Neutral Citation Number: [2024] EWCOP 26

Case No: 13550630

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/05/2024

Before :

MS JUSTICE HENKE

- -

Between :

P **Applicant**

(By his Litigation Friend, the Official Solicitor)

- and -

(1) Manchester City Council **Respondents**

(2) The Mother

(3) The Father

Re: P (Application to Withhold Closed Material: Concurrent Civil Proceedings)

- -

- -

Francesca Gardner (instructed by **Irwin Mitchell LLP**) for the **Applicant**
Richard Borrett instructed by and for the **First Respondent**
The **Second and Third Respondents** appearing as **Litigants in Person**

Hearing date: 22 March 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 1 May 2024 by circulation to the parties or their representatives by e-mail. After considering anonymisation, this approved judgment was released to the National Archives on 3 May 2024.

.....

MS JUSTICE HENKE

This judgment was delivered in public but a transparency order is in force and must be observed. The judge has given leave for this version of the judgment to be published on

condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the Protected Party and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Ms Justice Henke :

This Judgment

1. The substantive issue before the court is an application made by the Official Solicitor who represents the protected party to withhold material - closed material - from the Protected Party's parents.

2. This judgment is written in accordance with paragraph 26 of the *Closed Hearings and Closed Material: Guidance* [2023] EWCOP 6.

3. It is written to enable disclosure at an appropriate point in the future and to enable the speedy and proportionate determination of any appeal if this decision is appealed by any party.

Introduction

4. The Protected Party is P. P is an adult with an acquired brain injury. He was struck by a vehicle whilst cycling in 2017. He sustained serious, life-changing injuries including a skull fracture and subdural haematoma. There is a personal injury claim pending in the King's Bench Division. Within those proceedings, liability has been accepted by the Defendant although contributory negligence is claimed of 12.5%. Although the parties to the civil claim both accept that damages are likely to be in the millions, quantum currently remains in issue.

5. P is not engaging with his legal representatives in either the personal injury proceedings or this court.

6. At the time of the hearing before me, the Official Solicitor believes that P is living with his parents (the Second and Third Respondents), but that has not been confirmed. Prior to his accident, P lived independently.

7. P is reported to suffer from a cognitive impairment which affects his ability to concentrate, retain information and solve problems. A report from a Consultant Neurosurgeon dated 20 November 2020 stated the following: -

    a. He is rarely unsupervised and rarely ventures out alone.

    b. He has not returned to university or his previous employment activities. He is finding engaging with his computer difficult. He has difficulty learning new material and a crude understanding of local and worldwide events.

    c. He has altered behaviour and has demonstrated a very short temper, poor anger management, and physical aggression,

    d. He has a particularly poor short-term memory and has issues with long-term memory which can be selective, often incorrect, and "twisted".

    e. He has poor concentration, recollection, and comprehension.

8. P has been deemed to lack capacity to manage his property and affairs and to litigate his personal injury claim. The Official Solicitor has been appointed as litigation friend for P within both these and the personal injury proceedings, and Irwin Mitchell LLP ("Irwin Mitchell") is likewise instructed in both sets of proceedings.

9. The application before me on behalf of the Official Solicitor arises out of failed attempts by Irwin Mitchell to engage with P to progress the civil claim on his behalf. It is an application to withhold material from his parents. The relevant material is a COP9 and a closed version of a skeleton argument in support. The order sought is for a time-limited period and for a specific purpose, namely for P's capacity to be assessed.

Litigation History

Proceedings in the King's Bench Division

10. In February 2020, P purportedly issued a personal injury claim in relation to his injuries in the High Court. On 28 October 2020, a second set of proceedings in relation to the accident were issued on his behalf with P's mother acting as his litigation friend within those proceedings.

11. On 1 December 2020 Master Eastman contacted the Official Solicitor in writing and invited the Official Solicitor to act as P's litigation friend in the personal injury case. Master Eastman was concerned about P's mother's handling of proceedings and not convinced that the family were acting in P's best interests. The family had been advised to contact solicitors but seem not to have allowed any that they contacted to continue to act. The Official Solicitor accepted that invitation to act on P's behalf. On 7 December 2020 the Official Solicitor asked Irwin Mitchell to accept instructions to act on P's behalf in the personal injury claim.

12. On 16 February 2021, Irwin Mitchell made an application in the personal injury proceedings, seeking that:

    a. The Official Solicitor be appointed to act as litigation friend;

    b. P undergo a capacity assessment; and

    c. the second set of proceedings issued by the P's family be struck out as an abuse of process.

13. On 3 March 2021, Irwin Mitchell wrote to P's mother to advise her of the application made in February 2021, and to explain to her that Irwin Mitchell's objective was to ensure that P receives full and fair compensation in his personal injury claim. The family was invited to a meeting to discuss the case further.

14. On 21 April 2021, Master Eastman heard the application Irwin Mitchell had made on 16 February 2021. The application was contested by P's family, but Master Eastman appointed the Official Solicitor as P's litigation friend. Thereafter, Irwin Mitchell arranged an appointment with a Consultant Neuropsychologist, to assess P, including his capacity. That assessment was to take place on 7 May 2021. However, P's family did not confirm their willingness to attend, and the appointment was duly cancelled.

15. On 10 May 2021, P's mother filed an application to appeal the order of Master Eastman dated 21 April 2021.

16. The court is told on behalf of the Official Solicitor that on 27 July 2021, Irwin Mitchell held a meeting via MS Teams with P's parents. Irwin Mitchell requested the cooperation of the family to progress the personal injury claim and sought to address the concerns of the family. The meeting did not secure the family's cooperation. P's parents are alleged to have stated that for there to be cooperation by the family in the case, Irwin Mitchell should obtain an urgent interim payment for P to be paid into his Court of Protection Deputyship Account, for which P's mother is the Deputy, as well as provide disclosure of Irwin Mitchell's full file of papers to family.

17. Irwin Mitchell wrote to P's parents on 26 August 2021 to advise that instructions had been taken from the Official Solicitor and that the requests made by them in the meeting on 27 July 2021 could not be agreed.

18. Since then, it is asserted on behalf of the Official Solicitor that Irwin Mitchell have repeatedly written to P's mother requesting the family's cooperation and seeking contact with P so that a case manager could be appointed for him for the purposes of the provision of support and therapies for his injuries, and further that there could be resolution of the personal injury claim in his favour. It is said on behalf of the Official Solicitor that each attempt at contact has either been ignored completely or has been met with a response which suggests that Irwin Mitchell, the Official Solicitor and even the Court are acting in a way that is dishonest and discriminatory.

19. Irwin Mitchell wrote to the Safeguarding Team within the local authority on 8 September 2021 raising concerns as to P's welfare and requesting a safeguarding enquiry. Prior to this, it is understood that the local authority previously had contact with P in 2019, when his relationship with his family reportedly broke down and he became homeless for a period. Subsequently, a social worker visited P in around March 2022, accompanied by police, and Irwin Mitchell were subsequently informed that P appeared to be safe and did not wish to receive further support from adult social care. P did not provide consent to the local authority to share further information with Irwin Mitchell.

20. On 18 October 2021, P's mother lodged an application in the King's Bench Division regarding the conduct of the personal injury claim. The position statements lodged by P's mother in support of this application repeated allegations previously made about the conduct of the case by Master Eastman, the Defendant's solicitor, an expert instructed by the Defendant, experts approached by the P family to act as expert witnesses in the claim, and Irwin Mitchell, including allegations of bad faith and dishonesty, professional errors in the conduct of the claim, and conflict of interest. The application came before Master Eastman on 23 December 2021. Master Eastman found that the second set of proceedings brought by P's mother were an abuse of process and they were struck out. The first set of proceedings was to continue, and the Official Solicitor remained appointed as Litigation Friend.

21. On 3 February 2022, Irwin Mitchell received two notices of appeal issued by P's mother. The appeals were heard before Mr Justice Martin Spencer on 23 February 2022. The appeals were refused, and Mr Justice Martin Spencer made an Extended Civil Restraint

Order ("ECRO"), preventing P's mother or anyone she appoints or instructs to take any further action in relation to the personal injury proceedings.

22. On 28 March 2022, Irwin Mitchell received two further notices of appeal. The first was appealing the order of Mr Justice Martin Spencer, refusing the appeal from the order of Master Eastman. The second was appealing the Extended Civil Restraint Order.

23. The Court of Appeal struck out the appeal against the order of Mr Justice Martin Spencer as it was prohibited under the terms of the ECRO. Further, by order of Lady Justice Nicola Davies dated 5 October 2023, P's mother was refused permission to appeal the ECRO and the application was certified as totally without merit. On the face of the order of 5 October 2023, it is recorded that "*the interests of the claimant have not adequately and sufficiently been represented to date by his family who lack the necessary knowledge, legal expertise, and experience to conduct litigation in a case of this kind. The claimant's claim is complex and of high value, the compensation is likely to be a significant seven figure sum. It is imperative that appropriate and specialist expertise is obtained in order to expeditiously pursue the litigation and ensure that the claimant's best interests and needs are met*". The order further stated: "*The actions of the appellant, as carefully considered by the judge, in pursuing claims and applications was rightly found not to be in the claimant's best interests. The applicant's actions have led to delay and unnecessary costs*".

24. On 4 November 2022, Irwin Mitchell wrote to P's mother to advise of the duty of disclosure in the personal injury claim and to request any documents which may be relevant. No response was received.

25. On 21 March 2023, Irwin Mitchell wrote to P's mother to update her on their liability investigations in the personal injury claim and to ask that P attend an appointment with a Neuropsychiatrist who specialises in acquired brain injuries in adults. I am told that the solicitor instructed by the Official Solicitor offered to travel to Manchester to meet P and his family.

26. On 10 April 2023, P's mother wrote to Irwin Mitchell accusing the firm of discriminating against P. In it she alleges that Irwin Mitchell "*threatened to block the case until the Claimant dies with the intent that P recover no damages*" and "*acted as a weapon in the hands of the insurance company*". It was further suggested that Irwin Mitchell lacked knowledge of the CPR for arranging an expert assessment when there was no order to rely on such evidence.

27. On 17 April 2023, Irwin Mitchell again wrote to P's mother confirming that their intention was to make progress in the claim and to assist the Claimant to obtain the compensation to which he is entitled. Irwin Mitchell offered to arrange an Immediate Needs Assessment, a meeting in Manchester and advised that the Neuropsychiatrist had arranged to visit P at home for a medico-legal assessment.

28. On 27 April 2023, a further copy of P's mother's email from 10 April 2023 was received by Irwin Mitchell.

29. On 17 May 2023, a letter was sent to P's mother to advise her that, as no response had been received to confirm the expert appointment, the decision had been made to move

the assessment online. A link to access the assessment on Zoom was provided. In addition, the details of P's current GP were sought, such that P's medical records could be obtained, and it was requested P provide the local authority with permission to share social care records with Irwin Mitchell.

30. P did not attend the appointment with the Neuropsychiatrist. However, his mother sent Irwin Mitchell an email advising that the firm had ignored her correspondence. Irwin Mitchell responded on the same date enclosing copies of the correspondence, which had addressed the concerns she raised. No further response was received.

31. Following the missed appointment, the Neuropsychiatrist informed Irwin Mitchell that he was concerned for P's welfare given what he had read in the medical records he had received. He indicated that had he been due to see P in a treating capacity and that he would make a safeguarding referral. He was concerned that the family were not acting in P's best interests.

32. Irwin Mitchell wrote again to the relevant local authority on 16 June 2023, requesting that the local authority takes urgent steps to safeguard P. The letter contained a request that a statutory advocate be appointed for P.

33. A response was received from the local authority on 18 July 2023, stating:

> *"I can now confirm that my clients have completed their safeguarding enquiries under s.42 Care Act. My clients have no ongoing concerns about P and are satisfied that he is safe and well. I appreciate that you will want more detail about P's circumstances, presentation and the manner in which the safeguarding enquiries were conducted but I am not at liberty to share that information with you. P has made it clear that he does not want personal information to be shared with Irwin Mitchell. My clients have contacted P's GP and have been informed that he is engaging appropriately with relevant health professionals. Since the Council have no concerns about P's welfare, we do not currently feel that an application under s.16 to the Court of Protection is warranted."*

34. There then followed further correspondence, in which Irwin Mitchell sought to find out if capacity assessments had been conducted by the local authority, or if P had been seen on his own. The response of the local authority is dated 5 September 2023. It includes:

> *"Please find the Council's responses to your questions below:*
>
> *1. Whether P's capacity to make decisions about sharing information was assessed P's capacity to make decisions about sharing information was not assessed.*
>
> *2. Whether P's capacity to make decisions about engaging with medical experts in respect of his personal injury claim was assessed P's capacity in this domain was not assessed.*
>
> *3. Whether P was seen by your client on his own, without family members present P was not seen alone.*

4. Whether an advocate was appointed to support P An advocate was not appointed to support P.

5. Whether coercion and control was considered as part of the safeguarding enquiry Coercion and control was considered as part of the safeguarding enquiry.

6. Whether the impact on P if his claim is not properly pursued was considered as part of the safeguarding enquiry.

The impact on P was considered. The Council (in line with the Care and Support Statutory Guidance) have to ensure that safeguarding is person centred. There is no suggestion that P lacks capacity regarding information sharing as a result it was open to him to choose that no information regarding the safeguarding enquiry be shared with Irwin Mitchell. The Council cannot appropriately comment further on the potential consequences of his decision."

Proceedings in the Court of Protection

35. Against the above backdrop, on 19 October 2023 a COP1 was issued by the Official Solicitor acting as Litigation Friend for P. By that application, she asked the court to:

    a. Determine P's litigation capacity, make decisions about sharing information, make decisions about contact and make decisions about his residence and care needs;

    b. If P lacks capacity, make best interest declarations as to his care, residence, contact and sharing of information; and

    c. Authorise any deprivation of liberty arising out of his care regime as in his best interests and the least restrictive option.

36. The local authority was served with the application and P's parents were notified of it.

37. On 1 November 2023, there was a hearing before HHJ Burrows on the papers. He considered s. 48 of the Mental Capacity Act 2005 ("the MCA 2005") and declared himself satisfied that there is reason to believe that P lacks capacity to make relevant decisions as a result of his brain injury. Accordingly, he made an interim declaration that the Court has reason to believe that P lacks capacity to:

    a. litigate these proceedings;

    b. make decisions as to sharing information with his legal representatives;

    c. make decisions as to contact with others; iv) make decisions as to where he should live; and

    d. make decisions as to his care and treatment.

38. The Official Solicitor was appointed to act as P's litigation friend in these proceedings. The relevant local authority was joined as a party. P's mother was to be notified of the proceedings and the applicant was to use their best endeavours to notify P's father of the proceedings. A transparency order was made, and the application relisted for hearing before HHJ Burrows on 27 November 2023.

39. The Respondent local authority acknowledged service on 17 November 2023. P's father filed his acknowledgement of service on 24 November 2023. On the face of the form, it is stated that: "*the actions of the representatives of the government of the United Kingdom of Great Britain and Northern Ireland and other authorities of the United Kingdom of Great Britain and Northern Ireland show intent to completely deny any compensation to P and punitive intent showing clear retribution towards P and his family*". P's father requested an adjournment of the hearing listed on 27 November 2023 because he had been admitted to hospital. He informed the court that the next hearing should be remote as he is bedridden. He asked for an interpreter. In an addendum to the Acknowledgment of Service, P's father set out the family's case. It can be summarised as follows:

    a. P has capacity including the capacity to litigate;

    b. The burden of proving P lacks capacity rests on the shoulder of he who asserts;

    c. There is no assessment currently before the court to establish a lack of capacity;

    d. The Neurosurgeon's report of November 2020 is not a capacity assessment;

    e. The Official Solicitor has a conflict of interests. That assertion is backed a by a chronology which contains the information that liability has been agreed as long ago as 18 September 2019 and an allegation that leading Counsel instructed by Irwin Mitchell within the personal injury claim has personally threatened that he will block the case until P dies so that he receives no damages. It is alleged that there is a premeditated plan between leading Counsel, Irwin Mitchell and the Official Solicitor to defeat P's claim;

    f. The Official Solicitor, it is claimed, has been seriously and professionally deficient when conducting the civil claim. Part of the complaint is that she has not visited P at all in the three years since her appointment and taken no real steps to secure an interim payment for P;

    g. There is no need for the Official Solicitor to act for P as the family can act for him. The Official Solicitor should be an appointment of "last resort"; and

    h. Irwin Mitchell have charged excessive fees to the detriment of P.

40. The hearing on 27 November 2023 did proceed and I have before me the judgment given by HHJ Burrows that day. Neither P's father nor mother were in attendance. The judge records that nevertheless he considered it in P's best interests to proceed given the administrative nature of the directions he was asked to make; the most significant of which was to require the local authority to file an assessment by the time of the next

hearing at which arrangements would be made for P's father to attend remotely and for an interpreter to be available.

41. The next hearing was on 23 January 2024. In advance of that hearing, P's mother had issued two COP9 forms. By the first COP9 dated 15 December 2023, P's mother sought the following directions from the court:

    a. The court set aside its previous order for want of jurisdiction;

    b. In the event the court decides it has jurisdiction, the court to decide that it should not have exercised its jurisdiction;

    c. In the event the court has jurisdiction, HHJ Burrows to reconsider the last order he made; and

    d. An order for disclosure against the Official Solicitor and the local authority.

42. The second COP9 is dated 19 January 2024. Within it, P's mother seeks the following directions from the court:

    a. A statement which was unsigned and did not contain a statement of truth should be ruled inadmissible;

    b. The five assessment reports exhibited to an unsigned and unverified statement should be ruled inadmissible;

    c. In the event that the court allows the statement with exhibits to be admitted, a reference to the Attorney General as the statement makers are said to be in contempt of court; and

    d. A request for an immediate transfer to the High Court and allocation to a Tier 3 judge.

43. I have in the papers before me the order of 23 January 2024. It records that P, by his litigation friend the Official Solicitor, was represented by Counsel as was the local authority. P's father attended the hearing remotely, but P's mother did not attend as she was unwell. P did not attend the hearing (in person or remotely) and no explanation was given for his absence. It was recorded at that hearing that:

    a. The Official Solicitor applied:

        i. for permission to instruct an independent expert to assess P's capacity and the extent to which he is the subject of undue influence and control from his parents; and

        ii. for a closed hearing to be convened and for closed material to be considered, in the absence of the second and third respondents.

    b. The local authority altered their position. They no longer considered that these proceedings should be concluded and acknowledged that their assessments to that

date had not been *robust enough.* Accordingly, they *did not* object to the application for permission to instruct an expert, but sought further time to consider its response to the application relating to a closed hearing and closed material.

c. P's father confirmed at the hearing that:

i. He considers P to lack capacity to make his own decisions;

ii. He does not accept that this court can make decisions relating to P's personal injury claim, and that decisions arising from P's road traffic accident in 2017 should be made in the proceedings in the King's Bench Division;

iii. In his view, P suffered catastrophic injuries as a result of the accident in 2017 and his current presentation is as described in the medical reports contained within the court bundle; and

iv. He agrees that it is in P's best interests for his personal injury claim to be resolved without further delay.

44. It was also recorded on the face of the order that the 'Closed Hearing' and 'Closed Material' Guidance ([2023] EWCOP 6), provide that it is the expectation that any closed hearing should be conducted by a Tier 3 judge, and further consideration will be given to the judicial allocation of the closed hearing/material application at the hearing listed below. That hearing was listed before me on 22 March 2024.

45. In advance of that hearing on 25 January 2024, an application was made by a COP9 to authorise the Official Solicitor to investigate P's property and financial affairs, for the purpose of ensuring that the costs of his legal representation are met. That discrete application was granted by HHJ Burrows on 8 March 2024.

This Hearing

46. The closed hearing/material application was heard before me on 22 March 2024. By the time the application was before me, no party sought a closed hearing. The primary issue before me was in relation to the application by the Official Solicitor to withhold specified material - a COP9 and a skeleton argument in support - from P's parents. Accordingly, the case proceeded in open court subject to reporting restrictions contained within the previously made Transparency Order.

47. At the hearing, the Official Solicitor was represented by Counsel, Ms Gardner. The local authority was represented by Counsel, Mr Borrett. Counsel for both parties attended before me remotely. P's father attended the hearing. He chose to attend the hearing remotely. His communication with the court and his understanding of the hearing was facilitated using a Romanian interpreter. P's father's English is good and sometimes he preferred to speak to me directly in English. P's mother chose not to attend the hearing because she was unwell. She did not make any application for the hearing to be

adjourned so that she could attend. P did not attend (in person nor remotely) and his reason(s) for absence are not known.

48. In order to determine the issues before me I had before me the following documents: -

    a. A bundle of 780 pages prepared on behalf of the Official Solicitor; and

    b. A supplemental bundle prepared on behalf of P's parents.

49. The bundles contained the following documents: -

    a. The Official Solicitor's skeleton argument dated 31 January 2024 (the open document). In addition, the local authority and the Court have had a skeleton argument which has not been disclosed to P's parents (the closed argument);

    b. Skeleton arguments on behalf of P's mother and P's father both dated 13 February 2024. They are separate documents but in strikingly similar terms; and

    c. A position statement prepared on behalf of the local authority for this hearing.

50. At the hearing, I heard oral argument on behalf of the Official Solicitor, the local authority and P's father. The argument went into the afternoon of the listed day. Accordingly I reserved my decision and my judgment.

The Respective Arguments

51. The Official Solicitor's argument was contained in the skeleton arguments before me. On the Official Solicitor's behalf, I was told that the application in relation to the closed material had not been made lightly. However, for the reasons set out in the arguments, the Official Solicitor considered it necessary to withhold material from P's parents. The facts placed before me were said to demand non-disclosure of the material in question. All other avenues had been explored but none ameliorated the risks. The strict necessity tests was met. The order, if made, should be time limited and kept under review.

52. The local authority confirmed that they no longer considered that P had the necessary capacity. They now agreed with and supported the Official Solicitor's arguments before the court. In writing and in oral argument they concentrated on answering criticisms made of a statement their social worker had made and applications made by P's parents which included an application to commit the social worker and their team manager and/or a possible referral to the Attorney General.

53. In their written arguments, P's parents have stated their strong opposition to the Official Solicitor's application for material to be withheld from them. They argue that: -

    a. This court has no jurisdiction. There should be no *single synthesised hearing* - *Re SK* [2012] EWHC 1990. The proceedings should be in the King's Bench Division alone.

    b. In the event that I decide that I do have jurisdiction then I am asked to:

i. Decide that this court should discharge any previous orders made in the Court of Protection proceedings on the basis that this court should not have exercised its jurisdiction in this case. The grounds for that application are said to be the UK Government acting through the Official Solicitor (a) *punitively* to deny P and his parents any compensation and (b) in breach of P's human rights. The decisions taken are said to have interfered with P's right to litigate and make decisions about with whom he can share material, where he can live, and what care and support he should receive. The material upon which they have been based has been obtained, they say, by *torture*;

ii. Reconsider the initial order of HHJ Burrows and in particular that part of the order (a) appointing the Official Solicitor to act as P's litigation friend and (b) declaring that P lacks capacity to litigate etc; and

iii. Order the Official Solicitor and Irwin Mitchell to disclose all documents to them relating to P. They strongly resist the application by the Official Solicitor to withhold material from them on the basis that it breaches their right to a fair process and their rights under the Human Rights Act 1998, in particular Articles 6 and 8.

c. P has capacity and the evidence before this court has not displaced that presumption. The report of the Neurosurgeon is not accepted by the parents. They argue that it is a report addressing causation, not capacity.

d. It is said that the Official Solicitor has a "*serious conflict of interest*". She has not seen P once despite being appointed for over 3 years. The Official Solicitor, it is said, has acted for financial gain and to the detriment of P.

54. P's father told me in oral argument that he wants to be treated equally and have equality of arms with the other parties before the court. He did not agree that some documents should be "hidden" from him and his wife. All parties should have the same material.

55. He also told me that he did not accept the decision of Master Eastman that P did not have the capacity to litigate, or the decision that the Official Solicitor should be appointed to act for P in the civil claim. He did not agree with the decision of Master Eastman to dismiss the civil proceedings his wife had initiated. He did not accept the outcomes of the appeals against those orders. He wanted P's capacity assessed - a "*new evaluation*" - but asserted that that should be carried out in the civil proceedings not these. He denied that he had previously influenced expert assessment of his son or taken steps to prevent it. He complained that despite the length of time since the accident, P had not received any money to date. He asserted that P had made complaints against the Official Solicitor and Irwin Mitchell.

The Law

56. The Court of Protection is a superior court of record, independent of the High Court of Justice, created by s.45 of the MCA 2005, to hear cases involving persons who lack capacity ("P'"). Under s.15, the court may make declarations as to the capacity of a person and the lawfulness of any act done in relation to them. Under s.16(1) and (2)(a), if

a person lacks capacity in relation to a matter or matters concerning his or her welfare or property and affairs, the court may, by making an order, make the decisions on their behalf.

57. Section 1 of the MCA 2005 sets out the principles on which the Act is based and on which the Court must act. Section 4 sets out the steps to be taken by the court when considering P's best interests. These include permitting and encouraging P to participate as fully as possible in any act or decision (s.4(4)), considering his or her wishes and feelings (s.4(6)(a)), and taking into account the views of anyone interested in his or her welfare (s.4(7)(b)).

58. The Court of Protection Rules 2017 ("the Rules") start in Rule 1.1 by stating an overriding objective: "*to deal with a case justly and at proportionate cost, having regard to the principles contained in the Act*". Rule 1.1(3) provides that dealing with cases justly includes, so far as is practicable, *inter alia*: ensuring that it is dealt with expeditiously and fairly; ensuring that P's interests and position are properly considered; ensuring that the parties are on equal footing.

59. Part 3 of the Rules provides the court with extensive powers of case management, including under Rule 3.1(2)(n), the power to "*take any step or give any direction for the purpose of managing the case and furthering the overriding objective*" and, under Rule 3.3, the power to "*dispense with the provisions of any rule*". Rule 3.4 provides for the exercise of powers on the court's own initiative as follows:

> *"(1) Except where these Rules or another enactment make different provision, the court may exercise its powers on its own initiative.*
>
> *(2) The court may make an order on its own initiative without hearing the parties or giving them the opportunity to make representations.*
>
> *(3) Where the court proposes to make an order on its own initiative it may give the parties and any other person it thinks fit an opportunity to make representations and, where it does so, must specify the time by which, and the manner in which, the representations must be made.*
>
> *(4) Where the court proposes (a) to make an order on its own initiative; and (b) to hold a hearing to decide whether to make the order it must give the parties and may give any person it thinks likely to be affected by the order at least 3 days' notice of the hearing."*

60. The Rules provide the court with power to exclude any person from attending a hearing or part of it, whether the hearing be in private (Rule 4.1(3)(b)) or in public (Rule 4.3(1)(c)), but only where it appears to the court that there is good reason for making the order (rule 4.4(1)(a)). The Rules allow the court to order the editing of information in documents prior to service or disclosure (Rule 5.11) and to dispense with any requirement to serve a document (Rule 6.10).

61. Following the decision in *Re A (Covert Medication, Closed Proceedings)* [2022] EWCOP 44, Hayden J (the then Vice President of the Court of Protection) formulated guidance to establish a clear procedure for those cases in which closed material falls to be considered. The Guidance is before the court. Although the Guidance is stated to be

for guidance only**,** it is based on all the relevant authorities which preceded it. I have had the benefit of reading those authorities.

62. Within the Guidance, "Closed material" is defined as material which the court has determined should not be seen by the party (and/or their representative). The Guidance emphasises that the situations in which closed material applications are made are rare. Nothing within the Guidance is intended to increase the number of applications for material to be closed. Rather, "*its purpose is to apply clarity of the principles to be applied and considerations to be taken into account in the very limited circumstances under which such steps may be appropriate*".

63. The starting point when dealing with any application in relation to closed material is set out in paragraph 6 of the Guidance. It states:

> *"6. The starting point is that, in principle, all parties (and, if not joined as a party, P) to proceedings before the Court of Protection should be able to participate in all hearings, and have sight of all materials upon which the court will reach its conclusions. There are several reasons for this:*
>
> > *1. The principle of open justice, "fundamental to the dispensation of justice in a modern, democratic society", normally requires that a judge cannot read or hear evidence, or receive argument which is not before all the parties to the proceedings;*
> >
> > *2. Securing the full participation of parties to proceedings, including by way of disclosure, not only enables them to present their case fully but also ensures that the court has the assistance of those parties in arriving at the right decision in relation to P's capacity and best interests;*
> >
> > *3. In any case where there is a suggestion that the court may in reaching its decision proceed on the basis of materials adverse to a party, both common law fairness and Article 6 of the ECHR normally requires that that party should be able to answer that material by way both of evidence and argument."*

64. Paragraph 7 sets out when a different course may be justified. *The most likely* circumstance in practice is where the withholding of material from one party is *required* to secure P's rights under the ECHR.

65. Paragraph 8 sets out the governing principle as follows:

> *"Any judicially crafted solution to the situation where either a party is excluded from a hearing, or is prevented from seeing material upon which the court will rely in making its determination, will always be imperfect. This means that any derogation from the starting point must (1) be as limited as possible; and (2) kept under review to ensure that it is only maintained for as long as strictly necessary."*

66. At paragraphs 23-25 the Guidance states this in relation to closed material:

> *"23. In any case where the basis for withholding disclosure is identified as being necessary to secure the rights of P, the following staged approach applies to the court's*

consideration (and hence to the matters which must be set out in any application for material to be closed):

> *1. When deciding whether to direct that a party should not be able to inspect the part in question, the court should first consider whether disclosure of the material would involve a real possibility of significant harm to P;*
>
> *2. If it would, the court should next consider whether the overall interests of P would benefit from non-disclosure, weighing on the one hand the interest of P in having the material properly tested, and on the other both the magnitude of the risk that harm will occur and the gravity of the harm if it does occur;*
>
> *3. If the court is satisfied that the interests of P point towards non-disclosure, the next and final step is for the court to weigh that consideration, and its strength in the circumstances of the case, against the interest of the other party in having an opportunity to see and respond to the material. In the latter regard the court should take into account the importance of the material to the issues in the case;*
>
> *4. In all cases, the test for non-disclosure is whether it is strictly necessary to meet the risk identified by the court.*

24. If the basis for resisting disclosure is not the interests of P but some other compelling reason (see paragraph 3 above), the staged approach will remain relevant as regards the testing of risk, and the requirement that non-disclosure be strictly necessary to meet the identified risk. However, the factors to put in the balance will include the nature of the interest relied upon, the interest of the party in question, and the impact of non-disclosure on the court's ability to discharge its obligations towards P.

25. In either case, experience has shown that, in this context, disclosing materials and/or restricting access to a party's legal representatives alone is likely to generate significant ethical problems and cannot, comfortably, be reconciled with the profession's Codes of Conduct."

67. In *Re SK* [2012] EWHC 1990, Bodey J considered the overlap and interface between personal injury proceedings and proceedings in this court, he considered the attraction of having one set of proceedings to determine all of the issues relating to P, but identified that, although that approach may be pragmatic, it could not outweigh the fact that:

> *"…the underlying issue in the two sets of proceedings, however, similar, is not the same. The jurisdiction of the Court of Protection is as to best interests and that of the Queen's Bench [as it was] is compensatory. The tests to be applied, although very similar ('best interests' as against 'reasonable needs') are not the same".*

68. Bodey J emphasised that, wherever possible, P should be represented by the same litigation friend in both civil proceedings and proceedings in this court, so as to ensure that differently held opinions are not reached as to where their interests may lie in the different proceedings.

My Analysis and Decision

Jurisdiction

69. On the basis of the information then before the court on 1 November 2023, HHJ Burrows considered s.48 MCA 2005 and declared himself satisfied that there is reason to believe that P lacks capacity to make relevant decisions as a result of his brain injury. That declaration has not been appealed. Since that date, no information has been placed before this court which would cause this court to set aside that declaration or to come to a different view.

70. When I have considered the papers, I have done so knowing of P's father's assertion, supported by his mother in writing, that P has capacity. I have reminded myself that there is a presumption that a person has capacity. I have also considered P's parents' dissatisfaction with the evidence from the Neurosurgeon. I do not agree with their assessment of his evidence.

71. I have re-read the papers that were placed before me for the March 2024 hearing. On the basis of the evidence placed before me, I have considered s.48 MCA 2005 and I am satisfied that there is reason to believe P lacks capacity to make relevant decisions by reason of his brain injury. Accordingly, and for the avoidance of doubt, I make an interim declaration that the Court has reason to believe that P lacks capacity to: i) litigate these proceedings; ii) make decisions as to sharing information with his legal representatives; iii) make decisions as to contact with others; iv) make decisions as to where he should live; and v) make decisions as to his care and treatment.

72. I have already set out the legal framework which governs the jurisdiction of the Court of Protection. The Court of Protection was created by s.45 Mental Capacity Act 2005 to hear cases involving persons who lack capacity. Section 15 of that Act gives the court the power to make declarations as to the capacity of the person and the lawfulness of any act done to that person. By reason of s.16, if that person lacks capacity in relation to a matter or matters concerning his welfare or property and affairs, the court may make orders on that person's behalf.

73. Section 48 of the Mental Capacity Act 2005 states as follows:

> *"**48 Interim orders and directions***
>
> *The court may, pending the determination of an application to it in relation to a person ("P"), make an order or give directions in respect of any matter if—*
>
> *(a)there is reason to believe that P lacks capacity in relation to the matter,*
>
> *(b)the matter is one to which its powers under this Act extend, and*
>
> *(c)it is in P's best interests to make the order, or give the directions, without delay."*

74. I consider that each of the three statutory pre-conditions are met in this case. For the reasons I have already given, there is reason to believe that P lacks capacity in each of the relevant domains I have set out above. The court has the power under the Act to determine each of those issues. Thirdly, it is clearly in P's best interests to make any

necessary directions without delay. I consider that all the orders and directions that have been made to date have been lawful, necessary, and proportionate.

75. Given the above analysis, I have no doubt that this Court does have the jurisdiction to make the orders and directions that it has made to date.

Application by P's Parents to Dismiss the Proceedings before this Court and Discharge all Previous Orders and Directions

76. I consider that every order and direction made to date has been properly made on the evidence before the court. Each of the orders and directions made has been lawful, necessary and proportionate. There is no evidence before me that in making any of the orders or directions made to date there has been any unlawful interference with P's human rights.

77. I have been asked by P's parents to discharge all previous orders and directions in these proceedings. They wish this litigation to end and for the personal injury proceedings to be the only proceedings before any court in relation to P.

78. I have already set out the decision of Bodey J in *Re SK* (above). As in *Re SK*, the underlying issues in the two sets of proceedings in this case are similar but not the same. On behalf of the Official Solicitor, it is accepted that there are several issues which will require co-ordination between this Court and the King's Bench Division including the management of any monies P may receive. Further, this Court may, in due course, be required to authorise any care arrangements put in place as a result of the civil proceedings, such as any arrangements depriving P of his liberty. This overlap between the two sets of proceedings is perhaps inevitable given the welfare concerns in relation to P were raised in the personal injury proceedings. However, there are significant and relevant differences between the two proceedings. The personal injury proceedings are about compensation for injuries received. The Court of Protection proceedings were initiated because of safeguarding concerns about P and concerns about his capacity to decide (amongst other matters) where he should live, who he should have contact with, and issues about his care and treatment. Those will be best interest decisions will be matters for this court.

79. Based on the papers currently before me, I agree with the Official Solicitor that as this case proceeds, there may be legitimate disputes to be determined in this court about where P should reside to receive the care he requires and potentially issues about whom he should have contact with. Accordingly, I do not agree with P 's parents' argument that these proceedings should be dismissed, and all previous orders should be discharged. This court has jurisdiction. The proceedings before this court are necessary and have a purpose which cannot be fulfilled by the personal injury proceedings alone. The King's Bench Division will determine the level of P's compensation and his needs in that context. This court will consider his best interests when making any welfare orders that may be required in the future.

Closed Material

80. P's father, supported by his mother, wishes to be treated equally before this court. He seeks equality of arms.

81. I begin this part of my judgment by reminding myself that the starting point of my analysis must be that "*all parties (and, if not joined as a party, P) to proceedings before the Court of Protection should be able to participate in all hearings, and have sight of all materials upon which the court will reach its conclusions*".

82. I have reminded myself that Article 6(1) of the ECHR states as follows:

> *"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 …"*

83. Open justice is an important aspect of accountability in a democratic society. It has a high value which I respect and factor into my decision making. Part of open justice is that all parties to proceedings have the same case papers at the same time. The proceedings before me are adversarial in nature and for one party to be deprived of material available to other parties means that they will not be litigating on an even playing field. However, there are rare cases where that inequality is justified in the interests of justice. I find that this is one such rare case.

84. Having read the closed material, there is a real possibility that disclosing that relevant information to P's parents at this stage would place P at risk of significant harm - physical, emotional, and psychological – in breach of his Article 8 rights. In addition, I consider that there is a real possibility that disclosing the material at this stage to his parents would prevent a fully informed capacity assessment. A fully informed capacity assessment is necessary if there is to be, in due course, a fair process leading to a fair trial on the issue of capacity. P has a right to a fair trial; his Article 6 rights are engaged. An assessment which is not fully informed will undermine that right. However, I weigh against that a consideration of whether P would benefit from full disclosure, including to his parents, now. Such full disclosure would ensure equality of arms at all stages of the process. However, against that I take into consideration that P may have the opportunity to challenge the material if it is put to him by the assessor as part of the assessment process. Further, whether or not it is used by the assessor in that manner, P or his representatives will have the opportunity to challenge the closed material and any assessment based upon when the assessment has been completed and filed within these proceedings. At that stage, the closed material can be disclosed to all parties including P's parents and they too will have the opportunity to challenge within the proceedings that material and any conclusions the assessor has or has not drawn from it before any substantive decisions are made based upon that assessment. Thus, there will be an opportunity for challenge on P's behalf and by his parents, and they will not be deprived of the opportunity to make representations. I consider that so long as the closed material is disclosed before any substantive decisions are made on the basis thereof and/or the assessment, then there can be a fair hearing on the substance of the matter and the proceedings as a whole will have been fair. In that way, the Article 6 rights of P and his parents will have been respected.

85. Having weighed the relevant factors, I stand back and make my holistic evaluation. I consider that the overall interests of P clearly benefit from non-disclosure at this stage.

86. I am conscious that in this case, P's parents have little or no confidence in this court and these proceedings or in the Court hearing the personal injury proceedings. I consider that there is a real possibility that withholding material from them will feed into that lack of confidence. However, I weigh that against the significant history in this case of non-engagement and non-cooperation that already exists. Sadly, I consider that the disclosure of the material to them at this stage would not restore their faith in the court and this process. Indeed, given the content of the materials, it might even make matters worse. I place in the balance that non-disclosure to P's parents of the closed material will prevent P's parents from challenging the material before it is used by the assessor and will prevent them from presenting to the assessor material which may contradict the closed material. However, that unfairness will be ameliorated by disclosure of the closed material when the assessment is filed and before any final decisions are made based upon it, and it is justified by the need to protect P from the risk of significant harm. Thus, whilst this part of the process will deprive them of an equal footing with the other parties, the proceedings as a whole will not be unfair, so long as they have the opportunity to challenge the material before any substantive decisions are made on the basis of the assessment and/or the closed material.

87. For the reasons above, I consider that non-disclosure at this stage infringes P's parents Article 6 and 8 rights, but when I balance that against the potential infringement of P's Article 6 and 8 rights, I conclude that the balance in this case comes fairly and squarely down in favour of non-disclosure to P's parents at this stage.

88. Further, I conclude that withholding the material from P's parents at this stage is necessary to protect P's Article 8 rights, which include the right to be protected from significant harm and his Article 6 right to a fair hearing. I use the word 'necessary' in this context to connote the imperative. A gist of the information to be withheld will not ameliorate the risks to P from disclosure.

89. Accordingly, I make the non-disclosure order sought by the Official Solicitor in the terms of the draft order save for one important amendment. Throughout this part of the judgment dealing with closed material, I have written *at this stage.* Any interference with the rights of any party must be lawful, necessary, and proportionate. This court has a duty to keep the issue of disclosure under review and to only make an order for such duration as is necessary and proportionate on the facts of this case. On the facts as presently before this court, I cannot see any justification for withholding the material from P's parents once the court assessment proposed by the Official Solicitor has been served on P's parents. The duration of the order will thus be until the assessment has been served on P's parents or further order of the court, whichever is the sooner.

Other Issues

90. That concludes what was to have been the only real issue before me at the March hearing. However, there are outstanding issues primarily between P's parents and the local authority. I considered that, as time allowed, it would be prudent to deal with all the issues I could at this hearing. I thus heard separate oral submissions from all parties in relation to these issues and ensured P's father had a full opportunity to relay his argument to me.

91. The issues arise from an application made by P's mother and supported by P's father for the court to:

    a. Decide that the statement of a named social worker dated 8 January 2024 is not signed and thus not admissible pursuant to Rule 5.5;

    b. Decide that the exhibits to the statement are not admissible pursuant to Rule 5.4; and

    c. Alternatively, if the evidence is admissible, "request the Court to permission pursuant to paragraph (1)(a), Rule 21.17 be referred to the Attorney General with a request that the Attorney General consider whether to bring proceedings for contempt of Court against Team Manager named and the named social worker".

92. I shall deal with the issues in turn.

93. Firstly, an unsigned social worker statement had been filed before this court. However, since P filed her application the social worker in question has signed her statement and her signed statement is also before this court.

94. Rule 5.5 states that a witness statement which is not verified by a statement of truth shall not be admissible "*unless the court permits*". Furthermore, the court has a wide discretion to deal with procedural defects such as this. Rule 3.5 provides that "*the court may waive the error or require it to be remedied or may make such other order as appears to the court to be just*".

95. Given the witness statement in question now has a signed statement of truth, and given that that version of the statement as filed and served in advance of this hearing, the failure to sign the initial version of the statement caused the other parties no prejudice and that error has now been rectified. Accordingly, I permit the local authority to rely on the signed version of his statement.

96. Secondly, Rule 5.4 deals with application notices and not exhibits. The second limb of P's mother's application has no basis and is accordingly dismissed.

97. The third limb is the application to commit the social worker in question and her team manager or their referral to the Attorney General to consider whether a contempt application should be brought. No explanation has been given for the suggested referral to the Attorney General. Applications to commit in the Court of Protection are governed by Part 21 of the Rules. The application in this case is procedurally irregular. Contrary to Rule 21.3(2), permission to bring the application has not been sought. Contrary to Rule 21.5(1), the application was not served personally on those against whom it is made. The application does not set out the matters prescribed by Rule 21.4(2). In the circumstances, it is dismissed.

98. That is my judgment.

Postscript

99. This judgment will be handed down electronically on Wednesday 1 May 2024. The parties are asked to agree a draft of the order made and to submit it for my consideration by no later than 4pm on 3 May 2024. By the same date they are asked to make any representations in writing about whether this judgment should be published. I will determine that issue on the papers.