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IN THE COURT OF PROTECTION

AND

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 20/12/2019

Before:

MR JUSTICE MORGAN

[Judgment given in public]

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IN THE MATTER OF Z
Between:

JK	**Applicant**
- and -	
(1) AB **(2) CD** **(3) EF** **(4) GH**	**Respondents**

- -
- -

Richard Dew and **Emma Hargreaves** (instructed by **Kingsley Napley LLP)** for **JK**
Eason Rajah QC and **Mark Baxter** (instructed by **Macfarlanes LLP**) for **AB**
Edward Cumming QC (instructed by **Mishcon de Reya LLP**) for **CD**
Tracey Angus QC (instructed by **Charles Russell Speechlys LLP**) for **EF and GH**

Hearing date: 25 November 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE MORGAN

The judge has given leave for this version of the judgment to be published on condition that in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MR JUSTICE MORGAN:

Introduction

1. On 26 November 2018, I made a detailed order in this case. I made that order after considering the matter on the papers and without a hearing, I can summarise that order as follows:

    i) The order recited the procedural history of the matter;

    ii) The order set out an undertaking by AB, EF and GH;

    iii) The order set out undertakings by CD;

    iv) I declared that Z lacked capacity to manage his property and financial affairs; this declaration was not made by consent but was made by me after considering the evidence relevant to that matter;

    v) Everything else in the order was with the consent of AB, CD, EF and GH;

    vi) The order contained four declarations which were expressed to be by consent; the first of these related to the question of contact between Z and CD; the other three declarations by consent related to certain lasting powers of attorney in relation to Z;

    vii) When making these declarations by consent, I had to consider, and I did consider, that it was proper for the court to make declarations by consent;

    viii) The order contained a number of further provisions expressed to be by consent; the first of these permitted the provision of a copy of the order to certain persons (including members of Z's family) to the extent that such provision was reasonably necessary in Z's best interests; the last of these provisions stated that Z and any other person affected by the order might apply to the Court pursuant to rule 13.4 of the Court of Protection Rules 2017 on notice to the parties;

    ix) I should explain that rule 13.4 applies where the court makes an order without a hearing or without notice to any person affected by the order; where rule 13.4 applies, a person affected by an order may apply to the court for reconsideration of that order.

2. AB is the wife of Z, CD is Z's brother and EF and GH are Z's daughters.

3. This is an application by JK, who is a son of Z, for the disclosure to him of certain documents which have been filed by the other parties in the course of these proceedings and prior to the making of the above order.

4. The documents sought by JK were summarised in the draft order sought by JK as:

    i) The expert medical reports filed in the original proceedings together with the instructions and material upon which those reports were based;

ii) Copies of all witness statements filed, together with exhibits (if the latter are part of the court file);

iii) Copies of any skeleton arguments filed;

iv) Any documents held on the court record which are relevant to the settlement reached with CD.

5. All references in this judgment to "rules" are to the Court of Protection Rules 2017, save where the contrary is expressly stated.

6. JK was notified of the original proceedings in accordance with rule 9.10 and Practice Direction 9B. He did not apply at any time in the past to be made a party to the proceedings and he still does not apply to be made a party. However, pursuant to rule 9.14, he is bound by any order made or directions given by the court in the same way that a party to the proceedings is so bound. In this way, JK is bound by the declaration I made as to Z's capacity. He is also bound by the other declarations which were made by consent.

7. JK's application is made pursuant to rule 5.9 and pursuant to the inherent jurisdiction of the court. The inherent jurisdiction of the court allows the court to give effect to the constitutional principle of open justice and relates to certain documents in certain circumstances. Mr Dew, for JK, appeared to accept that rule 5.9 exists in order to give effect to the same principle of open justice.

8. JK's application is opposed by AB and EF and GH. CD says that he is neutral as to JK's application although he has been represented by leading counsel (Mr Cumming QC) on the hearing of this application and CD has expressed the opinion that, notwithstanding his neutral position, he can see advantages in JK being given access to the documents which he seeks.

9. Before considering matters in more detail, there are a number of features of the position of JK on the one hand and AB, EF and GH on the other that are worthy of remark.

10. As regards JK, he could have applied at the outset, or even later before the above order was made, to be made a party. If he had applied, it was not submitted to me by anyone that he would not have been added as a party. As a party, he would have had access to the documents which he now seeks. He could have chosen to participate in the proceedings or, having seen the relevant documents, he could have remained neutral. In addition, the solicitors for AB have on a number of occasions, and in a number of ways, offered to engage with JK so as to inform him of what happened in the proceedings and have offered to give JK access to the expert in old age psychiatry, who is also treating Z, to ensure that JK was fully informed about the medical evidence which had been given by that expert and details of Z's treatment. However, JK did not respond to any of these offers of assistance at the time at which they were made and he remains unwilling to engage in the way which has been proposed. It is also remarkable that although JK relies on the open justice principle which is designed to assist public scrutiny of cases which ought to be heard in public, the original proceedings were not dealt with in public and were never going to be dealt with in public. Further, JK does not apply for an order opening up the documents

which he seeks to public scrutiny but he accepts (in the draft order which he seeks) that any documents which he is permitted to see must remain confidential so that he may not disclose them to any third person (subject to very limited exceptions, such as for the purpose of taking legal advice). In addition to all this, at the outset of the hearing of JK's application, Mr Dew invited me to sit in private and thereby to exclude the public from hearing an application which was made in purported reliance on the open justice principle. I acceded to that application which had the support of all the parties and which I considered appropriate in the best interests of Z.

11. But there are features of the opposition to this application which are also worthy of remark. As I have pointed out, JK could have applied to have been made a party to these proceedings and it seems that such an application would have succeeded, whereupon all the documents now in issue would have been seen by JK. Further, as explained, AB's solicitors (I infer with the approval of EF and GH) have offered to provide JK with a considerable amount of information including information from the expert in old age psychiatry but yet AB, EF and GH oppose an application which seeks, amongst other things, disclosure of the evidence given by that expert to the court in the proceedings. Further, AB, EF and GH accept that JK is bound by the above order and has locus to apply under rule 13.4 for a reconsideration of the order. Nonetheless, they submit that JK should not have access to the documents which were before the court when it made the above order and if JK were minded to take legal advice on whether to apply to the court for a reconsideration of the order, he and his legal advisers should be left unaware of the material which was placed before the court and on which the court is likely to have relied, at least to some extent.

The legal principles

12. Rule 5.9 provides:

> "**5.9.— Supply of documents to a non-party from court records**
>
> (1) … a person who is not a party to proceedings may inspect or obtain from the court records a copy of any judgment or order given or made in public.
>
> (2) The court may, on an application made to it, authorise a person who is not a party to proceedings to—
>
> (a) inspect any other documents in the court records; or
>
> (b) obtain a copy of any such documents, or extracts from such documents.
>
> (3) A person making an application for an authorisation under paragraph (2) must do so in accordance with Part 10.
>
> (4) Before giving an authorisation under paragraph (2), the court will consider whether any document is to be provided on an edited basis."

13. It is agreed that rule 5.9(1) has no application in the present case because there was no judgment or order given or made in public. In any case, JK has been provided with a copy of the order of 26 November 2018. I did not give a judgment in relation to the making of that order.

14. JK's application is made under rule 5.9(2). It is accepted that JK is not a party to these proceedings. Rule 5.9(2) refers to "the court records". In *Dring v Cape Intermediate Holdings Ltd* [2019] 3 WLR 429, the Supreme Court considered the meaning of the same phrase, "the court records", and the phrase, "the records of the court", in CPR 5.4C. Baroness Hale of Richmond PSC said at [23]:

> "23. The "records of the court" must therefore refer to those documents and records which the court itself keeps for its own purposes. It cannot refer to every single document generated in connection with a case and filed, lodged or kept for the time being at court. It cannot depend upon how much of the material lodged at court happens still to be there when the request is made."

15. Earlier in her judgment, Lady Hale had discussed other matters which might throw light on what documents might be expected to form part of the court records. At [21], she explained:

> "Some indication of what the court records may currently contain is given by CPR Practice Direction 5A, paragraph 4.2A of which lists the documents which a *party* may obtain from the records of the court unless the court orders otherwise. These include "a claim form or other statement of case together with any documents filed with or attached to or intended by the claimant to be served with such claim form"; "an acknowledgement of service together with any documents filed with or attached to or intended by the party acknowledging service to be served with such acknowledgement of service"; "an application notice", with two exceptions, and "any written evidence filed in relation to an application", with the same two exceptions; "a judgment or order made in public (whether made at a hearing or without a hearing)"; and "a list of documents". It does not include witness statements for trial, experts' reports for trial, transcripts of hearings, or trial bundles."

16. At [22], Lady Hale stated that one would expect, in relation to the CPR, that the court records would include the claim form and the resulting judgments and orders but not all the evidence which had been put before the court.

17. In *Dring*, the Supreme Court did not attempt a comprehensive list of what documents would fall within the phrase "the court records". One reason for that approach in that case was that, as Lady Hale explained in [24], the current practice as to what was kept in the records of the court could not determine the scope of the court's powers to order access to case materials in particular cases. The purpose for which the court keeps its records was completely different from the purposes for which a non-party might properly be given access to court documents. Lady Hale explained that quite

apart from the provisions of CPR 5.4C, a non-party could seek access to case materials by relying on the inherent jurisdiction of the court to order such access in order to further the constitutional principle of open justice.

18. It was accepted that the meaning given in *Dring* to "the court records" should be applied to rule 5.9, in relation to the Court of Protection. I was not given any information as to what records are generally kept by the Court of Protection nor was I given any information as to what documents were part of the court records in the present case. It would appear from the discussion in *Dring* that if one attempted a comprehensive statement as to what constituted the court records in this case it would not extend to many of the documents which are sought by JK. In particular, it would not extend to the expert medical reports, the witness statements for the trial or the skeleton arguments. It would include the original application but, as will be seen, JK was given that at the outset of the original proceedings.

19. As in *Dring*, the argument in the present case really focussed on the constitutional principle of open justice as expounded in *Dring*. It is possible to summarise the scope of the principle in these terms, with particular reference to this case:

i) The principle applies to all courts and tribunals exercising the judicial power of the state; it is accepted that the principle applies to this court;

ii) It is for the court in question to determine what the principle requires in terms of access to documents or other information placed before the court;

iii) The question is how the jurisdiction is to be exercised in any particular case;

iv) The principle has two principal purposes, although there may be others;

v) The first purpose is to enable public scrutiny of the way in which courts decide cases; this is in order to hold the judges to account for their decisions and to enable the public to have confidence in them;

vi) The second purpose is to enable the public to understand how the justice system works and how decisions are taken; for this purpose, the public have to be in a position to understand the issues and the evidence adduced; the public need to have access to written material and should not be confined to what is expressed orally in court;

vii) The documents potentially within the scope of the principle include the written submissions and arguments and the documents placed before the court and referred to during the hearing;

viii) Although the court has power to allow access to documents in accordance with the principle, an applicant seeking access has no right to be granted access, save to the extent that the rules confer such a right;

ix) A person seeking access to documents must explain why he seeks it; he must show a legitimate interest in doing so;

x) A person seeking access to documents must explain why granting him access will advance the open justice principle;

xi) The court will conduct a fact-specific balancing exercise in relation to all relevant considerations;

xii) The considerations include the purpose of the principle and the potential value of the information in question in advancing that purpose;

xiii) The considerations also include any risk of harm to the judicial process or the legitimate interests of others;

xiv) A legitimate interest of another person might arise from the need to protect the interests of a mentally disabled adult or from the protection of privacy more generally;

xv) The practicalities involved in granting the request are relevant to the ultimate decision;

xvi) The proportionality of the request is relevant to the ultimate decision;

xvii) The applicant will be expected to pay the costs of granting access;

xviii) "In short, non-parties should not seek access unless they can show a good reason why this will advance the open justice principle, that there are no countervailing principles of the sort outlined earlier, which may be stronger after the proceedings have come to an end, and that granting the request will not be impracticable or disproportionate."

20. I was also referred by the parties to *Dian AO v Davis Frankel & Mead* [2005] 1 WLR 1074 and *ABC Ltd v Y (Practice Note)* [2012] 1 WLR 532. In the course of argument, I referred the parties to the decision of the Court of Appeal in *Dring* [2019] 1 WLR 479. That decision is helpful because it contains a summary of the case law which showed how the principle of open justice applies in relation to an application by a non-party for disclosure of documents and how the law in that area has developed. The decision is also helpful as it contains a discussion of the earlier case of *Dian* and it addresses a point which arises in the present case, as I will explain below.

21. It is clear that where there is a hearing in open court, the open justice principle is engaged and the principles laid down by the Supreme Court in *Dring* as to the disclosure of documents apply. This is the position even if there is no judicial decision following the hearing in open court because, for example, the case is settled before judgment. That was the position in *Dring* itself. In the Court of Appeal in that case, there is a detailed discussion as to why the open justice principle is relevant to disclosure of documents to a non-party where there has been a hearing in open court even where there is no judicial decision: see at [123] – [126].

22. In the present case, there was no hearing in open court. Ms Angus, for EF and GH, submitted that the open justice principle was simply not engaged in this case and was not relevant to JK's application for disclosure of documents. The decision of the Court of Appeal in *Dring* is relevant to that submission. The Court of Appeal considered the earlier decision in *Dian*. It was explained (at [116]) that the application for disclosure of documents in *Dian* related to documents in respect of three interlocutory applications. One of these applications was determined in open court,

one was determined on the papers (an application for permission to serve out of the jurisdiction) and a third was ultimately not pursued. In *Dian*, the judge allowed access to documents relating to the application which had been considered in open court and also those relating to the application which had been considered on the papers; however, the judge refused access in relation to the application which was not pursued. In relation to that application, the judge said that such an application should generally be refused unless there were strong grounds for thinking that it was necessary in the interests of justice to allow inspection.

23. The Court of Appeal in *Dring*, at [126] and [128], approved the approach adopted in *Dian*. Thus, the open justice principle applies where there has been a hearing in open court (whether or not a judicial decision was given) and to an application which leads to a judicial decision on the papers (that is, where there has not been a hearing in open court). Further, something akin to the open justice principle applies where there has been an application which is not pursued but where "there are strong grounds for thinking that it is necessary in the interests of justice" to allow a non-party to have access to the relevant documents.

24. *ABC v Y* involved a series of hearings in private. Later, a non-party applied for disclosure of relevant documents. The judge held that as there had been a good reason for holding the hearings in private there was similarly a good reason for not allowing a non-party to have access to the documents. The judge said, in the light of *Dian*, that even where there had not been a hearing in open court, the court could still permit a non-party to have access to documents where there were strong grounds for thinking that such access was necessary in the interests of justice. As there had been judicial decisions at private hearings in that case, then following *Dian* (as explained by the Court of Appeal in *Dring*) the judge could have held that the open justice principle was engaged but it was still open to the judge to dispose of the case in the way in which he did. Essentially his view was that if there had been a good reason, notwithstanding the principles as to open justice, to hold the hearings in private, that would normally also be a good reason to withhold access for a non-party to the material used at those hearings.

25. Applying the above reasoning to the present case where the order of 26 November 2018 was made without a hearing in open court, but after the court considered certain documents on the papers, the principle of open justice is engaged in relation to matters which involved a judicial decision. As regards matters which were agreed between the parties and which did not involve a judicial decision, the principle of open justice is not engaged save that there remains a power for the court to permit access to documents filed with the court if there are strong grounds for holding that such access is necessary in the interests of justice.

26. Finally, as to the legal principles as to open justice, it is clear that an entirely private or commercial interest in a document can qualify as a legitimate interest: see the Court of Appeal in *Dring* at [135]. That does not, however, mean that all things which qualify as legitimate interests are to be given identical weight when carrying out the balancing exercise described above. Some legitimate interests will be more weighty than others.

27. Mr Dew raised a question as to the relevance of section 1(5) of the Mental Capacity Act 2005. That subsection provides that "[a]n 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". Mr Dew submitted that section 1(5) is not relevant to the present application. I agree. This application does not involve the court doing an act or making a decision "for or on behalf of" Z: and see *Re O* [2014 Fam 197 at [33]. That means that the best interests of Z are not determinative. Nonetheless, as *Dring* makes clear, the legitimate interests of Z and any need he may have to be protected from any consequences of the order sought by JK are relevant considerations to be taken into account in the balancing exercise referred to above. Further, under rule 1.1 which defines the overriding objective, I am required, so far as practicable, to ensure that Z's interests and position are properly considered: see rule 1.1(3)(b).

28. Mr Cumming referred me to subsections (3), (6) and (7) of section 4 of the Mental Capacity Act 2005. Section 4(1) of that Act is relevant where a person, such as the court, is "determining for the purposes of this Act what is in a person's best interests". However, I consider that I am not determining for the purposes of that Act what is in Z's best interests although I am considering what his interests are in relation to the present application. Section 4(3), (6) and (7) do not contain the same words as appear in section 4(1) about a person determining best interests for the purposes of the Act but I consider that they are all governed by the opening words of section 4(1). However, given that I am considering what are Z's interests in relation to the present application, I can have regard to the matters identified in section 4 where the court is asked to make a best interests decision. Those matters include Z's past and present wishes and feelings, his beliefs and values and other factors that Z would consider if he were able to do so. Those matters also include the views of anyone engaged in caring for Z or interested in his welfare and the views of any donee of a lasting power of attorney granted by Z.

The original proceedings and the order of 26 November 2018

29. In the light of the above statement of the applicable legal principles, I will now describe what led to the making of the order of 26 November 2018.

30. Prior to 23 November 2018, there were a number of hearings at which directions were given. Pursuant to those directions, the parties filed witness statements and expert reports. The expert reports related to the mental capacity of Z.

31. The proceedings were listed to be heard in a window commencing on 26 November 2018, with a time estimate of 7 days. The case was due to be listed before me. On 23 November 2018, the solicitors for AB wrote to me stating that the parties had agreed a draft order which I was asked to make. The draft order was sent with the letter. The letter explained that the draft order included a declaration that Z lacked capacity to manage his property and affairs. The parties recognised that the court would only be prepared to make such a declaration if it was satisfied on the evidence before it that such a declaration was appropriate. The letter of 23 November 2018 specifically drew my attention to the expert evidence in the case. That evidence was principally from Professor Howard but in addition there was evidence from a Dr Series. The letter invited me to make this declaration and the remainder of the draft order without an oral hearing but stated that if I would be assisted by an oral hearing, then the parties agreed that such a hearing should be arranged.

32. On receipt of the letter of 23 November 2018, I considered the draft order. I read the expert evidence which I had been invited to read. On the basis of that evidence, I concluded that Z lacked capacity to manage his property and financial affairs and I considered that it was appropriate for the court to make a declaration to that effect.

33. I considered the remainder of the draft order and, in particular, the draft declarations which I was asked to make by consent. I considered whether it was appropriate to make declarations by consent appreciating that whilst I had jurisdiction to make a declaration by consent, I should be cautious before doing so. The draft declarations by consent related to the dispute between AB, EF and GH on the one hand and CD on the other as to lasting powers of attorney which Z had granted or purported to grant. The draft declarations were sought as a result of the parties' agreement as to which lasting powers of attorney would be effective and which would not. The parties' agreement was helpful as it resolved that dispute between the parties and provided clarity in that important matter. The draft order asked the court to declare that the parties' agreement about the powers of attorney was in the best interests of Z. I considered that it was in the best interests of Z for the dispute to be resolved by agreement. On that basis, I made the declarations by consent in accordance with the draft order. Finally, I reviewed the remainder of the draft order and concluded that it was a proper order to make. I considered that I did not need to have an oral hearing before reaching these conclusions. I made the order accordingly.

34. Applying the above principles to what occurred in relation to the order of 26 November 2018, the open justice principle is engaged in relation to those parts of the order which involved a judicial decision. That was certainly the case in relation to the declaration as to the capacity of Z. As regards the declarations by consent, there was an element of judicial decision making involved in that I had to be satisfied that it would be appropriate to make declarations by consent. Conversely, I did not have to decide the underlying dispute about the powers of attorney because the parties had settled that dispute. As I have explained, my judicial decision related to it being appropriate for me to record the agreement of the parties as declarations by consent but I did not make a judicial decision as to who would have succeeded if the disputed matters were to be determined at a trial. Accordingly, in relation to the substantial body of evidence which related to that dispute, I consider that the open justice principle is not engaged; however, I have power to allow JK to have access to that material if there are strong grounds for holding that it is in the interests of justice to allow him to have access. As regards the remainder of the material which was provided to the court in relation to matters which were settled and which were the subject of other parts of the order of 26 November 2018, the open justice principle was not engaged but, as before, I have power to allow JK to have access to that material if there are strong grounds for holding that it is in the interests of justice to allow him to have access.

Further facts

35. Before referring to other matters in relation to the original proceedings, it may be relevant to refer to certain events concerning the family trust which preceded the issue of those proceedings. Z had been the protector of that trust. On 30 October 2017, the trustee constituted a protector committee in view of serious concerns which it then had about Z's capacity to act as the protector of the trust. The protector committee consisted of a limited company, AB, EF, GH and another son of Z, but not JK. This

decision was approved by Z at the time. On 15 January 2018, the trustee met JK to explain to him the trustee's decision to constitute this committee. The trustee explained that its decision was supported by a medical report dated 21 December 2017, as to the capacity of Z, prepared by a consultant neurologist, Dr Jarman. In so far as JK is concerned about his exclusion from the protector committee, that matter came before the issue of the original proceedings.

36. On 21 February 2018, Macfarlanes as solicitors for AB issued the original proceedings in the Court of Protection. The application form identified the parties as AB, CD, EF and GH, of course by name and not just by anonymised initials. The application form also referred to JK, by name, and his brother as persons to be notified of the proceedings. A continuation sheet to the application form identified the relief which was sought by AB. The relief sought included declarations as to Z's capacity to manage his property and affairs and as to a number of other matters such as specified lasting powers of attorney and the contact between Z and CD.

37. On 23 February 2018, Macfarlanes wrote to JK. They stated that JK may have noticed that Z was confused and forgetful and was susceptible to undue pressure from people looking to take advantage of him. They informed JK of the proceedings in the Court of Protection and served on JK the application form, a notice that the application form had been issued and an acknowledgment of service/notification form. The acknowledgment of service form stated how JK could apply to be joined as a party to the proceedings. Macfarlanes' letter specifically drew attention to the possibility that JK could apply to be joined in the application. The letter also referred to an application which AB had made against CD the previous week seeking restrictions on CD's contact with Z, which restrictions had been imposed by the court. The letter stated that matters were being dealt with on a confidential basis, that JK should not discuss them with third parties but that he could speak to his mother and his siblings. It was also stated that JK should seek legal advice if he would find that helpful. JK was also invited to contact the named solicitors at Macfarlanes.

38. On 26 February 2018, Macfarlanes wrote again to JK enclosing the continuation sheet for the notice of the application which had been omitted from the documents sent on 23 February 2018. This continuation sheet contained very similar information to that already provided with the application form.

39. On 28 February 2018, Macfarlanes wrote again to JK and stated that they would be very happy to speak to him or to meet him to discuss the proceedings and the order (imposing restrictions on CD) and any questions which JK might have.

40. JK did not apply to be joined as a party to the original proceedings. He did not reply to the letters from Macfarlanes. He did not contact Macfarlanes for further information.

41. JK gave evidence in a witness statement as to what he did and what he thought following receipt of these letters from Macfarlanes. He said that he called AB to find out what was going on. He said that he knew that AB had "made a mistake and gone too far". He said that he thought that CD could "fight his own battles" and that he did not understand the impact that the proceedings would have on Z's future welfare and affairs and JK's relationship with Z. He said that he had not been told that not engaging in the original proceedings would mean that he would be precluded from

obtaining information about what was going on. He also thought that if he wanted information he would simply ask the family office. Later, during the course of the original proceedings, JK did intend to give a witness statement via CD's lawyers. In the event, he did not give such a statement. He said that it was clear to him that his mother would not stop the proceedings and that it would be too upsetting for Z for JK to become involved in the dispute.

42. It may matter in this case whether JK was given proper information about the subject matter of the original proceedings and was given the opportunity to be joined as a party to those proceedings. The documents served on JK did make it clear that the court would be asked to decide as to Z's capacity. It should have been obvious to JK that a decision that Z lacked capacity would mean that Z could not act as a decision maker of any kind in relation to the family trust. It should also have been obvious to JK that in so far as he had asked Z in the past to act as a decision maker in relation to that trust so that JK would benefit from such a decision, that would not be possible if it were determined that Z lacked capacity. It should also have been clear to JK that the court in the original proceedings would be asked to decide on the validity of powers of attorney granted by Z and that those decisions would determine who were and who were not the validly appointed attorneys for Z. Further, in addition to what JK could see from the documents served on him, he was invited to contact Macfarlanes for further information if he wished to have any.

43. Having decided what JK was told by Macfarlanes at the outset of the original proceedings, it may not matter why JK did not apply to be joined as a party. I am somewhat sceptical as to the reasons he gives for not applying to be joined. His reasons have the appearance of being a reconstruction of his position at the time with a view to suggesting explanations as to why he did not participate in the proceedings at the time but yet he now applies for information which he could have obtained earlier. I am prepared to accept that he may not have foreseen in February 2018 everything that happened after the order of 26 November 2018. However, I consider that I do not need to make any findings as to the reasons JK had for not participating at the earlier stages. This is because what is of greater relevance is the fact that JK was given the ability to involve himself in the proceedings and to be fully informed about them but he did not seek to be involved and he did not ask for any information about them.

44. On 4 December 2018, Macfarlanes emailed JK to tell him that the original proceedings had recently ended and that it was important that Macfarlanes met JK to discuss the outcome and what it meant for JK's family. JK did not reply to this email.

45. On 6 December 2018, Macfarlanes emailed JK again. Macfarlanes said that they had spoken to AB and that JK had himself spoken to AB and wanted to know what the proposed meeting would be about. Macfarlanes explained why it would be helpful to have a meeting to give JK a full explanation of the background to the proceedings, the outcome of the proceedings and the practical effect of the proceedings. JK was invited to raise any other matters or questions he chose. JK did not reply to this email.

46. On 7 December 2018, in the absence of a meeting with JK, Macfarlanes wrote a detailed letter to JK referring to Z's capacity and stating that Z's doctor, Professor Howard would be happy to speak to JK about Z's illness and care needs. The letter went on to describe the background to the proceedings and the proceedings

themselves. The letter then described the outcome of the proceedings. It stated that CD did not have authority to act on behalf of Z in relation to Z's property or financial affairs or the family trust and that, similarly, JK did not have that authority. The letter stated that AB, EF and GH would appreciate JK's input and advice with regards to matters relating to Z even though JK did not have a formal role. Finally, the letter invited JK to ask Macfarlanes any other questions about the proceedings, their outcome or impact and stated that the trustee of the family trust was also intending to speak to JK about the impact which Z's lack of capacity had on the trust and its administration.

47. On 11 December 2018, the trustee of the family trust wrote to a number of persons, including JK, to record the trustee's position in response to having been informed of the declaration by this court on 26 November 2018 as to Z's lack of capacity. The trustee stated that it was reviewing its practices in relation to the administration of the trust in view of the fact that Z lacked capacity to manage his property and financial affairs. The letter then set out the procedures to be adopted in relation to Z. The letter stated that these procedures were designed to ensure that Z would continue to feel supported by the trustee and by his family. The letter also dealt with the position of CD in relation to the trust.

48. On 22 February 2019, the trustee of the family trust wrote again to JK referring to the constitution of the protector committee on 30 October 2017 and the meeting with JK on 15 January 2018 and stated that the earlier concerns of the trustee were confirmed by subsequent medical evidence and the declaration made in this court on 26 November 2018.

49. On 10 April 2019, Kingsley Napley wrote to Macfarlanes stating that they acted for JK. They stated that JK was concerned as regards Z's welfare and the conduct of those with control and influence over Z's affairs. They referred to the original proceedings. They stated that it was important that JK received some clarity in circumstances where, according to a letter from solicitors for CD, the trustee had misreported the position regarding Z's capacity to third parties. This must have been a reference to the trustee's letter of 11 December 2018. I do not see anything in that letter which amounted to a misreporting as to Z's capacity. Kingsley Napley then requested a number of documents including copies of the lasting powers of attorney and the documents now being sought on the present application by JK.

50. On 15 April 2019, Macfarlanes replied to Kingsley Napley stating they were carefully considering the request and inquiring as to the letter from the solicitors for CD to which reference had been made.

51. There followed further correspondence between Kingsley Napley and Macfarlanes. Those solicitors met on 20 May 2019 and Kingsley Napley were provided with the lasting powers of attorney and the order of 26 November 2018. On 24 May 2019, Kingsley Napley again requested documents along the lines of the documents now sought. They said that JK needed transparency and in the absence of the agreement to provide the documents, JK would have no option but to apply to the court for disclosure of "the court file".

52. On 7 June 2019, Macfarlanes wrote a long letter to Kingsley Napley setting out the history of the original proceedings. They referred to the events in relation to the

family trust as Kingsley Napley had wrongly suggested that the fact that JK was not on the protector committee was the result of the court proceedings, which it was not. Macfarlanes then dealt with Z's best interests and expressed concern about certain behaviour on the part of JK. They then proposed a way forward to allow JK to have a full understanding of Z's capacity. They stated that Professor Howard had been treating Z since January 2018 and proposed a meeting between JK and Professor Howard. JK did not respond to this suggestion and no such meeting has taken place. The letter ended by encouraging JK to engage positively with the remainder of the family.

53. On 1 July 2019, JK issued the present application for disclosure of documents. The application was supported by a witness statement from Mr Mowat, JK's solicitor. Mr Mowat stated that JK had been excluded from family, financial and personal matters in consequence of the original proceedings. He gave the particular example of the forming of the protector committee which did not include JK, although this had happened before the issue of the original proceedings. Mr Mowat said that JK did not accept that Z lacked capacity for all matters. Mr Mowat explained that he had been asked to advise JK as to his position and to inform JK as to how the court made the orders which it did and he expressed the view that he could not do that without the documents he had requested. He said that the application was made for three reasons:

    i) JK wished to understand the proceedings, to understand the issues in dispute and to have access to the evidence; JK was also concerned, it was said, about the exclusion of CD;

    ii) JK wished to understand how and why the proceedings concluded; and

    iii) Mr Mowat wished to advise JK as to what the proceedings decided, as to Z's capacity and as to JK's options.

54. There has now been a considerable exchange of evidence in this application. JK has served his own witness statement. He made detailed comments about his relationship with Z and with the other members of the family. He stated that while Z's capacity had diminished with age and he had become more vulnerable, the recent attitude of the other family members was disparaging and hugely disrespectful of Z. JK explained that he would like to understand the evidential basis for the declaration as to Z's capacity. He stated that as regards the powers of attorney, the important thing was that they were exercised properly. He said that he wanted to understand and scrutinise what happened in the original proceedings. He said that he wanted to be able to explain matters to Z himself. He suggested that Z wanted to seek independent legal advice in relation to the original proceedings and in relation to JK's application.

55. In the course of this application, Professor Howard has prepared two reports as to Z's capacity. The first report is dated 28 August 2019 and contains just over 7 pages. The second report is dated 19 September 2019 and contains 2½ pages accompanied by a lengthy CV. Those reports contain considerable detail as to Professor Howard's assessment of Z and the deterioration observed in Z over time. I will not set out much detail as to Z's medical condition and mental capacity but I will summarise the reports as stating:

    i) Z is physically frail and extremely vulnerable to pressure and influence;

ii) Z obviously lacks capacity and displays disorientation and confusion;

iii) In particular, Z does not have capacity to manage his property and affairs because of his memory impairment, disorientation and vulnerability to influence;

iv) When Z is relaxed and well supported and when the subject does not involve any degree of family dispute or conflict, Z retains a limited capacity to weigh up options and to make and express a decision; this is limited to the most simple and straightforward decisions;

v) Professor Howard has been treating Z since January 2018 and has seen significant deterioration in Z since that time;

vi) Z no longer understands his condition or his lack of capacity although he does understand that he is dependent on his family;

vii) Z had deeply held views as to the importance of his family;

viii) Z is adversely affected by conflict and tension in his family environment;

ix) Z did not understand the original proceedings;

x) Z does not understand what is involved in the present application;

xi) Professor Howard is most concerned that if Z were to be asked to be involved in JK's application and/or further assessment and/or meetings with lawyers, he may be caused significant distress and suffering.

56. Professor Howard has served a witness statement dated 20 November 2019 confirming the contents of these two reports. He also stated that he had met Z again on 5 November 2019 when he reviewed the position which remained the same as described in the two reports.

57. In his first report, Professor Howard related an incident on 15 January 2019 involving Z, JK and Professor Howard, who was visiting Z in Z's apartment. During this visit, JK telephoned Z from an adjoining apartment. Professor Howard heard JK swearing angrily at Z. Z asked JK if he would like to speak to Professor Howard and they then spoke for about 20 minutes. JK told Professor Howard that he doubted that Z's capacity had diminished in any way. JK said that Z had manipulated Professor Howard into believing that he lacked capacity and that Z was "a fucking fraud". Professor Howard offered to meet JK to explain his assessment of Z's condition.

58. In his witness statement, JK has referred to Professor Howard's account of the conversation on 15 January 2019. He rejected the suggestion that he was abusive to Z or that he called Z a fraud. JK said that he was unhappy that Professor Howard was spending time with Z. JK said that if he had used the words "fucking fraud" he would have directed them at Professor Howard rather than Z. In his witness statement he apologised for using that language but he said that he felt frustrated. He agreed with Professor Howard that conflict had a negative effect on Z but he said that he had not brought about conflict.

59. Although there are obvious difficulties in resolving a conflict of evidence between Professor Howard and JK on a reading of their evidence and without cross-examination, I can comment that Professor Howard's account is more likely to be accurate. Professor Howard has no reason not to give a faithful account. The only possible reason to doubt his account is that JK may have been somewhat incoherent and he did call Professor Howard a fraud but this was misunderstood by Professor Howard as referring to Z. Neither version of the conversation reflects any credit on JK. If he called Z a fraud, then that is very revealing as to his relationship with Z, notwithstanding many statements in his evidence which seek to portray a very different relationship between Z and JK. If JK called Professor Howard a fraud, then it seems that JK is not prepared to accept Professor Howard's professional judgment on the matters on which he has expressed his considered opinion. However, I have been given no reason to doubt Professor Howard's professionalism, or objectivity or integrity so my conclusion would be that JK is being irrational on the subject of Z's incapacity.

60. On 18 November 2019, AB applied for permission for Professor Howard to attend the hearing of JK's application for disclosure in order to give oral evidence as to the capacity, health and best interests of Z. AB explained that Professor Howard could assist the court if it had any questions in relation to those matters and Professor Howard was tendered for cross-examination by Mr Dew, counsel for JK. Professor Howard did attend the hearing on 25 November 2019. I did not wish to ask Professor Howard any questions to supplement his reports and his witness statement in relation to JK's application. Mr Dew did not wish to ask Professor Howard any questions and suggested that the application for permission to have Professor Howard in court and the fact that he was tendered for cross-examination was entirely inappropriate and, in any event, unnecessary for the purposes of dealing with JK's application for disclosure.

61. In response to JK's application, AB, EF and GH gave considerable evidence as to JK's behaviour which it was said by them was relevant to my decision as to JK's application for disclosure. JK responded by saying that this evidence was untrue or inaccurate and was, in any event, irrelevant to my decision. The evidence being irrelevant, he said it would not help me if he were to give his version of events and, in the main, he did not deal with the allegations against him. With one exception, to which I will refer below, I will not make findings as to these matters. I do not agree with JK that this evidence was irrelevant although in the end I am able to deal with his application without making findings in relation to it. The evidence was relevant because, if accurate, it showed that JK was a considerable source of conflict in the family, that his behaviour was unjustified and that it posed a risk of Z being involved in the conflict leading to harm to Z, contrary to his best interests. However, there are difficulties in my making findings of fact on disputed matters without the evidence being tested by cross-examination. Further, if I held that JK is a source of conflict and is ready to involve Z in that conflict in a way which is harmful to Z, the outcome of this application will not have a direct bearing on that possibility. If, in the past, JK has behaved in that way, the dismissal of his application will not of itself stop JK's behaviour (unless the court imposes restrictions on JK and I have not been asked to do that). Similarly, if JK succeeds in his application to any extent, he will obtain documents which will probably not tell him very much but which may encourage him to involve Z in conflict and to cause harm to Z's best interests. In addition to these

considerations, there is the additional point that it may not help the members of this family to co-operate with each other in the future if I were to examine in detail all of the allegations and cross-allegations which have been made particularly where I do not need to do so to determine the present application.

62. The exception to my decision not to refer to the evidence as to JK's behaviour relates to the events of 3 September 2019. I have evidence from AB and from JK in relation to these events. In summary, AB recounted how JK came to see Z at his home on 3 September 2019. JK asked Z to transfer to JK £250,000 to enable him to "defend the proceedings". It was not made clear whether this was a reference to the present application or to quite separate proceedings concerning JK's son. It was clear to AB that JK wanted money quickly. AB said that JK was intimidating and provocative in his language to Z (and AB). JK told Z that JK was going to fly to the family office in Switzerland to sort matters out. JK made a recording of Z agreeing to give JK the money. AB stated that Z did not understand what was going on.

63. Later on 3 September 2019, Z telephoned the family office and asked them to give JK the money in cash. JK was present when the telephone call or calls were made. Later that evening, JK arrived and told AB that he was taking Z to the family office in Switzerland and he had booked a plane for the next day. Z said that he did not think he should go and that made JK angry.

64. JK accepts that he asked Z for money but he explains that on the basis that Z had repeatedly told JK that he would provide financial support for legal proceedings. JK also said that Z had asked JK to take Z to Switzerland.

65. Whilst I will not make specific findings about who said what and the tone they used, I can comment that JK's behaviour appears to me to be completely inappropriate in the light of Professor Howard's evidence as to the physical and mental state of Z. It should have been obvious to JK that it was not in Z's best interests to fly him to the family office in Switzerland to have a confrontation there in order to force the family office to provide the money to JK, contrary to what they had written to others, including JK, on 11 December 2018, that they would not be able to accept Z's instructions to make substantial payments out of the trust. If that was not obvious to JK, then his perception as to how to behave and the adverse effect of his behaviour on Z is seriously defective. If it was obvious to JK that he was not acting in the best interests of Z but was determined to obtain a large sum of money from the trust, then JK is also open to serious criticism.

Discussion and conclusions

66. Before considering the position in more detail, I comment that this is an unusual case in which to attempt to apply the open justice principle. The original proceedings were dealt with in private. The application for disclosure was heard in private. JK does not apply for the public to have access to any documents in these proceedings. It follows that if I were to accede to his application, this would not enable the public to scrutinise the way in which courts decide cases nor would it allow the public to understand the issues and the evidence adduced. In many respects, this case is not about open justice at all. Instead, it is an application by one individual for information about what happened in the proceedings where any such information will remain private. The parties are entitled to say that if JK had participated in the proceedings,

he could have had all this information but he chose not to obtain it. JK is entitled to respond that if he could have had all the information earlier, what is the difficulty about providing him with the information at this stage. The parties are then entitled to answer that by saying that they have offered repeatedly to provide JK with the information either from Professor Howard as to medical matters or from Macfarlanes as to anything else but JK has repeatedly refused to accept the information in that way. Instead, JK has insisted on the information being provided by means of disclosure of a large amount of material which had earlier been prepared, including a substantial body of evidence which was never used at any court hearing or in any decision.

67. Notwithstanding that general comment, I will attempt to analyse the case by applying the principles as to open justice as that is the way in which JK's application is made. The major event in the original proceedings was the making of the order of 26 November 2018. As I explained earlier when discussing the legal principles, the open justice principle is engaged in relation to those parts of the order which involved a judicial decision. The declaration as to the capacity of Z involved a judicial decision. As regards the declarations by consent, there was an element of judicial decision making involved but there was not a judicial decision in relation to the underlying dispute about the powers of attorney, because the parties had settled that dispute. Accordingly, in relation to the substantial body of evidence which related to that dispute, the open justice principle is not engaged; however, I have power to allow JK to have access to that material if there are strong grounds for holding that it is in the interests of justice to allow him to have access. As regards the remainder of the material which was provided to the court in relation to matters which were settled and which were the subject of other parts of the order of 26 November 2018, the open justice principle is not engaged but, as before, I have power to allow JK to have access to that material if there are strong grounds for holding that it is in the interests of justice to allow him to have access.

68. It follows that I should consider the application of the open justice principle in relation to three different topics. The first concerns the evidence relevant to the declaration as to Z's capacity. The second concerns the evidence as to the disputed lasting powers of attorney. The third concerns the evidence as to matters which were settled and did not involve a judicial decision.

69. The declaration as to Z's capacity was based on medical evidence which was not disputed by the parties. JK had been told at the outset that the proceedings would involve the court being asked to determine Z's capacity but yet JK showed no interest whatsoever in being involved in that matter. He failed to respond to offers from Macfarlanes to answer any questions he might have had. The principal evidence came from Professor Howard. Professor Howard remains involved with Z's care. He has prepared two further reports which have been provided to JK. JK has been invited to meet Professor Howard to ask any questions which he might have but he has shown no interest in doing so. The only time that JK spoke to Professor Howard (on 15 January 2019) he did not use the opportunity to seek information about Z's capacity. JK did not want his counsel to cross-examine Professor Howard on any matter.

70. I have already said that I have been given no reason to doubt the professionalism, objectivity or integrity of Professor Howard. If JK wanted more information about Z's capacity, he has not put forward any good reason as to why he should obtain such

information by means of an order as to the evidence prior to the order of 26 November 2018 instead of obtaining the information in the other ways in which it has been offered. Insofar as the medical evidence already provided to JK, in the form of Professor Howard's two recent reports, deal with the up to date position rather than the position before November 2018, it is obviously the up to date position as to Z's capacity which matters. JK stresses that he has no present intention of applying to the court for a reconsideration of the declaration as to Z's capacity but if he were to apply for a reconsideration, then the court would focus on the current position in that respect and that is the subject of the more recent reports.

71. I consider that I have not been given a good reason for the court to make a compulsory order that the parties disclose the medical evidence which was relied upon when I made the order of 26 November 2018. Conversely, I am not persuaded that there is any very powerful reason why that evidence should be withheld. As I understand it, Professor Howard is prepared to answer all proper questions from JK as to Z's capacity in the past and at present. It is therefore not obvious to me why Professor Howard's earlier reports should not be available to JK if he genuinely wants to know what is in them.

72. I suspect that the dispute about the previous medical evidence has been caught up in the wider dispute about disclosure of documents. JK's application is for everything or virtually everything which was filed with the court, including material relating to a dispute with CD which has been settled and the parties can legitimately take the view that that dispute should stay settled. Further, AB, EF and GH have real concerns about JK's behaviour if he had access to all of the documents which he seeks and that behaviour might adversely affect Z. As against that, as I have already stated, absent any restrictions on JK's behaviour, AB, EF and GH will no doubt continue to have concerns about JK's behaviour whether he obtains the documents or not.

73. I also suspect that this application for disclosure is being brought and resisted for reasons which go beyond the legal arguments deployed before me. JK plainly feels excluded and wants the court to make orders in his favour and against AB, EF and GH which he will be able to see as a vindication of his position. However, when I am asked to make a compulsory order, an applicant must establish the grounds for such an order. In relation to the medical evidence which is sought by JK, he has not persuaded me that I should make that order. As regards the continuing relationship between JK and his family, I do not consider it is appropriate for the court to make an order, which is not otherwise justified, just for the purpose of allowing JK to claim vindication.

74. I turn now to consider the evidence as to the dispute about the lasting powers of attorney. In the order of 26 November 2018, I made declarations by consent. I did not need to, and I did not, consider the evidence as to that dispute. Instead, I was aware that this dispute within the family had been settled by the parties to the proceedings and indeed they had settled the wider dispute in relation to CD. I considered that such a settlement was to be welcomed in the wider interests of family harmony and was in the best interests of Z who was adversely affected by tension and conflict. As I have indicated the open justice principle is not engaged in relation to documents which were relevant to the dispute which was settled but which were not relevant to the limited decision which was made. The judicial decision relied on the fact of the settlement not the merits of the underlying dispute. Although I could order disclosure

of these documents if there were strong grounds for thinking that such an order was necessary in the interests of justice, there are no such grounds and, indeed, JK's application was not put that way.

75. As regards the third category of documents, relating to matters in dispute which were settled where there was no judicial decision, the open justice principle is not engaged and JK has not tried to show strong grounds, or any grounds, why disclosure of such documents is necessary in the interests of justice.

76. Mr Dew submitted that JK was entitled to have disclosure of the documents which he seeks in order to understand why the original proceedings were in private. However, it is obvious why the original proceedings were in private. It was for the same reason as all parties, including JK, asked for the hearing of this application to be in private.

77. Then Mr Dew submitted that JK was entitled to have disclosure of the documents which he seeks in order to understand why Z was not a party to the proceedings. I do not know why Z was not a party and no one made any submissions to me as to what was appropriate in that respect. If JK genuinely does want to know the reason, then the proportionate way to obtain that information is for JK or his solicitors to ask Macfarlanes. If necessary, I will direct that Macfarlanes are able to provide that information to JK notwithstanding the fact that the original proceedings were conducted in private.

78. JK said that he wanted to understand and scrutinise what happened in the original proceedings. Insofar as the reference to scrutiny is a reference to scrutinising the behaviour of the court, the only specific matters mentioned on behalf of JK which might come within the subject of scrutiny appeared to be the reference to the proceedings being in private and to Z not being a party. Apart from those matters, the role of the court was limited to giving other case management directions and making the order of 26 November 2018. In this judgment, I have given a full explanation of the role of the court when it made the order of 26 November 2018. In fact, that explanation would not have been revealed by the disclosure of the documents sought by JK, which is what his application seeks.

79. Mr Dew submitted that JK wanted to know what was said about him in the original proceedings because the proceedings impacted on him. JK appears to have in mind, in particular, his exclusion from the protector committee and his allegation that the attorneys have been excluding him following the order of 26 November 2018. However, the proceedings did not lead to JK's exclusion from the protector committee which preceded the proceedings. Further, what has happened since the order was not dealt with in the proceedings. As to what was said about JK in the proceedings, I do not know what was said but, whatever it was, it played no part in any judicial decision so that the open justice principle is not engaged in relation to that.

80. JK has stated that he believes that Z wants JK to have access to the documents he seeks. In view of Professor Howard's evidence as to Z's capacity, I consider that Z has not formed any wishes in that respect. I can believe that JK has been able to influence Z to say words to that effect but I do not believe that the words represent Z's actual wishes. As to what Z's wishes would be if he had capacity, I think that Z would want JK to engage with Professor Howard to obtain a proper understanding of

Z's condition and for JK and his solicitors to engage with Macfarlanes to ask any other questions they might have rather than pursuing the present application against AB, EF and GH.

81. It is submitted on behalf of JK that it is in Z's interests to reduce conflict in the family. I am sure that is right and that is the wish of AB, CD, EF and GH also. However, I do not see how disclosure of a substantial number of documents to JK will serve to reduce conflict. The way to reduce conflict, so far as the subject matter of this application is concerned, is for JK to engage in a mature way with Professor Howard and if he genuinely wants to know more about the course of the earlier proceedings, for JK and his solicitors to ask Macfarlanes for information. It is not good enough for JK to say that he wants something and when that is not agreed by others for JK to say that the court must make an order in his favour to avoid conflict. JK can only obtain a court order in his favour if he demonstrates proper grounds for such an order.

82. Macfarlanes have offered to give JK information in the past and it was not suggested by the other parties that that was inappropriate by reason of the fact that the original proceedings were conducted in private. On the other hand, Macfarlanes have on occasion suggested that they might be inhibited in providing certain information to JK because the proceedings were conducted in private. There should not be any real difficulty in this respect. If all of the parties agree that JK can be given the information which he seeks, subject to restrictions as to its continued confidentiality and (possibly) other restrictions as to its use, then that information can be provided to JK. If, contrary to my expectation, there are difficulties in this respect, then JK or a party can seek a direction from the court.

83. It was submitted on behalf of JK that he should have access to the documents which he seeks so that he could explain them to Z. On the basis of Professor Howard's evidence, it is not in Z's best interests for JK to act in that way.

84. JK has stated that he is also concerned about the position of CD. The original proceedings involved a number of issues in relation to the position of CD. Those issues were settled by the parties to the proceedings in the carefully drafted order of 26 November 2018. CD has stated that he is neutral on JK's application and he did not give any indication that he supports the application in order to gain any advantage for himself. I do not see how JK can advance his application by claiming to be concerned about the position of CD.

85. JK complains about the way in which AB, EF and GH are acting as attorneys for Z. If JK has a legitimate complaint in that respect, then he can take legal advice as to his options but I do not see how disclosure of the documents sought in this case would assist in that respect.

86. In addition to the open justice principle, JK relies on the specific provisions of rule 5.9. JK has not shown that the documents which he seeks form part of the court records but if any of those documents were in the court records in this case, I would not exercise my discretion under rule 5.9 in a different way to the way in which I have decided the application so far as it is based on the open justice principle.

The result

87. I will dismiss JK's application for disclosure of documents whether under rule 5.9 or under the open justice principle.

88. I proposed to the parties that this judgment should be handed down in an anonymised form in open court. I made that proposal in view of the fact that *Dring* is a recent statement of the principles as to open justice and this case required the court to consider how those principles were to be applied in a case which had been conducted in private. Accordingly, the judgment may be relevant in other cases, in particular, in the Court of Protection. JK and the parties have agreed to that proposal and, accordingly, this judgment is given in open court in an anonymised form.