**IN CONFIDENCE**
**This judgment was handed down on 19th July 2023 at Birmingham Family Court.**

**Neutral Citation Number: [2023] EWCOP 52**

**IN THE COURT OF PROTECTION** **CASE NO: 14045574**

**IN THE MATTER OF THE MENTAL CAPACITY ACT 2005**
**AND IN THE MATTER OF X**

**BETWEEN**

**LINCOLNSHIRE COUNTY COUNCIL** **APPLICANT**

**-and-**

**X**
**(by their litigation friend, the Official Solicitor) (1)**
**LB (2)**
**MK (3)**
**AL (4)** **RESPONDENTS**

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**JUDGMENT**
**19TH JULY 2023**

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## Introduction

1. This Judgment concerns an application made by the Official Solicitor on behalf of the First Respondent ('X') for a contempt application listed on 19 July 2023 to be heard in private. The application for contempt has been issued by the Applicant Local Authority against the Second and Third Respondents, ('LB' and 'MK' respectively).

2. On the 3rd July 2023 at a Directions Hearing listed in respect of the contempt application, the Official Solicitor informed the Court and other parties that this application would be made. Although LB and MK had been personally served with notice of the Directions Hearing, and of the listed contempt application to take place on 19 July 2023, they did not attend the Directions Hearing and no communication was received by the Court from them.

3. Following the hearing on 3rd July 2023, this application was issued. The Court served a redacted copy of the application and the supporting document on the media via the Press Association at alerts.service@pamediagroup.com.on the 4th July 2023. On the 5th July 2023 the Court received an acknowledgment of the service of those documents.

4. The application to hear contempt proceedings in private is a significant one for any party to make, and a significant one for the Court to consider and determine: as the authorities demonstrate, open justice is a fundamental principle in a democratic society, and for good reason. It is a principle which must be closely guarded. Any application to depart from it should be subject to careful consideration, and robust and rigorous scrutiny.

**The application**

5. The primary application made on behalf of X by the Official Solicitor is that:
    a. The court should sit in private for the reason set out in rule 21.8(4)(d) of the COP Rules 2017, namely that a private hearing is necessary to protect the interests of X.
    b. In the event that the court sits in private, in any judgment issued by the court, any information that may lead to X's identity being discovered should be withheld pursuant to COPR r4.2. It is submitted that X should not be named in any judgement, and, further, that nor should LB or MK.

As a secondary position, it is submitted by the Official Solicitor that, if the Court determines that the court should sit in public, X's identity should not be disclosed, in order to protect X's interests and secure the administration of justice. The Official Solicitor contend and 'accept' that, in those circumstances, an application to withhold the disclosure of LB and MK's names pursuant to COPR r21.8(5) cannot succeed.

**The Law**

**The application to hear committal application in private: Open Justice and other Convention Rights**

6. The principle identified in paragraph 4 above has been clearly and unambiguously articulated in relevant authorities over many years. By way of example only, in **A v British Broadcasting Corporation** [2014] 2 WLR 1243 Lord Reed said:

> "It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy. As Toulson LJ explained in R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening) [2012] EWCA Civ 420; [2013] QB 618, para 1, society depends on the courts to act as guardians of the rule of law. … In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny." (Paragraph 23).

7. Those principles apply with more potent effect in criminal proceedings, and, also, in proceedings such as these for contempt of court and committal, where an individual's liberty is at risk, because they are alleged to have breached an Order of the Court. In **Re S (A Child) Identification: Restrictions on Publication)** [2004) UKHL 47, Lord Steyn stated:

> "23. The importance of the freedom of the press to report criminal trials has often been emphasised in concrete terms. In *R v Legal Aid Board ex parte Kaim Todner (A firm)* [1999] QB 966, Lord Woolf MR explained (at 977):
>
> > "The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely . . . Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it. However, Parliament has recognised there are situations where interference is necessary."
>
> These are valuable observations."

8. Later in the same Judgment, the House of Lords identified that the foundation of the jurisdiction to restrain publicity in a case such as that then before the Court derived from Convention rights under the ECHR, noting that that "is the simple and direct way to approach such cases. In this case the jurisdiction is not in doubt."

9. The importance of open justice under the European Convention of Human Rights is equally unambiguous. Article 6 itself provides that:

> ***Article 6: Right to a fair and public hearing***
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him
- to have adequate time and facilities for the preparation of his defence
- to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require
- to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him
- to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

10. Just as in national law, the European Court of Human Rights (EctHR) has repeatedly stressed the importance of open justice. Again, by way of example only:

"The court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society . . ."

Per the European Court of Human Rights *Diennet v France* (1995) 21 EHRR 554, at para 33

11. It is also important to acknowledge that the ECHR and national courts have identified that there are circumstances in which some exceptions or derogations to the principle that Court hearings, including, in exceptional circumstances, committal applications, should be heard in public. It is important to stress that those derogations are an exception to a strong principle of open justice.

12. The text of Article 6 expressly identifies such a possibility: "the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." Pursuant to Article 6, a hearing, or part of it, may take place in private when, in the opinion of the Court, a number of conditions are established: the restriction must be strictly necessary in the special circumstances of the case, where publicity would prejudice the interests of justice; exclusion of the press or public is required in the interests of morals, public order, national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require.

13. Likewise, national courts have accepted that in some, exceptional cases, derogation from the principle of open justice is required. See for example, per Maurice Kay LJ in **Global Torch Ltd v Apex Global Management Ltd** 2013) EWCA Civ 819: to protect against blackmail where on the particular facts there may need to be protection so as to avoid the full application of the open justice principle exposing a victim to the very detriment which the cause of action is designed to prevent. Some of the cases also refer to, as a relevant consideration, the role or position of the party or individual in the litigation: for example the position of a witness may be different that of the party who initiated proceedings (as it may not be unreasonable to regard that party as having accepted the normal incidence of the public nature of court proceedings). A witness may have no interest in proceedings and have a stronger claim to protection by the courts if liable to be prejudiced by publicity. See for example **R v Legal Aid Board, ex parte Kaim Todner** [1999) QB 966 and 978F.

14. In many instances where an application is made to depart from the principle of open justice, different rights arising under the ECHR compete. Article 8 of the ECHR provides as follows:

> **1. Everyone has the right to respect for his private and family life, his home, and his correspondence.**
> **2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others ".**

15. In the context of this right, in the case of **Y v Slovenia**, the European Court held (in the context of the victim of sexual abuse being cross-examined by her abuser during his criminal trial) that '*it was first and foremost the responsibility of the presiding judge to ensure that respect for the applicant's personal integrity was adequately protected at the trial'* (see in particular paragraph 109, and 101 – 103). In the case of **C v Romania** the court has emphasized (see in particular paragraph 85) the need to take measures to protect the rights and interests of victims of sexual abuse during court proceedings. Other aspects of the right in Article 8(1) are the right to maintain confidentiality about personal information, including medical information or other sensitive information about an individual's private law. However, the right set out in Article 8(1) is not absolute, and may be subject to interference as set out in Article 8(2).

16. Article 10 of the ECHR provides as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary

17. In **In re S (FC) (a child)** [2004) UKHL 47, Lord Styn stressed the importance of this right. See in particular, the passage quoted at paragraph 7 of this Judgment above.

18. Further, in **Re S.**, when considering, in particular, the interplay between Article 8 and 10, the House of Lords in, identified, from the Judgment in *Cambell v MGN Ltd* [2004) 2 WLR 1232, the following four propositions:

> "First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."

19. In carrying out that 'ultimate balancing test', it is necessary, in particular, to consider the type of interference which it is asserted open justice will have with the Convention rights of others. It is necessary to consider what may occur, how likely that is to happen, and the likely consequences which could flow from that interference with other Convention rights.

20. In 2015 (therefore several years before amendments were made to the Court of Protection, Rules of Procedure) the Lord Chancellor issued a Practice Direction: Practice Direction: Committal for Contempt of Court – Open Court [2015] 1 WLR 2195 (PD 2015). The Practice Direction applies to proceedings for committal for contempt of court under the Court of Protection Rules 2007. In particular, that Practice Direction provides (where relevant):

> *Paragraph 3: Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are made in public. This rule applies to all hearings, whether on application or otherwise, for committal for contempt irrespective of the court in which they are heard or of the proceedings in which they arise.*
>
> *Paragraph 4: Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper*

*administration of justice. Derogations shall, where justified, be no more than strictly necessary to achieve their purpose.*

*Paragraph 9: In considering whether there are exceptional circumstances justifying a derogation from the general rule, and whether that derogation is not more than is strictly necessary the fact that the committal hearing is made in the Court of Protection or in proceedings relating to a child does not of itself justify the matter being heard in private. Moreover the fact that the hearing may involve the disclosure of material which ought not to be published does not of itself justify hearing the application in private if such publication can be restrained by an appropriate order.*

21. Since that Practice Direction has been issued, the Court of Protection Rules (COP Rules) have been amended. New rules were issued in 2017. Amendment to those rules came into effect on 1 January 2023. The COP Rules 2017 expressly address the question of when proceedings for contempt of Court in cases in the Court of Protection should be held in public or private at Part 21.8. The relevant parts of this rule are set out below.

***Hearings and judgments in contempt proceedings***

***21.8.****—(1) All hearings of contempt proceedings shall, irrespective of the parties' consent, be listed and heard in public unless the court otherwise directs, applying the provisions of paragraph (4).*

*(2) In deciding whether to hold a hearing in private, the court must consider any duty to protect or have regard to a right to freedom of expression which may be affected.*

*(3) The court shall take reasonable steps to ensure that all hearings are of an open and public character, save when a hearing is held in private.*

*(4) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice—*

*(a)publicity would defeat the object of the hearing;*

*(b)it involves matters relating to national security;*

*(c)it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;*

***(d)a private hearing is necessary to protect the interests of P, a protected party or any child;***

*(e)it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;*

*(f)it involves uncontentious matters arising in the administration of the affairs of P or in the administration of P's estate; or*

*(g)the court for any other reason considers this to be necessary to secure the proper administration of justice.*

*(5) The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness.*

*(6) Unless and to the extent that the court otherwise directs, where the court acts under paragraph (4) or (5), a copy of the court's order shall be published on the website of the Judiciary of England and Wales (which may be found at www.judiciary.uk). Any person who is not a party to the proceedings may apply to attend the hearing and make submissions or apply to set aside or vary the order.*

*(7) Advocates and the judge shall appear robed in all hearings of contempt proceedings, whether or not the court sits in public.*

*(8) Before deciding to sit in private for all or part of the hearing, the court shall notify the national print and broadcast media, via the Press Association.*

*(9) The court shall consider any submissions from the parties or media organisations before deciding whether and if so to what extent the hearing should be in private.*

*(10) If the court decides to sit in private it shall, before doing so, sit in public to give a reasoned public judgment setting out why it is doing so.*

*(11) At the conclusion of the hearing, whether or not held in private, the court shall sit in public to give a reasoned public judgment stating its findings and any punishment.*

*(12) The court shall inform the defendant of the right to appeal without permission, the time limit for appealing and the court before which any appeal must be brought.*

*(13) The court shall be responsible for ensuring that judgments in contempt proceedings are transcribed and published on the website of the judiciary of England and Wales.*

22. In **Esper v NHS NW London ICB** [2023] EWCOP 29, Mr Justice Poole held that where there are inconsistencies between the COP Rules and the Lord Chancellor's Practice Direction 2015, paragraph 15 that the COP Rules took precedence.

23. In my judgment, the fact that the COP Rules 2017 make express provision for a Court to sit in private when hearing contempt proceedings, does not dilute or reduce the importance of the principles of open justice which I have summarised above: in any case where the Court is considering exercising the powers set out in r.21.8 of the COP Rules 2017, the Court must still undertake the careful 'ultimate balancing exercise' of the different rights which may arise, in order to determine whether there are genuinely circumstances arising within any of the categories set out in r.21(4)(a)-(g) and, separately whether it is necessary to sit in private to secure the interests of justice. The COP 2017 rules set out in r.21 the principles enshrined in Article 6 ECHR and case law concerning the principle of open justice in the specific context of the work of the Court of Protection. The starting point is the principle of open justice. However, when competing interests or rights arise which are so compelling that failing to afford them specific protection risks the proper administration of justice, the Court should consider sitting in private and (according to the express terms of COP 2017 r.21(4)) must do so if satisfied that that that risk arises.

## Identification of Respondents in the applications for committal

24. As set out above, part of the application before the Court includes an application to prevent identification of X and the Second and Third Respondents. In that context, in addition to the provisions of COP Rules 2017, r. 21.8(5), I have invited to consider r.4.2, which provides as follows

> ***4.2. The Court's general power to authorise publication of information about proceedings***
>
> *(1) For the purposes of the law relating to contempt of court, information relating to proceedings held in private (whether or not contained in a document filed with the court) may be communicated in accordance with paragraph (2) or (3).*
>
> *(2) The court may make an order authorising—*
>
> *(a)the publication or communication of such information or material relating to the proceedings as it may specify; or*
>
> *(b)the publication of the text or a summary of the whole or part of a judgment or order made by the court.*

*(3) Subject to any direction of the court, information referred to in paragraph (1) may be communicated in accordance with Practice Direction 4A.*

*(4) Where the court makes an order under paragraph (2) it may do so on such terms as it thinks fit, and in particular may—*

*(a)impose restrictions on the publication of the identity of—*

*(i)any party;*

*(ii)P (whether or not a party);*

*iii)any witness; or*

*(iv)any other person;*

*(b)prohibit the publication of any information that may lead to any such person being identified;*

*(c)prohibit the further publication of any information relating to the proceedings from such date as the court may specify; or*

*(d)impose such other restrictions on the publication of information relating to the proceedings as the court may specify.*

25. In **Esper v NHS NW London ICB** [2023] EWCOP 29, Mr Justice Poole considered the extent to which the rules set out in COP 2017 permitted the Court to withhold the identity of a respondent, if the Court were not satisfied that the power to do so arose under r.21(5). His consideration of these rules appear at paragraphs 44-50 of his judgment. In oral argument it was submitted that Poole J considered that such a power did not arise under r.4.2.

26. At paragraph 44 of the Judgment Poole J stated:

> "I have considered COPR rr4.1 to 4.4 but am satisfied that they do not give the power to restrict reporting in committal proceedings in the Court of Protection. COPR r4.1 provides that "The general rule is that a hearing is to be held in private" but by r4.(4), "The general rule in paragraph (1) does not apply to a hearing for a committal order or writ of sequestration (in respect of which rule 21.27 makes provision)." Unfortunately r21.27 is no more. The new COPR Part 21 applies to hearing for a committal order in the Court of Protection, and there is no r21.27 within Part 21.

Arguably,t here is no further analysis of whether, and the extent to which, r.4.2 specifically may provide a power to restrict identification of a Respondent as a party to the proceedings. The

only express reference to r.4.2 is at paragraph 45. Poole J states "COPR r.4.2 governs the court's control of the publication of information in relation to proceedings held in private." (Paragraph 45).

27. Rule 4.2 appears in Part 4 of the COP Rules 2017, under the first heading 'Hearings', and under the additional heading 'Private Hearings'. The heading to r.4.2 indicates that the rules in that particular rule sets out the Court's 'general power to authorise publication of information about proceedings'. Rule 4.2(1) expressly states that the provisions of r.4.2(2) and (3) apply to communications of the Court for the purposes of the law relating to contempt of court relating to proceedings held in private. That would, arguably, appear to be a reference to the rules in r.21.8. The provisions of r.4.2(4) refer to the type of orders which the Court may make under r.4.2(2). One such order identified is that of imposing restrictions on the publication of the identity of any party. However, as noted above, the amendments to the COPR 2017 contained in r.21.8 are relatively recent. Rule 4.2 predates those amendments. In submissions today those acting for the Official Solicitor have submitted that, rather than r.4.2 referring to r.21.8, it refers to the rules governing contempt of court set out under r.12.1 of the Administration of Justice Act 1960. Those rules, as set out in **Esper**, enables the publication of information in private proceedings, whilst withholding the names of parties. That, in my view, militates in favour of the analysis of Poole J. It is contended, however, by the Official Solicitor, that notwithstanding that matter, as presently drafted, the power to restrict publication of the respondents' names in this case still exists under r.4.2 so far as the proceedings are held in private.

28. My interpretation of those provisions, absent any authority, would have been that r.4.2 would appear to permit the Court to restrict publication of identification of a respondent in contempt proceedings, in addition to the power set out in r.21.8(5), where the contempt proceedings are held in private (pursuant to r.21.8, although that is not stated). I recognise however, that that interpretation of a general case management power creates a broader discretion than the specific rule in r.21.8(5) and that in general, a specific rule cannot be restricted or enlarged by a more general power.

29. The rule in 21.8(5) is, in my view, not in truth, a discretionary provision. Its terms are both defined and mandatory where two preconditions are met: if the Court is satisfied first, that non-disclosure of a party or witnesses' identity is necessary to secure the administration of justice; and, secondly, that that step is necessary to protect the interests of the party or witness, it must order non-disclosure of that individual's identity. There is no discretion not to do so.

Conversely, the same rule also provides that the Court may only do so if those two conditions are met (as denoted by the words 'if and only if').

30. Notwithstanding the apparent tension between those two rules, my preliminary view was that where the court determines it is appropriate to sit in private the power to withhold the identity of a respondent pursuant to r.4.2 exists and, that in this case, the more difficult question is whether that power should be exercised.

31. Having circulated a draft of this Judgment to counsel and solicitors, I have revisited this issue. My determination had been to adjourn consideration of this aspect of the case. I remain of the view that this is the correct approach. Having considered the decision in **Esper** further, and my analysis above, the tension referred to above in paragraph 30 is clear. This may be an area where further judicial consideration will need to be given to this point.

**Submissions**

32. It was submitted that the Court may wish first, to consider whether it is 'necessary' to sit in private in order to protect X's interests, and secondly whether it is 'necessary' in order to secure the administration of justice. It was submitted, correctly in my view, that the court must be satisfied that no lesser measure than sitting in private will suffice to protect both X and to secure the administration of justice

33. It was submitted that it is necessary to hold the contempt application in private in order to protect X's interests for the following reasons:

    a. At a previous hearing before Mrs Justice Lieven, X became very distressed when it became clear that a number of members of the public were planning to attend the hearing. They were very fearful that a public hearing would somehow lead to them being at increased risk from the Second and Third Respondent's associates (who it is alleged by X, have caused them the most serious harm including physical and sexual assault and abuse.) It was submitted that one of the threats which has often been made by LB is that LB will instruct her associates to harm X.
    b. X is acutely aware of the possibility of the public and, in particular, media attendance at the court hearings. X raises this repeatedly with their legal team, and is very anxious about the possibility of the contempt proceedings being held in public and the Second and Third Respondent's associates being in attendance.

c. It was submitted that there is a real risk that if the contempt application is conducted in public, it will cause X serious anxiety and, potentially, put them at risk of significant harm from others. The particular risk identified was two-fold. First, that due to attending the hearing, or hearing or reading about it in the media, the Respondents' associates would actually take steps to harm X. The second is X's acute anxiety about that possibility. It was accepted that the first risk might not have a solid or evidenced based basis, although the Applicant considers it is a risk. However, it was submitted that the second was very real, almost inevitable, if the proceedings were held in public and that the level of X's anxiety and distress about it was significant, as evidenced, for example, by that which occurred at the hearing on 8th March 2023 before Lieven J. X has, in recent months managed to maintain a level of stability and is excelling in education, notwithstanding their concern about this litigation. It is submitted that it would not be in X's interests to disrupt the hard won progress they are now making.

34. It was further submitted that X is an intelligent young adult who accesses media through the internet, so will be acutely aware if they are named in any judgment and subsequent media reports: this will undoubtedly cause X distress. It was submitted that any reasoned judgment as to both the need for the injunctions and the serious consequences to X of their breach, will need to include confidential information about X's diagnosis, background, and the very serious abuse X has suffered at the hands of the Second and Third Respondents. It was submitted that this would remove X's right to conceal or reveal such intimate and difficult details of their life to those X may form relationships with in the future.

35. Further, the Court was invited to consider the position statement lodged by the applicant local authority which supported the application made by the Official Solicitor. That document also set out that X is at risk of reprisals from LB and MK's associates if LB and MK are named in any judgement. It was submitted that the only way to avoid the Respondents being named is to sit in private. (It was submitted that (subject to the argument concerning r.4.2) this is because if the court is to sit in public, an order for non-disclosure of LB and MK's names must be made pursuant to COP r.21.8(5). This requires the non-disclosure to be necessary to protect LB and MK's interests (rather than X's). No such necessity can be established and so that application is not pursued by the Official Solicitor.

36. It was submitted that X's article 8 rights to personal and psychological integrity are engaged and that, in circumstances where a judgment will be delivered in public, the balance comes

down in favour of protecting X's article 8 rights to personal integrity during the contempt hearing itself.

37. It was further submitted that it is necessary to hold the contempt hearings in private to secure the administration of justice: the purpose of the injunctions made by the Court of Protection are to protect X from the harm X has suffered at the hands of the Second and Third Respondents, and, the court must be careful to ensure that the consequential committal hearing does not itself cause harm to X. To do so would, to some extent, defeat the purpose of the COP proceedings.

38. It was submitted that if the Court acceded to the application to sit in private, COPR r 4.2 applies which allows the court to make an order imposing restrictions on the publication of the identity of (amongst others), parties, witnesses and P – see paragraph 37 of *Sunderland City Council v Macpherson* [2023] EWCOP 3. The Court was invited to:

    a. Pursuant to the requirement in COPR r.21.8(11), deliver a judgment in public setting out its findings and any punishment.
    b. Withhold disclosure of X's name in that judgment pursuant to COPR r.4.2.
    c. Withhold any information that may lead to X being identified as the subject matter of the COP proceedings. As to this:
        i. X's legal representatives note the position of the local authority, that if LB and MK are to be named, it may lead to X being identified.
        ii. X's legal representatives further note the local authority's view that naming LB and MK puts X at risk of reprisals from LB and MK's associates.
        iii. Accordingly, the court is invited to withhold the disclosure of LB and MK's names both in any judgement and when listing the contempt application on 19 July 2023 pursuant to COPR r4.2(4).

39. Finally, it was submitted that in the event that the Court does not sit in private, pursuant to r.21.8(5), X should not be named either in the judgment or in any reports of the proceedings.

## Analysis and conclusions

## The relevant factual background

40. I have set out the relevant legal principles at some length. It is also necessary, in this judgment, to set out some of the relevant factual background. I do so in the following paragraphs only so as to enable this judgment to be delivered in public with some small amendments only to the following paragraphs.

41. X has a complex and difficult life history, the consequences of which impact them today. The background to the complexities arise from matters which could not, sensibly or reasonably, be considered to be X's 'fault' or responsibility. X has lived through those experiences. X lives with a number diagnoses all of have as a common factor, heightened anxiety and can contribute to difficulty regulating emotion.

42. In the past there have been acute concerns about X's well being and health.

43. X has a relationship with LB, and through that MK. X's relationship with LB is of some significance to X and X is anxious not to lose it completely. X expresses a wish not to be treated badly by LB but a wish to maintain the relationship.

44. The Applicant asserts that the contact between X and LB and MK is harmful to X and that X lacks capacity to make decisions about that contact. In particular, it is set out in evidence before the Court that LB asks for money from X, and that X then seeks to secure that money for LB. The evidence before the Court is that those requests are accompanied by threats of, or actual harm to X, including threats to cut all ties with X, X being requested to, and having sex with men to 'pay' LB's debts, including drug debts; and selling intimate images of X in order to settle debts.

45. X has a number of vulnerabilities which makes X particularly susceptible to abuse and manipulation by LB.

46. In addition, X lives with the diagnoses set out above. Anxiety and heightened emotion feature within each of those.

47. X has also described significant abuse and harm as a result of their relationship with LB: physical, emotional and sexual abuse. The consequences of harm of that nature for victims can present in many forms. Anxiety, poor self-esteem, fear, anger, dysregulated emotion are some examples. In X's case acute anxiety is one clear feature of their presentation.

48. The LA issued the underlying COP proceedings in 2022 because it considered that X did not have capacity to make decisions about contact with LB and MK, and further that that contact was harmful to X. It sought injunctions to prevent that contact. Those injunctions were granted by Mrs Justice Lieven on 8th March 2023. It is asserted that they have been breached since they have been served upon LB and MK. The LA now seeks an order for committal of LB and MK in respect of that breach. It is important, in my judgment, to recall, that the purpose of committal

proceedings is to ensure that the Court's Orders are complied with. The reason for the Order in this particular case, was to protect X. That is the purpose of the litigation before the Court.

**The balancing exercise**

49. There is no doubt in my mind that Article 8 is engaged. These proceedings are about X. The purpose of them is to protect X. The litigation is distressing for X: it involves a relationship important to X. The reason for the proceedings arises from the consequences of X's personal circumstances, including X's diagnosis and life history. X is not the Applicant. The proceedings have been issued by the local authority pursuant to its statutory duties.

50. The impact of these proceedings upon X is significant. X, legitimately, wishes to participate in them as they concern decisions about themselves. The evidence that the LA relies upon emanates from that which X has said and messages and calls X has received. The background to the need for the proceedings arise from X's private life. The harm asserted and need to protect X arises from the abuse they are said to have suffered.

51. The prospect of a hearing taking place in open court may, not only cause the difficulties for X described in this judgment, but also act as a deterrent or further obstacle to X being willing to cooperate or place before the Court arena evidence relevant to determination of the applications before the Court. Self-evidently, given the nature of these proceedings and purpose of contempt proceedings, that raises the prospect of an impediment to the proper administration or justice. Given X's diagnosis it also raises the additional point that X must be able to enjoy and exercise their Convention rights without discrimination (as set out in Article 14 ECHR).

52. Steps can be taken to reduce the extent to which that information is referred to during the committal proceedings through a form of words I will discuss further with counsel this morning. However, to properly understand the case and issues in it, reference to some of those matters is inevitable. Further, assuming participation of LB and MK takes place during that hearing, it may, on a practical level, be difficult to prevent those individuals from stating their names and those of the Respondents during the hearing. Restrictions can be put in place about the reporting of those names, but those measures will not serve to reduce the acute anxiety felt by X and the consequences that has for them given their particular vulnerabilities.

53. The relief sought is set out within the COP Rules 2017 as set out above, and therefore within the rules sanctioned by parliament as discussed in more detail in the **Esper** case.

54. Article 6 sets out the right to a public hearing, subject to the potential derogations set out above. Open Justice is a fundamental aspect of a democratic society. That right is engaged in these

proceedings for all parties, and particularly the Respondents. The importance of that right and open justice are evident from that set out above. I do not repeat them here.

55. Article 10 is also engaged. The importance of the freedom of the press is also set out above

56. I note also that, within these proceedings it may also be relevant to consider Article 14 (having regard to X's additional needs, and the impact of these proceedings upon X), in addition to Article 3 (protection from inhuman or degrading treatment). Within the documents referred to the Court, X is reported to have been feeling suicidal in the last few months as a result of the anxiety X has beens experiencing because of these proceedings. This raises the potential relevance of Article 2 and the positive duties that Article imposes upon the State.

57. The consequence of not holding these proceedings in private are twofold. First, the evidence before the Court is that X will experience heightened anxiety and distress because they fear that threats made to X by LB (that LB will 'get' her associates to harm X) may occur. That is in addition to the existing distress and anxiety regarding the proceedings themselves. The second potential consequence is that, having learned about the proceedings, LB or MK's associates take steps to harm X. The third consequence is that private information about X, their life, their experiences of harm and their diagnoses could be seen and read by others. There is strong evidence before the Court regarding the first of these three consequences. The third is self-evident. The second is supported by the LA statement, although not with specific detail.

58. A strict reporting order could go some way to limiting the latter, and possibly the second possible consequence. However, that would not limit the first consequence. That, in my judgment, is significant. I consider that the only way in which the acute anxiety X experiences regarding the proceedings is to hold them in private. I stress, the anxiety described is not simply worry or concern about the proceedings, it is of a much greater level as described above. It is part of the very harm which the proceedings seek to protect against.

59. If the proceedings are held in private, the press and members of the public are excluded from the hearing. However, at the end of the hearing the Court will give a public judgment, explaining the decision made and why it was made. The derogation sought from the principle of open justice is provided for in the rules as set out above.

60. In this case I consider that it is necessary to sit in private to protect the interests of X as set out in COPR 2017 r.21.8(4)(d). Further, I consider that it is necessary to do so to secure the proper administration of justice pursuant to r.21(8). If the proceedings are not held in private I consider

that part of the harm the proceedings before the Court seek to prevent would, in fact, be caused by proceedings themselves.

**Naming the Respondents**

61. I have found this aspect of the application more difficult. With some hesitation, my preliminary view, as set out above, was that the power to order that their names should not be disclosed exists in r.4.2 COP Rules 2017. I repeat the points I make at paragraphs 28-31. The more difficult question is whether that power should be exercised in this case. In practice, given my conclusion set out above that the committal application should be held in private, the moment at which this further derogation from the principle of open justice would take place, is when the judgment is delivered in public pursuant to r.21.8(11). My initial view in this case is that it would not be appropriate to withhold the name of the Respondents at that stage. The committal proceedings would then have been heard. That, in my judgment may go some significant way to manage X's anxiety. In addition, there is not specific evidence before the Court about actual risk to X from associates.

62. On balance, I have determined to postpone a decision on this issue until the committal proceedings have been heard. I will also seek further submissions from the parties in light of the points I have raised within this judgment.

**Further submissions**

63. Following the hearing on 13th July, a hearing was listed, eventually for 18th July 2023 to hand down this Judgment.

64. Prior to that hearing, communication was sent to the Court by two members of the public. Unfortunately, due to the time at which they became aware of the hearing, and the hours the Court staff work, their emails were not received by me until after the hearing had taken place. By that stage, I had circulated a draft judgment to counsel and solicitors. As a result of the emails received on 18th July, I directed that, prior to the committal application listed on 19th July 2023, I would sit in public to provide a Judgment (as required by r.21.8(10) COPR 2017). Further, before finally determining the issues set out above, I would consider any submissions made by members of the public who could also attend the hearing.

65. The Court has received written submissions from Mr Peter Bell and Professor Celia Kitzinger. Those submissions are measured, helpful and insightful. Professor Kitzinger draws my attention to r.218 COPR 2017, and to the decision in **Esper**. She invites me to consider carefully

whether it is really necessary to sit in public to protect X. She also invites me to consider exceptionally carefully holding contempt proceedings in private, stressing that this is an 'exceptional' measure. She questions whether, given the decision in **Esper**, the withholding of the name of the alleged contemnor is permitted under the relevant rules. She refers me, in particular to paragraph 54 of the Judgment in **Esper.** She also invites me to consider the fact that in McPherson and Esper, the alleged contemnors were identified and invites consideration of whether the same could not occur in this case.

66. She explains the difficulties members of the public have in finding out about upcoming committal hearing which it is intended should be heard in private. Similar points are raised by Mr Bell. I acknowledge that which Professor Kitzinger and Mr Bell set out.

67. Mr Bell observed that, in general, proceedings in the Court of Protection should be heard in public and that P may be protected through a Transparency Order and that, for reasons he explains, should be the course adopted. He too stresses the importance of identifying the name of the person who is subject to contempt proceedings.

68. I considered these submissions during the hearing and in the public hearing. I do not disagree with any of the points raised in principle. I hope that the Judgment set out above provides reassurance that this Court places the principal of open justice at the forefront of its decision making.

69. The circumstances of this case are, in my judgment, properly described as exceptional. The facts, and X's life are unique. They are different to those in **McPherson** and **Esper.** The combined effect of X's presentation, diagnoses, lived experiences and consequences thereof are exceptional. I consider that the relevant tests of necessity are met in this case for the reasons I have set out above. I consider that the best way to meet the interests of justice, permit the proper administration of justice, and protect P's interests, is to hold the hearing in private as set out above. That requires this public judgment to be delivered, and, in accordance with r.21.8(11) a further public judgment to be delivered.

70. The question of whether the alleged contemnors should be named is not entirely straightforward. The Court is aware of and actively considering the judgment in **Esper.** I have adjourned consideration of this matter and will consider further these submissions, together with any others received by the Court.

71. Finally, as to the practicalities of listing the case so that there is the best opportunity for members of the public and press to know in advance of the cases to be heard, it is relevant that

I record that directions for the listing of the hearing on 13th July 2023 were made on 3rd July 2023. The Judgment and guidance in **Esper** was handed down on 10th July 2023. Very little time passed between that date and the hearings this week. I wish to provide a commitment, however, to ensuring that the practical arrangements of this Court follow that guidance.

**HER HONOUR JUDGE KATHERINE TUCKER**
**SITTING AS A JUDGE OF THE HIGH COURT PURSUANT TO S.9(1) OF THE SENIOR COURTS ACT 1981**