue of her future residence, there was a dispute between the clinicians and the family about whether the central venous line ("CVL") which had been inserted in G for some years should be maintained or removed. At the conclusion of the hearing on 13 December, the judge delivered an ex tempore judgment and made an order pursuant to s.16(2) of the 2005 Act (a) consenting on G's behalf to the removal of the CVL and (b) deciding on her behalf that she should be discharged from the hospital and move to A House. He gave directions for the preparation and filing of a care plan and the convening of a best interests meeting between all parties to consider whether agreement could be reached about the plan and, if not, identify the issues requiring determination by the Court.

11. In his judgment, the judge paid tribute to the dedication and care which the parents, and in particular the father, had shown to G. Of the father's strong objection to the proposed move to A House, the judge observed (paragraph 56 – 57):

> "56. …. Properly analysed, LF's reaction, in my assessment is essentially visceral, borne of panic, apprehending and understandably so, a diminution of his day-to-day involvement in his daughter's life. Though I consider his objections to be driven more by fear than by reason, I have no doubt at all that it is motivated by his concern for his daughter's welfare. It reflects LF's unconditional love for his daughter. In the witness box, LF did not really engage with the competing evidence. He could not identify the balance that requires to be struck between the two alternative plans. The door was simply closed in his mind to any advantages that the home might have to offer or, more importantly, how a full assessment of G's needs, outside the hospital setting might ultimately strengthen the prospects of a reunification with her family.
>
> 57. That does not bode well for the future, but I hope will not be a blockade to the objective that LF truly desires. What he wishes, of course, is to have his daughter come back and live in a home where he and his partner can care for her."

12. The judge acknowledged that, if all went well, this would ultimately be in G's best interests, observing (paragraph 60):

> "…the emotional benefit to G of being able to live with her parents cannot be underestimated. In my view, it is of magnetic importance."

He concluded, however, (paragraphs 71 – 72):

> "71. … I have ultimately had very little hesitation in coming to the clear conclusion that that would not, at this stage, be the right plan for G. It is fretted with risk. It has the very real danger that it might set G up to fail. Were it to do so, it is probably the case that she would have no further chance to return to her parents' care.
>
> 72. There must be a recognition that the timescales contemplated for the future plan must be driven wholly and entirely, by a clear identification of G's needs: it is necessary for her to readjust to life outside the hospital environment; it is important to stabilise her medically; it is essential that the relationship between the treating clinicians and the family (LF in particular) becomes fully functional; allied to this last point is the need for clear and unambiguous planning which all understand and are committed to; it must be understood, at all times, that G's relationship with her parents is of paramount importance to her as well as to them; notwithstanding this extensive period of hospitalisation, G has enjoyed a high quality of family life which must be preserved in her new environment, recognising that this will involve significant changes for her."

13. The father did not seek to appeal against the order of 13 December 2021. But the judge's hopes that the relationship between the family and the treating clinicians would become "fully functional" were not realised. On the contrary, the relationship deteriorated significantly. In February 2022, the father applied for the lifting of the reporting restriction order which had been in place throughout the proceedings. The ostensible reason for his application was to facilitate crowdfunding for a specially-adapted vehicle, but in his judgment (reported at [2022] EWCOP 8), having considered emails sent to the Court by various media organisations, the judge found that the real reason was to allow public discussion of the family's disagreement with the plan for discharge to A House and that such discussion might jeopardise or sabotage the placement, an outcome which would be "devastating" for G. He concluded that

> "the Article 10 right asserted by the father [was] to pursue, in the public domain, an outcome which has been assessed as contrary to his daughter's interests."

In those circumstances, he held that the RRO should remain in force for the time being, recognising that a time may come when it should be lifted.

14. Meanwhile, efforts were continuing to formulate a care plan to facilitate G's move to A House. According to the Trust and the Integrated Care Board or ICB (which had succeeded the CCG as the funding body and been substituted as a party to the proceedings), these efforts were being impeded by the conduct of members of the family, in particular G's father but also her mother and paternal grandmother. On 26 April 2022, the two bodies filed an application seeking an injunction against the three individuals. The draft order filed with the application set out in considerable detail the restrictions to be imposed, including clauses: (1) providing that professional staff at the hospital and, after transfer, A House, would undertake all of G's personal and nursing care, save for limited defined tasks which family members would be permitted to continue to perform; (2) imposing obligations on the conduct of the three individuals (for example, that they "must at all times treat the staff, servants [sic] and employees of the hospital and care home with courtesy and respect"); (3) governing trips for G with family members out of the hospital and A House; (4) making provision for communication between the three family members and staff, (including a requirement that "at no time shall the parents or grandmother say or do anything or behave in a way towards any person working for or at the hospital, care home or CCG that would be considered rude, challenging or threatening"; and (5) defining the times when they would be permitted to visit G (9am to 7pm at the hospital, 10am to 6pm at A House). The application was supported by written evidence to the effect that the father had spoken to clinical staff in a hostile and intimidating way, challenged the competence of staff at the hospital and A House, written repeatedly to managers at A House raising numerous criticisms, and caused journalists and a PR consultant to contact the manager to discuss the family's ongoing opposition to the move. The written evidence did not identify any specific acts said to have been committed by either the mother or grandmother. The case against them was said to be based on their full support for the father's actions. It was argued that, unless the injunction was extended to cover them as well as the father, it was "likely that continued questioning of staff competence and insistence on direct involvement in hands-on care for G would continue."

15. The hearing of the injunction application was listed on 8 June 2022, but service of the application on the mother and grandmother was delayed. In particular, an electronic

copy of the application (which was drafted in very general terms and did not identify any of the respondents to the application by name) was not served on the grandmother until the last week of May and a written copy, with supporting documents including the draft order and supporting statement, not until 1 June. Neither the mother nor grandmother was a party to the proceedings, and they were only joined following an application to the Court on the first day of the hearing. A witness statement was filed by the grandmother but not by the mother.

16. That hearing took place over four days between 8 and 13 June. The mother was represented, a solicitor and counsel having been instructed shortly before the hearing, but the grandmother acted in person, and indeed only attended part of the hearing to give evidence remotely. The Court received written and oral evidence from various witnesses. The written evidence included a statement from the lead consultant, Dr B, and another statement from one named nurse in which she repeated accounts given by a number of other members of hospital staff who were anonymised. Those accounts included details of acts and comments by the father challenging and criticising the care given to G at the hospital and the quality of care which would be given to her after moving to A House. There was also some evidence suggesting that someone had tampered with the medical equipment by which G was being treated.

17. Judgment was reserved and handed down on 23 June 2022. Having summarised the background, the judge considered the legal framework, reciting sections 15, 16 and 17 of the 2005 Act, and addressing specific submissions on the law advanced by Mr John McKendrick QC (as he then was), who represented the father at first instance and again in this Court. The judge's treatment of the law lies at the heart of this appeal, and we return to this matter below. The judge then set out the evidence relied on by the Trust in some detail, including the hearsay evidence given by the anonymised hospital staff. Turning to the father's evidence, he said "where [his] evidence conflicts with Dr B's, I have no difficulty in preferring Dr B's account as more reliable". He agreed with the Trust's argument that the father's responses to the complaints of hospital staff were "entirely lacking in credibility". He referred to "troubling safeguarding concerns" arising from the evidence about tampering, but recorded that the Trust had ultimately not sought findings about this and that he was not making any findings about it. He noted a number of concessions made by the father in his evidence, including that he had deliberately taken G off the ward on three occasions despite being told not to due to Covid security, that he had sought to persuade the management of A House to withdraw the offer of a place for G, that his reason for sending numerous emails to A House was to put further pressure on them to withdraw the offer, that he had lied in saying in a witness statement that he had accepted the Court's decision about the move, and that, if not prevented, he would continue to do whatever he could to prevent the move taking place.

18. This led the judge to make the following observations:

> "44. These are significant concessions. LF's actions are a deliberate attempt to sabotage the placement and to undermine the confidence of the staff. The evidence, in its totality, permits of no other sensible inference. I should also add that the correspondence sent by LF to the care home and the company group responsible for it, is not a simple request for information but a sustained attempt to intimidate and undermine, in a way

> which mirrored his behaviour in the HDU. In particular, it focused on what he regards as the inadequate training of the staff. I do not propose to copy LF's correspondence into this judgment, but it is a cascade of criticisms and unfounded allegations and far from the genuine enquiry as to the contemplated care provisions that LF asserts it to be. I agree with Ms Powell when she analyses that this is not a lack of insight into his behaviour, but the deliberate and determined execution of an objective that he has now, in the witness box, accepted i.e., to stop the placement going ahead."

The judge concluded the totality of the evidence, including the direct evidence of Nurse T and Dr B, the concessions made by the father in his oral evidence, plus the hearsay anonymous evidence of the other nurses established a compelling basis for the injunctive relief to be granted against the father.

19. The judge then turned to the other respondents. Of the mother, he recorded that he found her a "troubling witness" who did not want to engage with the evidence, and that her support for the father "is complete, blind, and unquestioning". Her name was on correspondence and the judge accepted that it was probably correct that "she had appreciated the general thrust of the email content". The judge was struck by her "social isolation", living in an environment which consisted almost entirely of her partner and her daughter. He continued (paragraph 47) that this was

> " an illustration of the tight parameters of the world that this couple has been living in for so long. There is no issue, arising in this case, upon which M and [the father] are not in total agreement. There is no light and shade, M gives her partner 100% support on everything. Her hostility to the care home is every bit as strong as his. In August 2020, she navigated her partner back on to the ward knowing that he had been excluded for failing to comply with the Covid regulations in place because of an outbreak in the hospital. Not only is she supportive of [the father's] position, but she has also revealed herself to be facilitative of the disruption that he causes."

20. Of the grandmother, he noted that her criticisms of the hospital staff in her witness statement were "as full throated and voluble as those of her son", and that she had contacted a media consultant to orchestrate a press release who in turn had contacted the care home management "in similarly critical terms to those deployed by the family". He concluded (paragraph 50):

> "It is plain therefore, that both M and N are not only entirely supportive of LF's campaign, but they are also likely to become embroiled in the execution of a plan to derail the placement. It is for this reason that I have come to the conclusion that the injunctive relief sought in respect of them both is entirely necessary. The scope and ambit of the relief is to put in place clear boundaries to manage the family's behaviour. It is both justified and proportionate here to regulate [G's] personal and nursing care, permitting the staff to operate effectively in the

> provision of G's personal care, medication, nutrition, tracheostomy care and more generally, to establish her dignity as an adult."

21. The judge therefore made the injunction against all three adults, substantially in terms of the draft. The duration of the order was 12 months. As there is no challenge to the specific terms of the order, it is unnecessary to set out or analyse them any further.

22. When granting permission to appeal, Baker LJ declined a stay of the terms of the order which therefore remain in force against all three appellants. Meanwhile, the plans for G's move have been finalised and we were informed that she moved to A House in the last week of August.

The appeal

23. Unsurprisingly, there is considerable overlap in the grounds of appeal, which in terms are as follows:

(a) The father's grounds

(1) The Court was wrong to place significant weight on the anonymous and/or hearsay evidence of the nursing staff.

(2) The Court was wrong, and erred in law, by: (i) identifying the test of "necessary or expedient" pursuant to section 16 of the 2005 Act as the basis for the granting of the injunction; (ii) granting the injunction for the purposes of "protecting the placement" without identifying the legal or equitable rights between the various parties, and/or another basis for the grant of an injunction; and further erred by (iii) not carrying out a best interests evaluation of the restrictions on G's care and contact with her family prior to granting relief by way of an injunction to enforce a best interests decision.

(b) The mother's grounds

(1) Error of law: application of the wrong legal test. The Court was wrong to conclude that "section 16 and section 17 of the MCA constructively provide an entirely cogent framework for the granting of injunctive relief to give effect to the Court's order or directions in such cases where it finds it necessary and expedient to do so".

(2) No legal or equitable right in issue.

(3) Wrongful application of the injunction. The Court was wrong to grant the injunction as against the mother in the absence of any material evidence against her.

(c) The grandmother's grounds

(1) The judge correctly concluded that the Court of Protection has the power to grant an injunction. However, the imposition of an injunction upon the grandmother amounted to an error as

(a) the Court erred in concluding that the test for the imposition of an injunction was whether it was "necessary or expedient" rather than whether it was "just and convenient";

(b) the Court erred in concluding that it had the power to regulate the way in which the grandmother communicated with or about staff;

(c) the Court was wrong to make findings of fact in respect of the grandmother without requiring the Trust and CCG to particularise the allegations against her ahead of the hearing.

(2) In all the circumstances the judge was wrong to impose an injunction on the grandmother.

24. We shall consider, first, the point raised by all three appellants as to the legal test to be applied by the Court of Protection when considering an application for an injunction and, secondly, the other separate grounds raised by the individual appellants.

Statutory provisions

25. The general principles in s.1 of the 2005 Act include, in s.1(5), that "an act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests." S.4 of the Act sets out the approach to be followed by the Court when determining what is in a person's best interests.

26. S.16 entitled "Powers to make decisions and appoint deputies: general", provides as follows:

"(1) This section applies if a person ('P') lacks capacity in relation to a matter or matters concerning:
  (a) P's personal welfare, or
  (b) P's property and affairs.
(2) The Court may –
  (a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters,
  (b) appoint a person (a 'deputy') to make decisions on P's behalf in relation to the matter or matters.
(3) The powers of the Court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).
(4) When deciding whether it is in P's best interests to appoint a deputy, the Court must have regard (in addition to the matters mentioned in section 4) to the principles that:
  (a) a decision by the Court is to be preferred to the appointment of a deputy to make a decision; and
  (b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.
(5) The Court may make such further orders or give such directions and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).

(6) Without prejudice to section 4, the Court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the Court for an order, directions or an appointment on those terms.

(7) An order of the Court may be varied or discharged by a subsequent order.

…."

27. S.17(1), entitled "Section 16 powers: personal welfare", provides:

"The powers under section 16 as respects P's personal welfare extend in particular to-

(a) deciding where P is to live;

(b) deciding what contact, if any, P is to have with any specified person;

(c) making an order prohibiting a named person from having contact with P;

(d) giving or refusing consent to the carrying out or continuation of a treatment by a person providing healthcare for P;

(e) giving a direction that the person responsible for P's health allow a different person to take over that responsibility."

28. S.47(1) of the Act provides that the Court of Protection "has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court."

29. Under s.37(1) of the Senior Courts Act 1981 ("the 1981 Act"), "the High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so."

Submissions for appellants as to the legal test

30. As appears from the summary of their respective grounds of appeal (paragraph 23 above), each of the appellants contends that the judge applied the wrong test when considering whether to grant injunctive relief.

31. Mr McKendrick took the lead in oral submissions on this aspect of the appeal. His overall submission can be simply stated. It was that s.16(5) of the 2005 Act does not confer on the Court of Protection any power to grant injunctions, and hence that the Court when granting injunctions is exercising the powers conferred on it by s.47(1) of the 2005 Act and specifically the same power as that conferred on the High Court by s.37(1) of the 1981 Act, under which the relevant test is whether it is just and convenient to grant the injunction.

32. He developed this submission in a carefully constructed argument that consisted of the following steps:

(1) S.16(5) of the 2005 Act on its true construction is concerned with the case where the Court has appointed a deputy to make a decision or decisions under s.16(2)(b), and does not apply where it has made a decision itself under s.16(2)(a).

(2) Alternatively, s.16(5) does not in any event confer any power to grant injunctions. If it did, it would mean that an injunction could be granted whenever it was in the best interests of the patient (P) to do so, and without regard to the rights and interests of those sought to be restrained. It would be surprising if Parliament had intended this.

(3) The Court's power to grant injunctions was therefore to be found not in s.16(5) but in s.47(1) of the 2005 Act which conferred on the Court all the powers of the High Court. That included the power conferred on the High Court, or recognised, by s.37(1) of the 1981 Act under which the High Court may grant an injunction whenever it is just and convenient to do so.

(4) There is a "rich tapestry" of authority on what the words "just and convenient" mean, and the Court when granting an injunction should have regard to the principles established in such cases.

(5) This is not what the judge had done. He had instead proceeded on the basis that the Court could grant an injunction under s.16(5) of the 2005 Act. That had led him to adopt the test of whether an injunction was "expedient", which was a lesser test that did not sufficiently capture the requirement to take account of the rights of others.

(6) Since the judge had applied the wrong test, his judgment could not support the injunction. Nor could this Court safely say that an injunction could be granted applying the "just and convenient" test, as the judge had not identified any equitable right which the injunction could be granted to protect.

(7) The case should therefore be remitted for decision in accordance with the correct principles.

33. Ms Nicola Kohn, who appeared for the mother, and Mr Ian Brownhill, who appeared for the grandmother, largely supported this analysis, although they added some points of their own which it is convenient to pick up after considering Mr McKendrick's submissions, which we will do by considering each of the steps in his argument in turn.

Does s.16(5) only apply where a deputy has been appointed?

34. So far as step (1) in Mr McKendrick's argument is concerned, we do not accept it. In our judgment s.16(5) is not confined to the case where a deputy is appointed under s.16(2)(b), but also applies to the case where a decision is made by the Court under s.16(2)(a). This was the view reached by the judge who rejected a similar argument put to him by Mr McKendrick. He said in his judgment, among other things, that (paragraph 8):

> "it would be entirely illogical to confer wide powers to facilitate the enforcement of orders in the context of appointment of deputies and not upon the court more generally."

We agree.

35. Mr McKendrick's argument was based on the fact that s.16(5) reads:

> "The Court may make such further orders or give such directions **and** confer on a deputy such powers or impose on him such duties…"

His submission was that if it had been intended to apply to the case of a decision made by the Court itself as well as the case where a deputy had been appointed, the "and" which we have emboldened would have been an "or". He was able to point in support to the Explanatory Notes to s.16 which say of s.16(5):

> "*Subsection (5)* enables the court to grant the deputy powers or impose duties on him as it thinks necessary to avoid repeated applications to the court. However, it also enables the court to require the deputy to seek consent before taking certain actions."

36. Nevertheless an argument from the use of "and" rather than "or" is often a fragile one, and in the present case it seems to us an inadequate basis on which to adopt Mr McKendrick's reading. S.16(5) of course has to be read as a whole. The further orders or directions that the Court may make or give have to be such:

> "as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2)."

By using the words "an order or appointment made by it", that seems to us plainly to refer back to the two ways in which the Court can act under s.16(2), namely by the Court making a decision itself on P's behalf by making an order under s.16(2)(a), or by the Court appointing a deputy to make decisions on P's behalf under s.16(2)(b). S.16(5) therefore in our judgment applies to both cases. It is only fair to add that Mr McKendrick recognised the force of this point in the course of his submissions.

37. If this is right (and we have no doubt that it is), then the Explanatory Notes cannot lead to a different conclusion. Explanatory Notes are admissible to construe legislation and can often be of some assistance, but they cannot control the interpretation of the statutory language. On our interpretation of s.16(5), the Explanatory Notes here are not inaccurate; they are however incomplete.

38. In our view, therefore, where the Court has made an order under s.16(2)(a) of the 2005 Act taking a decision on P's behalf, s.16(5) enables the Court to make such further orders as it thinks necessary or expedient to give effect to, or otherwise in connection with, that order.

Do the orders which the Court can make under s.16(5) include injunctions?

39. Mr McKendrick pointed out that step (1) was not essential to his argument nor indeed his main point. We therefore go on to step (2) in his submissions. We do not accept this either. We see no reason either in the language of s.16(5) or in logic why the further orders that the Court might think necessary or expedient to give effect to its s.16(2)(a) order should not include orders in the nature of injunctions. And this seems to us to be put beyond doubt by the terms of s.17(1)(c).

40. As set out above, s.17(1) provides that the Court's powers in s.16 extend in particular to:

> "(c) making an order prohibiting a named person from having contact with P."

In our judgment an order made by the Court prohibiting a named person (X) from having contact with P is an injunction. An injunction is an order of the Court ordering someone either to do something or to refrain from doing something, and we can see no distinction between an order of the Court restraining X from having contact with P by way of injunction and an order of the Court prohibiting X from having contact with P. They are simply different ways of expressing the same thing.

41. Mr McKendrick submitted that all that s.17(1)(c) contemplated was a decision taken by the Court on behalf of P in the same way that a capacitous person could. He said that just as a capacitous person could prohibit X from contacting him, the Court could make a similar decision on P's behalf. But we do not think this sufficiently takes account of the effect of a prohibition such as is referred to in s.17(1)(c). A capacitous person (C) can no doubt decide, and tell X, that he wants to have nothing further to do with X and does not want any further contact from him. But this has little legal effect. If X ignores it and sends C unsolicited texts, X is unlikely to be in breach of any contractual obligation, and may very well not be committing any tort either unless and until his texts become so persistent as to amount to harassment in breach of s.1(1) of the Protection from Harassment Act 1997.

42. But the effect of a prohibition by the Court seems to us to go well beyond this. If such a prohibition is made, and X ignores it, X will be in breach of the Court's order. As such X will be amenable to the powers of the Court in respect of breaches of its orders. Mr McKendrick accepted that he could not see why a penal notice could not be attached to an order prohibiting X from having contact with P, and if this is done, there seems to us to be no doubt that the Court would have power to punish breaches of the order as contempts of court. It was not disputed that the Court of Protection, by virtue of s.47(1) of the 2005 Act, has the same powers in respect of contempt as the High Court does.

43. In these circumstances we see no difference in principle between an order of the Court prohibiting X from having contact with P and any other order of the Court prohibiting a respondent from doing something. Both are injunctions, and this to our mind makes it entirely clear that Parliament did contemplate that among other orders that the Court might make under s.16(5) of the 2005 Act were injunctive orders.

Does s.16(5) confer a "free-standing" power on the Court to grant injunctions?

44. That however is not the end of the analysis. Mr Michael Mylonas QC (as he then was), who appeared with Ms Olivia Kirkbride for the Trust and the ICB, was disposed to accept that even when granting an injunction under s.16(5) of the 2005 Act the Court was exercising the power to grant injunctions conferred on it by s.47(1), and that the test for the grant of such an injunction included a requirement that it be just and convenient. But Ms Sophia Roper QC (as she then was), who appeared with Mr Benjamin Harrison for G, acting by the Official Solicitor, put forward as her primary submission that the Court of Protection has two separate powers to grant injunctions,

one under s.16(5) and one under s.47, and that when granting an injunction under s.16(5), it was not necessary to satisfy the just and convenient test.

45. On this we prefer the analysis adopted by Mr Mylonas (and advanced by the appellants). It seems to us unnecessarily complicated, and potentially confusing, to regard s.16(5) as conferring a separate and free-standing power on the Court to grant injunctions which is governed by different principles from those normally applicable to the grant of injunctions. All parties accept, as Baker J (as he then was) said in *re M (A Patient) (Court of Protection: Reporting Restrictions)* [2011] EWHC 1197 (Fam) at [21], that outside s.16 the Court does have power to grant injunctions, that power being conferred on it by s.47(1); all parties accept that the power so conferred is (by the express terms of s.47(1)) the same power as that enjoyed by the High Court; and all parties agree that that power can therefore be exercised only when it is just and convenient to do so.

46. We have accepted above that the terms of s.17(1)(c) demonstrate that one of the things the Court can do under s.16(5) is to grant an injunction where it considers it necessary or convenient to do so for the purpose of giving effect to an order under s.16(2)(a), or otherwise in connection with such an order. But we see no reason why this should be read as doing any more than indicating that the Court may use its existing injunctive powers for this purpose. That seems to us to be a simple and straightforward reading of the statutory provisions which avoids unnecessary distinctions between injunctions granted under s.16(5) and those granted under s.47. In general we think it is better to read statutory provisions in as simple and straightforward a way as possible.

47. This accords with the analysis adopted by Keehan J in *re SF (Injunctive Relief)* [2020] EWCOP 19 at [32]-[33] as follows:

> "[32] Having had the benefit of counsels' submissions and the time to reflect on the authorities cited to me, I am now persuaded that the Court of Protection does indeed have the power to grant injunctive relief in support of and to ensure compliance with its best interests decisions and its orders.
>
> [33] I so find for the following reasons:
>
> (i) Section 47(1) of the 2005 Act is drafted in wide and unambiguous terms;
>
> (ii) it must follow that the Court of Protection has the power which may be exercised by the High Court pursuant to s 37(1) of the 1981 Act to grant injunctive relief;
>
> (iii) this conclusion is fortified by the terms of s 17(1)(c) of the 2005 Act which permits the court to prohibit contact between a named person and P;
>
> (iv) it is further fortified by the terms of ss 16(2) and (5) of the 2005 Act. The provisions of s 16(5) are drafted in wide terms and enable the court to 'make such further orders or give such directions as it thinks necessary or expedient for giving effect to,

> or otherwise in connection with, an order made by it under sub-s (2)';
>
> (v) finally, the 2017 Rules, r 21 and PD 21A, make provision for the enforcement of orders made by the Court of Protection including committal to prison for proven breaches of court orders."

48. This treats a prohibition of the type referred to in s.17(1)(c) as an example of the Court using the injunctive powers conferred on it by s.47(1) for the purposes specified in s.16(5), not as the exercise of a separate free-standing power. We agree with this analysis.

49. In our judgment therefore although the Court can indeed grant injunctions for the purposes specified in s.16(5) of the 2005 Act, when it does so it is exercising its ordinary injunctive powers which it has by virtue of s.47. As such the test for the grant of such an injunction includes the requirement in s.37(1) of the 1981 Act that it be just and convenient.

50. Thus although we have not reached this conclusion by the same route as that advanced by Mr McKendrick, we agree that the Court can only grant an injunction pursuant to s.16(5) of the 2005 Act if it is just and convenient to do so, those words being interpreted in accordance with the principles under s.37 of the 1981 Act.

What does the just and convenient test require?

51. That brings us to Mr McKendrick's step (4) and what he referred to as the rich tapestry of decided cases on the just and convenient requirement in s.37(1) of the 1981 Act.

52. There is indeed a substantial body of authority on this requirement, much of it at House of Lords and Supreme Court level. In their respective written submissions the appellants trace the development of this jurisprudence from the proposition stated by Lord Diplock in *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210 ("*The Siskina*") that an injunction can only be granted to protect a legal or equitable right, through the way in which this proposition has been interpreted or qualified in various subsequent cases.

53. Some reliance was placed by the appellants on the statement by Nugee J (as he then was) in *Holyoake v Candy* [2016] EWHC 970 at [8] that in normal circumstances what is needed to persuade the Court to grant an injunction is a threat to do an act which constitutes an invasion of a legal or equitable right. But we think little assistance can be gained from this. It was only a brief summary of the principles and Nugee J himself said that his judgment was not the place to examine the precise limits of the s.37 power, something that was not yet settled at Supreme Court level.

54. In any event the whole question of the ambit of the s.37 power has since then been comprehensively re-examined by the Privy Council in *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24 ("*Broad Idea*"): see at [4]-[58] per Lord Leggatt JSC giving the majority judgment of the Board (with the agreement of Lords Briggs, Sales and Hamblen JJSC). Having examined *The Siskina* and other cases in

detail at [4]-[51], Lord Leggatt's conclusion on what Lord Diplock said in *The Siskina* can be found in [52] as follows:

> "52. The proposition asserted by Lord Diplock in *The Siskina* and [*Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909] on the authority of [*North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30] was that an injunction may only be granted to protect a legal or equitable right. There can be no objection to this proposition in so far as it signifies the need to identify an interest of the claimant which merits protection and a legal or equitable principle which justifies exercising the power to grant an injunction to protect that interest by ordering the defendant to do or refrain from doing something. In *Beddow v Beddow* (1878) 9 Ch D 89, 93, Sir George Jessel MR expressed this well when he said that, in determining whether it would be right or just to grant an injunction in any case, "what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles." As described above, however, within a very short time after *The Siskina* was decided, it had already become clear that the proposition cannot be maintained if it is taken to mean that an injunction may only be granted to protect a right which can be identified independently of the reasons which justify the grant of an injunction."

55. This identifies two requirements before an injunction can be granted: (i) an interest of the claimant which merits protection and (ii) a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something.

56. After some further consideration of the cases Lord Leggatt went on to endorse the summary of the position as stated in *Spry* as follows (at [57]):

> "57. As an exposition of the court's equitable power to grant injunctions, it would be difficult to improve on the following passage in Spry, *Equitable Remedies*, 9th ed (2014), at p 333:
>
> > "The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate."

> This passage (stated in the same terms in an earlier edition of Spry's book) was quoted in *Broadmoor Special Health Authority v Robinson* [2000] QB 775, para 20, by Lord Woolf MR, who described it as succinctly summarising the correct position. It was again quoted and endorsed as a correct statement of the law by Kitchin LJ (with whom Briggs and Jackson LJJ agreed on this point) in [*Cartier International AG v British Sky Broadcasting Ltd (Open Rights Group intervening)* [2016] EWCA Civ 658], para 47. The Board would likewise endorse it."

57. The decision in *Broad Idea* is technically not binding on us, both because it is a decision of the Privy Council, and because it was not in fact necessary to the decision, the appeal being dismissed on the facts, as pointed out by Sir Geoffrey Vos MR in a minority judgment (with which Lord Reed PSC and Lord Hodge DPSC agreed) at [221]. But none of the counsel before us submitted that Lord Leggatt's analysis was wrong or should not be followed.

58. The general principle is that although decisions of the Privy Council are not binding on the Courts of England and Wales, they should normally be regarded as being "of great weight and persuasive value" (*Willers v Joyce (No 2)* [2016] UKSC 44 at [12] per Lord Neuberger PSC); and that, unless there is a decision of a superior court to the contrary effect, a Court in England and Wales "can normally be expected to follow" a decision of the Privy Council (*ibid* at [16]). It was not suggested to us that Lord Leggatt's analysis, which was based on numerous English authorities, was inconsistent with any decision of the House of Lords, Supreme Court or this Court.

59. As to the fact that the legal questions decided by the majority did not in fact need to be decided, this does not in our judgment detract from their powerful persuasive effect. Although this may mean that the decision on these matters is technically *obiter*, they are not mere passing remarks or unconsidered observations. On the contrary, Sir Geoffrey Vos in his minority judgment recognised that the majority's exposition was "erudite and compelling" (at [220]), and that their "ground-breaking exposition" would constitute "powerful *obiter dicta*" (at [221]). For their part, the majority considered that the fact that the Board upheld the decision of the Eastern Caribbean Court of Appeal on the facts did not make it inappropriate to decide the issue; on the contrary they considered it both important and necessary to decide it, and thereby lay to rest the residual uncertainty emanating from *The Siskina*: see at [119]-[120] per Lord Leggatt.

60. We were not referred to any decision of this Court considering *Broad Idea* in any detail. It appears that it was referred to and applied in *Kireeva v Bedzhamov* [2022] EWCA Civ 35 (see at [79] and [102] per Newey LJ), although there is no suggestion in the judgment that there was any argument about its status.

61. In accordance with the principles above, we should follow the majority decision in *Broad Idea* unless persuaded otherwise. But as we have said no attempt was made to persuade us not to follow it. Having regard to its source we would in any event have given it very great weight, but having read and considered the authorities for ourselves, we regard Lord Leggatt's analysis as compelling and unanswerable. It is not necessary to repeat his reasoning. It is sufficient to say that we respectfully agree with it. In these circumstances in our judgment we should follow *Broad Idea* and decide that it now represents the law of England and Wales as to the circumstances in which the Court

may grant an injunction, or in other words what the "just and convenient" test in s.37 of the 1981 Act requires.

Did the judge apply the wrong test?

62. There was some debate before us as to the basis of the judge's decision. We should set out the relevant parts of his judgment. Having at paragraph 8 rejected Mr McKendrick's submission that s.16(5) was confined to the case where a deputy had been appointed, he continued as follows:

> "9. Accordingly, I am satisfied that Section 16 and Section 17 of the MCA [ie the 2005 Act] conjunctively provide an entirely cogent framework for the granting of injunctive relief to give effect to the Court's orders or directions in such cases where it finds it necessary or expedient to do so.
>
> 10. Having come to this conclusion, I do not, strictly, have to deal with Mr McKendrick's submission that Section 47(1) of the MCA is not apt to cover restricting behaviours in the context of either a hospital or care home on the basis that those are *"a matter between those family members and the staff employers"* . I regard this as a creative but ambitious submission. Again, I am clear that it cannot be sustained."

He then set out the text of s.47(1) of the 2005 Act and s.37(1) of the 1981 Act, followed by a citation from the judgment of Nugee J in *Holyoake v Candy*, and continued:

> "14. Mr McKendrick, in his skeleton argument, seeks to extract both from the legislation and from the above authority the following proposition:
>
> > "The test for injunction in the Court of Protection therefore requires the court to be satisfied that the injunction is 'just and convenient' and not 'necessary or expedient'. How the unfettered nature of the section 37 (1) discretion should be exercised in the Court of Protection is an under-developed [sic]. It must however be a discretion exercised in accordance with legal principle - that requires identification of the legal right that is sought to be protected."
>
> 15. With respect to Mr McKendrick, that is misconceived. As Nugee J made clear, when extracting the established principles from the case law, the power extends both to legal and equitable rights. The submission that the scope of Section 37(1) should be confined to *"legal rights"* is unsustainable. Indeed, the language of the provision is itself cast in the lexicon of equitable principles."

He then went on to consider other matters.

63. Mr McKendrick submitted that those passages in the judgment indicate that the judge thought that as s.16 and s.17 of the 2005 Act provided a sufficient framework for the grant of injunctions, it was unnecessary to consider whether the injunction could be justified under s.47 of the 2005 Act (and hence s.37 of the 1981 Act).

64. We see the force of that submission, and indeed that is how we think the judgment would most naturally be understood. Mr Mylonas however sought to persuade us that that was not what the judge meant. He suggested that it was never disputed before the judge that it was necessary to satisfy the just and convenient test regardless of whether s.16(5) of the 2005 Act applied or not, relying on Ms Roper's written closing submissions which accepted that even if made under s.16(5) the Court has to be satisfied that an injunction was just and convenient. But Mr Mylonas was not himself at the hearing below, and Ms Roper, who was, told us that the oral submissions departed somewhat from the written submissions and that she did not feel comfortable endorsing Mr Mylonas' submission.

65. In these circumstances we do not think we can be confident that the judge did think it was necessary to consider the grant of the injunction against the just and convenient test. But we do not think this matters, as he went on to consider it against that test in paragraph 15, and decided that it was not necessary for these purposes to identify a legal right; it was sufficient for the grant of an injunction to be in accordance with equitable principles. He evidently considered that his grounds for granting the injunctions would meet this test. It seems to us that the remaining question on this part of the appeal is whether he was right in this conclusion.

Did the judge's grounds for granting the injunctions meet the just and convenient test?

66. Here we part company with Mr McKendrick's submissions. We have no hesitation in saying that the judge's grounds for granting the injunction amply satisfied the just and convenient test as it is now to be understood in the light of *Broad Idea*. (We are dealing here with the question of principle; it is a separate question, considered below under the various other grounds of appeal, whether the facts justified the judge's conclusions that such grounds existed in the case of each appellant).

67. There is in our view no doubt why the judge imposed the injunctions he did. It was to protect the decision he had made in December 2021 that G should move to A House. This appears clearly from his judgment. At paragraph 18 he explained the application for the injunctive orders sought by the Trust and the CCG as "both to implement and secure the placement at the identified nursing home". At paragraph 19 he said that the abandonment of a planned move to the home in March 2022 "can only be attributed to [the father's] tactical strategy designed to sabotage it." At paragraph 44 (set out at paragraph 18 above) he referred to the father's "deliberate attempt to sabotage the placement", and to his objective being "to stop the placement going ahead". At paragraph 50 (set out at paragraph 20 above) he referred to the mother and grandmother being likely to become embroiled in the execution of a plan "to derail the placement". In his Order dated 1 July 2022 he referred in the recitals to the father having behaved in a way that had "jeopardised the placement" at the care home. In a further Order dated 6 July 2022 refusing permission to appeal, he referred to the family's efforts to "undermine the placement".

68. There is no doubt therefore that the ground on which the judge imposed the injunctions was that there was a risk that otherwise the family's conduct would sabotage, derail, jeopardise or undermine G's placement at A House. Does this meet the just and convenient test? In our view it plainly does.

69. This test is now to be understood as comprising two requirements (paragraph 55 above). The first is that the person protected by the injunction has an interest that merits protection. (We have expressed it this way rather than, as Lord Leggatt does, by referring to "an interest of the claimant" because the injunctions in the present case were granted for the benefit of G rather than the applicants, and the relevant question is whether she had a sufficient interest). We see no difficulty in this. The judge having decided in December 2021 that it was in G's best interests to move to A House, she self-evidently had an interest in seeing that that decision was given effect to. We do not think it necessary to analyse this formally in terms of a substantive legal or equitable right: it is clear from *Broad Idea* that this is not required.

70. And we also think it self-evident that this was an interest that merited protection. G's interest in seeing that the December order was given effect to was at least as deserving of protection as, for example, the claimant's interest in *Broad Idea*. There the question of principle was whether the claimant could obtain a freezing order in the British Virgin Islands in aid of a substantive claim which it was bringing in Hong Kong, and Lord Leggatt identified the relevant interest of the claimant as "the (usually prospective) right to enforce through the court's process a judgment or order for the payment of a sum of money" (at [89]). If a right to enforce a future judgment for money is an interest that merits protection, it seems to us that G's right to move to A House under an existing order of the Court was equally deserving of protection.

71. The second requirement of the just and convenient test is that there is a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something. Again we do not think this poses any difficulty. S.16(5) of the 2005 Act itself contemplates that the Court may make "such further orders … as it thinks necessary or expedient for giving effect to" its order under s.16(2)(a). That by itself seems to us to justify granting an injunction to protect G's placement as decided in the December order. But if further identification of a relevant principle is required, we think it can be found in the general principle that a Court may grant ancillary orders, including injunctive orders, to ensure that its orders are effective.

72. This is a familiar principle which finds many illustrations. To take an example referred to by Phillips LJ in argument, suppose that the Court has decided under s.16(2)(a) that a fund held by A for P should be transferred to be held by B for P instead. If there is no reason to suppose that A will be obstructive, it may well be enough for the Court to decide that it is in P's best interests that the fund be transferred from A to B and make an order to that effect in the expectation that A would duly co-operate. If however there is a risk that A will seek to frustrate the order, the Court could undoubtedly add an injunction ordering A to transfer the fund. That would be an example of an ancillary order intended to make the s.16(2)(a) order effective.

73. Or to take another example, a useful analogy can again be found in *Broad Idea* itself. There Lord Leggatt identified the rationale for the grant of freezing injunctions as the so-called "enforcement principle", namely the principle that the essential purpose of a freezing order is to facilitate the enforcement of a judgment or order for the payment of

a sum of money by preventing assets against which such a judgment could potentially be enforced from being dealt with in such a way that insufficient assets are available to meet the judgment (see at [84]-[88]). Then, having identified the relevant interest as the claimant's (usually prospective) right to enforce through the court's process a judgment or order for the payment of a sum of money, he continued at [89]:

> "A freezing injunction protects this right to the extent that it is possible to do so without giving the claimant security for its claim or interfering with the respondent's right to use its assets for ordinary business purposes. The purpose of the injunction is to prevent the right of enforcement from being rendered ineffective by the dissipation of assets against which the judgment could otherwise be enforced."

74. Here too we find the relevant principle to be that the Court will grant injunctive relief to prevent an order being frustrated, even though the order (i) may not yet exist but may only be a potential future order and (ii) may not be an order of the relevant court at all but may be that of a foreign court. If the Court can do that, it can in our judgment certainly grant an injunction to prevent its own existing order from being frustrated.

75. In our judgment therefore the judge's decision to grant injunctions here fulfilled the just and convenient test as it is now to be understood, even though he did not have the benefit of the more extended argument we have received and consequently did not spell it out in the way we have done.

Other points

76. We can deal briefly with some other points raised by the appellants in support of this head of the appeal.

77. Mr McKendrick said that it was important to be clear whether the injunction was made under s.16(5) or s.47 of the 2005 Act because the former was a "best interests" decision which did not adequately take account of the rights of others. We have decided that the injunctions were made in accordance with s.16(5) for the purpose of protecting G's placement, being necessary or expedient to give effect to the December order, but were also an exercise of the power conferred on the Court by s.47. We do not however think this is likely to lead to any confusion. It was not disputed before us that orders made under s.16(5) have to be in the best interests of P. But in circumstances where the Court has already made an order under s.16(2)(a) taking a decision on P's behalf in P's best interests, it seems to us unsurprising that a further order designed to give effect to that order will usually also be in P's best interests. And as we have sought to explain, an injunction so granted must also be just and convenient, but in circumstances where it is designed to protect P's interest in the s.16(2)(a) order being given effect to, there will again usually be no difficulty in this test being met.

78. We do not think any of this means that the Court should, or will, ignore the rights of others. It is trite law that injunctions are discretionary, and that the Court will take account of all the circumstances. Very frequently the Court's decision as to whether to grant an injunction will involve balancing the rights of P against the rights of others, including Convention rights such as those under Article 8 or Article 10. This is a familiar and well understood process, and we would not want our judgment in the

present case to cast any doubt on it or lead to any significant change in practice. Our concern rather has been to consider the technical question whether injunctions granted by the Court under s.16(5) do need to meet the just and convenient test, and if so (as in our view they do) to identify whether and how that test is met (as in our view it is in the present case, and will usually be when injunctions are granted to prevent orders made under s.16(2)(a) from being undermined).

79. Ms Kohn pointed out that the wording of s.47(1) of the 2005 Act is that the Court of Protection has "in connection with its jurisdiction" the same powers as the High Court, and contrasted this with s.37(6) of the 1981 Act which simply provides that s.37 applies in relation to the family court as it applies in relation to the High Court. She also referred to the fact that the Court's power under s.16(2)(a) of the 2005 Act to take a decision for P is limited to doing what P could do for himself if capacitous, or in other words to the "available options": see *N v A Clinical Commissioning Group* [2017] UKSC 22 at [24] and [35] per Lady Hale DPSC. We do not think this affects the analysis. An injunction granted under s.16(5) to give effect to an order under s.16(2)(a) is plainly an injunction granted in connection with the Court's jurisdiction under s.16 of the 2005 Act. And although we accept of course that decisions made for P by the Court under s.16(2)(a) are limited to the available options, we do not think this limits the power of the Court under s.16(5) to grant injunctions to give effect to those decisions (something that P could of course not do for himself).

80. Mr Brownhill added an argument based on the Protection from Harassment Act 1997 ("the 1997 Act"). He submitted that what the judge had in effect done was grant an injunction, among other things, restraining harassment, but without considering the safeguards referred to in the 1997 Act. The 1997 Act both (by s.2) makes it an offence and (by s.3) provides for civil remedies, including an injunction (see s.3(3)), if a person pursues a course of conduct which amounts to harassment in breach of s.1(1). But this requires that the person either knows, or ought to know, that his conduct amounts to harassment (s.1(1)(b)), and it is a defence if it is shown that the pursuit of the course of conduct was reasonable (s.1(3)(c)).

81. There is a short answer to this point. The basis of the judge's grant of the injunctions was not the protection of the employees of the trust or of the CCG from harassment in accordance with the 1997 Act. The basis of the judge's grant of the injunctions was the protection of G's placement. The difference was well illustrated by Ms Roper, who gave the example of a hypothetical situation in which G had left the care home but a family member continued to write abusive letters to the home. In such a case an injunction could no longer be granted under s.16(5) as it would do nothing to protect G or her placement, and if an injunction were sought, it would indeed have to be sought on the basis of protection from harassment in accordance with the 1997 Act, and no doubt in another court. But that was not this case. We agree.

Conclusions on the Court of Protection's powers to grant injunctions under s.16(5) of the 2005 Act

82. We can summarise our conclusions on this aspect of the appeal as follows. The Court of Protection does have power to grant injunctions under s.16(5) of the 2005 Act, both in the case where a deputy has been appointed under s.16(2)(b) and in the case where the Court has made an order taking a decision for P under s.16(2)(a). In doing so, it is exercising the power conferred on it by s.47(1) and such an injunction can therefore

only be granted when it is just and convenient to do so. This requirement is now to be understood in line with the majority judgment in *Broad Idea* as being satisfied where there is an interest which merits protection and a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something. In the present case, as is likely to be the case wherever an injunction is granted to prevent the Court's decision under s.16(2)(a) from being frustrated or undermined, those requirements are satisfied because G's interest in the December order being given effect to is an interest that merits protection, and the principle that the Court may make ancillary orders to prevent its orders being frustrated is ample justification for the grant of injunctive relief if the facts merit it.

83. Although therefore we have accepted a number of the propositions advanced by the appellants, our overall conclusion on these grounds of appeal is that they should be dismissed.

The other grounds of appeal

84. We now turn to consider the other arguments raised on behalf of the three appellants.

(1) The Father

85. Although he is the second appellant, we start with the father who has taken the lead in challenging the care plan and was the main focus of the injunction application.

86. The judge carried out a thorough analysis of the evidence relied on by the Trust and CCG in support of their application for an injunction against the father. A significant part of this evidence was hearsay. One witness, Nurse T, gave written and oral evidence of statements made by a number of other nurses, none of whom was identified by name. The judge accepted this evidence as true and relied on it when concluding that an injunction should be granted. On behalf of the father, it is argued that the judge was wrong to place significant weight on the anonymous and/or hearsay evidence of the nursing staff.

87. The modern approach to hearsay evidence in civil proceedings in England and Wales is to focus on weight rather than admissibility. Earlier complex provisions about precisely when hearsay evidence was or was not admissible have been swept away. S.1 of the Civil Evidence Act 1995 ("the 1995 Act") provides that "in civil proceedings evidence shall not be excluded on the ground that it is hearsay". S.11 of the 1995 Act defines civil proceedings as meaning "civil proceedings, before any tribunal, in relation to which the strict rules of evidence apply". In *Enfield London Borough Council v SA and others* [2010] EWHC 196 (Admin) at paragraph 29, McFarlane J (as he then was) held that proceedings in the Court of Protection under the 2005 Act fall within the "wide definition" of civil proceedings under s.11 of the 1995 Act. We agree.

88. S.4 of the 1995 Act provides:

> "Considerations relevant to weighing of hearsay evidence.
>
> In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any

> circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.
>
> (2) Regard may be had, in particular, to the following—
>
> (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
>
> (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
>
> (c) whether the evidence involves multiple hearsay;
>
> (d) whether any person involved had any motive to conceal or misrepresent matters;
>
> (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
>
> (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

89. The judge cited s.4 in his judgment and observed (paragraph 17):

> " …I consider this evidence is not to be evaluated in isolation but requires to be woven into a survey of the broad canvas of available evidence, from which it gathers forensic weight. Similarly, when considering the anonymisation of the nurses, it is necessary to have regard to the broad sweep of the available evidence regarding the ongoing difficulties arising, particularly, from LF's relationship with the nurses and treating clinicians."

He prefaced his analysis of the hearsay evidence with these observations (at paragraphs 22 -23):

> "22. LF … is said to have spoken to the clinical staff in a *"hostile and intimidating"* way and was *"questioning their competence"*. The evidence in support of this is set out in the statement of Nurse T and amplified in her oral evidence before me. Nurse T is a Registered Paediatric Specialist who has worked for over 15 years in Critical Care in the High Dependency Unit (HDU) at the Hospital. She is a clinical nurse manager and acting ward manager (since October 2021). She told me in evidence that many staff had reported feeling

> undermined and intimidated by LF. So numerous were the complaints that the lead consultant, Dr B, asked Nurse T to investigate the matter. Nurse T had arranged for the Critical Care Psychology team to provide support sessions for anybody who had felt intimidated or vulnerable as a consequence of LF's behaviour. 30 nurses took the offer up. LF appears genuinely to struggle to understand this. He asserts that with one or two exceptions, he gets on very well with the nursing staff.
>
> 23. Given that G remains in the HDU and the nurses continue to care for her, they have been anonymised. At risk at over burdening this judgment, but in order to achieve context, it is necessary to set them out in full as Nurse T has done in her report."

90. Over the following 14 paragraphs, the judge then set out at some length the hearsay evidence of eight anonymous nurses as reported by Nurse T. He then recited extracts of the direct evidence given by Nurse T and Dr. B, observing (at paragraph 39) that

> " in analysing the evidential weight to be attached to the anonymous complaints, it is important to set out the wider canvas. Dr B gave wide ranging evidence before me."

He then recited part of the evidence given by the father, LF, including a series of concessions which, as recorded in paragraph 18 of our judgment above, led the judge to describe the father's actions as a "deliberate attempt to sabotage the placement and to undermine the confidence of the staff". Drawing the threads of the evidence against the father, he explained his approach to the hearsay evidence in these terms (at paragraph 45):

> "45. The correspondence, the direct evidence of Nurse T and Dr B, the admissions made by LF in the witness box, all provide the evidential framework for consideration of the anonymous evidence of the nurses. It is to be noted that the allegations that each of the nurses make identifies a pattern of behaviour which is, as I have demonstrated above, replicated with others. The allegations are internally consistent and extensive. Moreover, there is no rational or coherent reason as to why so many nurses should malevolently exaggerate or fabricate false evidence in the way that LF is driven to suggest. Accordingly, it would be entirely wrong to regard this evidence as having little or no weight as Mr McKendrick suggested. This evidence is, properly analysed, an intrinsic facet of a wider forensic canvas which reveals a consistent pattern of behaviour. Further, having regard to the atmosphere that has been created on the ward and the importance of achieving G's smooth and safe transition to the care home, I consider the continuing anonymity of the nurses to be essential."

As noted, it was on that evidence that he found "a compelling basis for the injunctive relief sought in respect of the father".

91. On behalf of the father, Mr McKendrick accepted that the Court of Protection can admit hearsay evidence in witness statements that contain accounts given by anonymous persons but submitted that great caution must be exercised when determining the weight to be attached to such evidence. He cited the judgment of this Court in *Boyd v Incommunities Ltd* [2013] EWCA Civ 736, a case concerning a claim for possession of the house, which in turn had cited another judgment of this Court in a similar possession case, *Moat Housing Group South Ltd v Harris and Hartless* [2006] QB 606, in which Brooke LJ (at paragraph 135) had warned that

> "the willingness of a civil court to admit hearsay evidence carries with it inherent dangers in a case like this … [where] rumours abound in a small housing estate…."

Brooke LJ continued (at paragraph 140):

> "… more attention should be paid by claimants in this type of case to the need to state by convincing direct evidence why it was not reasonable and practicable to produce the original maker of the statement as a witness. If the statement involves multiple hearsay, the route by which the original statement came to the attention of the person attesting to it should be identified as far as practicable. It would also be desirable for judges to remind themselves in their judgments that they are taking into account the section 4(2) criteria … so far as they are relevant."

Mr McKendrick contrasted the weight to be attached to anonymous hearsay evidence from members of the public in possession proceedings with that to be attached to anonymous hearsay evidence from professional witnesses such as nurses, who are trained, supported, and required as part of their job to give care for and manage the families of patients.

92. It was Mr McKendrick's submission that the judge had incorrectly grappled with the factors which would permit him to give extensive weight to the anonymous evidence of the nurses in this case. Factors must exist to provide a proper basis for applying extensive weight to anonymous hearsay evidence and such factors did not exist in this case. He argued that it was telling that, whilst damaging generalised allegations were made by the anonymous witnesses, the two nurse witnesses who did give evidence, Nurse T and a second nurse who gave evidence, were only able to give one concrete example of the father's alleged misconduct. In those circumstances it was unfair to place significant weight on the extensive anonymous hearsay evidence which could not be tested. Mr McKendrick also submitted that, although no findings were made by the judge about the allegations of "tampering", he had in fact accepted the veracity of that evidence and placed weight on the allegations which was prejudicial and unfair to the father.

93. In our judgment, there is no merit in Mr McKendrick's criticisms of the judge's treatment of the anonymous hearsay evidence. Very properly, Mr McKendrick had made similar submissions at first instance both on the interpretation and application of s.4 of the 1995 Act and on the case law, including the *Moat Housing* decision. It is evident that the judge accepted those submissions and applied the guidance in the statute and case law when considering the hearsay evidence given by the anonymous

nurses. The judge plainly recognised that he had to proceed with caution when assessing the weight to be attached to the evidence and took conspicuous pains to explain his approach and analysis. There was clear evidence from Nurse T and Dr B, accepted by the judge, demonstrating, as suggested by Brooke LJ in the *Moat Housing* case, the route by which the anonymous evidence had emerged and why it was neither reasonable nor practicable to identify and adduce direct evidence from the nurses. The fact that they are professionally qualified, trained and supported within the Trust, and accustomed to working with the families of patients did not obviate the need for anonymity in this case, given the evidence about the father's attitude provided by Nurse T, Dr B and the father himself.

94. Although the judge referred to the allegations of tampering, he clearly indicated that he would make no findings about that matter, and in our view there is no basis for concern that this evidence featured in his thinking when considering the weight to be attached to the rest of the hearsay evidence of the anonymous nurses.

95. Overall, we are satisfied that the judge's careful and thorough treatment of this evidence was entirely fair. As he rightly observed, it was an intrinsic facet of a wider forensic canvas which revealed a consistent pattern of behaviour.

96. In addition to the challenges to the judge's approach to the legal test, and the weight to be attached to the anonymous hearsay evidence, Mr McKendrick also argued that the judge failed to carry out any best interests analysis before making the injunction. Again we see no merit in this argument. Given his earlier decision that the placement at A House was in G's best interests, and the clear evidence about the father's conduct and his determination to do what he could to sabotage the plan, the decision to grant the injunction was manifestly in G's best interests and, in all the circumstances, just and convenient.

97. Accordingly, we would dismiss the father's appeal.

(2) The Mother

98. Ms Kohn contended, pursuant to ground 3 of the mother's appeal, that the entirety of the evidence against the mother was that set out by the judge as summarised in paragraph 19 above, evidence that disclosed no wrongdoing by her. The only allegation of positive involvement on her part related to August 2020, when she was said to have navigated the father back onto G's ward after he had been excluded. That event pre-dated the events complained of by 16 months. Ms Kohn submitted that it was "unarguably unjust to impose a penalty against an individual guilty of no wrongdoing": the mother's unwavering support of her partner could not be regarded as prohibited behaviour.

99. As explained above, however, the question was whether there was a risk (that is to say, a real risk) that the mother would act so as to frustrate or undermine the Court's order under s.16(2) and thereby infringe the interests of G in due compliance with that order. Whilst the assessment of such a risk is necessarily based on evidence of previous conduct and statements, it is a forward-looking exercise and does not require a finding that there has been previous "wrongdoing" or "prohibited behaviour". The imposition of an injunction is in no sense a penalty for past behaviour. The question of penalty only arises if the terms of the injunction are subsequently breached.

100. In the case of the mother, the judge was fully justified in finding that she was "likely to become embroiled in the execution of a plan to derail the placement". On the judge's unchallenged findings that she supports the father 100%, she is just as hostile to the care home as the father and has revealed herself to be facilitative of disruption caused by him, there was an obvious risk that, once the father was prohibited from causing such disruption, the mother would continue his campaign on his behalf or with his encouragement and support, unless herself restrained by injunction. It is an entirely conventional approach to ensuring the effectiveness of an injunction to include within its scope those associates of the primary respondent who might provide direct or indirect assistance in avoiding its terms and effect.

101. It follows that the judge's conclusion that it was necessary to grant injunctive relief against the mother is not open to criticism. It was plainly just and convenient to do so. Accordingly we would dismiss the mother's appeal.

(3) The Grandmother

102. As set out above, the grandmother was formally served with the proceedings and evidence on 1 June 2022, one week before the hearing. These papers included a draft of the order sought, but that draft did not name the grandmother (or refer to her) and did not include a penal notice. The evidence served made frequent references to the views and conduct of "the family", but contained very little specifically as to the conduct of the grandmother.

103. It was not until the first day of the hearing that the grandmother was formally joined as a respondent. She was not represented and attended remotely on a mobile phone from G's bedside in the hospital. She had served a witness statement, but it is unclear who had drafted it or on what basis.

104. During the course of the hearing a revised draft order was produced, naming the grandmother as a respondent to the injunction and including a penal notice. It does not appear that the grandmother was served with this document and it seems unlikely that she knew of the very significant changes from her point of view, let alone understood their nature and effect.

105. Ground 3 of the grandmother's appeal is that she was not, in those circumstances, given proper notice of the case against her. In our judgment that is an understatement. We consider that it was obviously unjust and inappropriate to proceed with a full trial as against the grandmother and to have granted a final injunction endorsed with a penal notice against her. Basic principles of fairness required that she be given proper notice of the relief sought against her and the grounds for it. The proper course, in such circumstances, would have been to adjourn the hearing as against the grandmother and, if appropriate, to grant an interim injunction against her, on a without notice basis, with a return date specified. Such a course would have ensured the proper protection of G and her interests, whilst ensuring that the grandmother's rights to a fair trial were also preserved.

106. We would accordingly allow the grandmother's appeal and remit for re-hearing the question of whether a final injunction should be granted against her. We therefore make no comment as to the merits of the substantive case against her, nor as to her potential defence. It is a matter for the applicants to consider whether an application for an

interim injunction in the meantime is appropriate. Although the judge has had conduct of the proceedings for some time, and has made a series of orders in G's best interests, we consider that fairness requires the rehearing of the application for an injunction against the grandmother to be conducted by another judge. We therefore remit this aspect of the case to the President of the Court of Protection, Sir Andrew McFarlane, to allocate the case to another Tier 3 judge of the Court.