Neutral Citation Number: -**[2024] EWCOP 76 (T2)**

Case No: 14216532

IN THE COURT OF PROTECTION

Sessions House,
Lancaster Road,
PRESTON PR1 2PD

Date: 19 December 2024

Before :

HIS HONOUR JUDGE BURROWS
(Sitting as a nominated judge of the Court of Protection at Tier 2)

- -

Between :

BURY METROPOLITAN BOROUGH COUNCIL	**Applicant**
- and -	
EM	**First Respondent**
(by her litigation friend, the Official Solicitor)	
-and-	
MM	**Second Respondent**
-and-	
FM	**Third Respondent**

- -

EM: DEPRIVATION OF LIBERTY, CARE PLANNING & COSTS

- -

Julie Waring (instructed by **the Local Authority**) for the **Applicant**
Francesca Gardner (instructed by **Simpson Millar**) for the **Official Solicitor on behalf of EM.**
MM and **FM** appeared in person.

Hearing dates: 9th September and 9th October 2024

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APPROVED JUDGMENT

HIS HONOUR JUDGE BURROWS:

INTRODUCTION

1. This case concerns a young woman of 18, who I shall call Emma, or EM.

2. The other parties are the named Local Authority (LA) and Emma's mother and father who I will refer to by those roles and as MM and FM.

3. This judgment deals with two principal issues. First, the issues of capacity and care planning on the basis of what is in Emma's best interests. The second is to deal with the Official Solicitor's application for costs following the hearing before this one.

BACKGROUND: EMMA'S RECENT HISTORY

In general

4. While EM's case is, of course, unique, it follows a depressingly familiar course. I will outline only very briefly the necessary facts.

5. EM is 18 and normally lives with her parents and younger sister. There is nothing about her parents or sister that should be considered concerning. They are an "ordinary" family. Although there have been arguments, her parents appear to love their daughter.

6. She has a history of dysregulated behaviour. Even at the age of 6, Emma when emotional, "ran off" to a local bridge, a euphemism for threatening suicide.

7. Emma was diagnosed with ADHD in 2020. Initially, she was medicated for this, but had to stop due to a medical condition.

8. Later, in 2020, she took a drug overdose. She was dysregulated and felt "invalidated" at home. She was allocated a CAMHS worker. However, she engaged in self-harm by cutting herself with razor blades.

9. In June 2023, Emma was diagnosed with autism spectrum disorder (ASD). She was referred to the Bury community mental health team (CMHT) in September 2022. Her presentation at that time was complex and it was thought it was likely to persist beyond her 18th birthday, so, with the support of her parents, Emma was moved towards a supported placement which could meet her Autism and Mental Health needs. She was placed at "the placement" as a result.

Incidents

10. In March 2023, Emma was detained under s. 2 of the Mental Health Act 1983 (MHA). Her mother had reported her as missing from home, and she was located on a busy road, headbanging and stating she wished to end her life. The police used their powers under s.136 MHA and took Emma to a place of safety at Fairfield Hospital, Bury.

11. This was the culmination of escalating self-harm whilst living with her parents.

12. The papers contain details of a large number of incidents that have occurred since in which Emma has tried to harm herself or has harmed herself by a number of different means. She has tied ligatures around her neck and has had to be rescued by staff using ligature scissors. She has cut herself and then become very distressed and has then started headbanging (i.e. the violent striking of her head against a hard surface).

13. These incidents, which have been numerous, have led to staff using verbal de-escalation techniques. Where those fail, actual physical restraint has been used, and MVA holds are deployed.

14. On some occasions, Emma has cut herself badly using a broken plate.

15. Although it is not the Court's wish to go into too much detail, it does seem appropriate in this case for me to quote the last few incidents earlier this year as listed in the evidence.

4 January 2024	Absconded when being escorted by staff to A&E. Ran off and was found attempting to walk in front of cars. Police contacted. Ward staff utilised MVA holds to support her into back of police van. No holds required once they arrived back at the unit.
5 January 2024	Found headbanging in her room, verbally deescalated, wound cleaned and utilised 50mg promethazine.
12 January 2024	Found headbanging. Verbal de-escalation utilised. Wound cleaned and 50mg Promethazine given. Found headbanging in her room, was verbally re-directed from wall
13 January 2024	Found Purging in bathroom Found headbanging in her room on the corner of a wall. Followed by unobserved headbanging.
16 January 2024	Secreted ceramic plate from kitchen, took to ward, required holds to remove tied a tight ligature, ligature knife utilised which caused cut to EM's neck, due to resisting removal
18 January 2024	self harm with a razor, required dressing. Unwitnessed headbanging, EM found tearful and blood on her forehead and the wall.
19 January 2024	Several cuts to arms, dressing applied. Ligature later made from bandages which were applied
20 January 2024	Ligature with tights required cutting down. Following this headbanging with blood on wall reports over overdose of promethazine whilst on leave
21 January 2023	00.30 Found in bathroom with ligature on her neck. Staff cut this off. 01.00 Found headbanging in bathroom Found on checks self-harming via cutting with piece of wood. Verbal de-escalation used. Then proceeded to headbang, verbal de-escalation utilised to move away from wall.
22 January 2024	Found in bathroom with tied unattached ligature. Staff removed Found in her bathroom with cuts to her legs from a piece of wood. Refused to turn over the item and have wound care. Lose arm holds applied to obtain the object.
23 January 2024	On return from leave with mum became distressed, resisted coming back to ward, holds used to bring her safely back to the ward
24 January 2024	Headbanging on corner of bedroom wall, MVA holds used to move EM away from the wall and to move to sensory room for to de-stimulate.
27. January 2024	Ingested 120ml of body mist. Superficial cuts made using snapped piece of canvas. Headbanging, no response to verbal de-escalation, in holds/restraint for 1 hour.
31 January 2024	Restraint to prevent headbanging, IM Lorazepam x2.

30 January 2024	Headbanging in bedroom. PMVA intervention required. x2 1mg IM Lorazepam, x1 25mg. Promethazine IM. >2 hours in restraint. >5 members of staff for restraint. 4 lots of IM in <12 hour window. Mum handed in item of clothing that EM had cut, highly suggestive of a ligature
12 February 2024	Headbanging against corner of a wall – figure of 4 hold
15 February 2024	Self harm via cutting to neck and chest with unknown item used. Found on 1:15 checks headbanging against corner of bedroom wall.

BACKGROUND: PROCEEDINGS

16. Proceedings were issued in the High Court in August 2023 inviting the Court to invoke its inherent jurisdiction to keep Emma safe by authorising restrictions upon her that amounted to a deprivation of her liberty.

17. A number of hearings came before Judges sitting in the Family Division's National DoLs List. This list has been established to hear the increasingly large number of similar cases in which the High Court is being invited to authorise care plans that amount to a deprivation of the liberty of young people.

18. There was a hearing on 6 October 2023 at which an interim order was made which lasted until 16 November 2023. A further hearing then took place on that later date. However, by then Emma was detained under the MHA and the Court made no order, indeed the Judge concluded the Court had no jurisdiction to make an order, and the proceedings were adjourned.

19. The next High Court hearing was on 15 December 2023 when Emma remained detained under s. 3 MHA. At that point the Court was understandably concerned about Emma's declining mental health and suicidal ideation.

20. A capacity assessment was carried out on Emma on 1 December 2023 and the assessor concluded that she lacked capacity to make decisions in relation to her residence and care.

A further update on that assessment was carried out on 28 January 2024 and the conclusion was the same.

21. At that stage, proceedings were issued in the Court of Protection. A suitable placement outside a hospital and the MHA had been found. Emma moved to the placement in March 2024 and it is recorded that the incidents of self-harm had declined following that move.

THE COURT OF PROTECTION PROCEEDINGS

22. The first attended hearing in this Court was on 15 July 2024. There had been a couple of orders made without attendance before that. By that stage, Emma had the services of solicitors instructed by her litigation friend, the Official Solicitor.

23. The hearing was listed urgently because of a failure by the LA to communicate adequately with those acting for Emma and also failing to disclose the sort of information needed for the Official Solicitor to do her job.

24. Within that context, an order was made specifying the documents and other information required for the proceedings to progress.

25. A list of documents to be disclosed by the LA was specified in the Order, that was to be provided to the Official Solicitor by 29 July 2024.

26. By the same date, the LA was to provide a copy of all social care records in their possession relating to Emma from July 2020 to the present at that point.

27. Furthermore, by 8 August 2024, the LA was to provide a witness statement outlining a number of important assessments and care plans in Emma's case.

28. By 15 August 2024, Emma's parents were to serve any evidence they wished to file in response to the above.

29. By 22 August 2024, those representing Emma had permission to file and serve any updating evidence as to her wishes and feelings.

30. Permission was given for a round table meeting to take place in the week commencing 26 August 2024 in order to consider the evidence and to discuss whether agreement could be reached or at least for the issues to be narrowed before the next hearing, if possible.

31. That hearing took place on 9 September 2024. By that stage, there had been little progress and serial breaches of the July order.

32. I quote a significant chunk of the Official Solicitor's position statement for that hearing for a flavour:

> 4. Following the order being made on 15 July 2024 Emma's representatives have made extensive attempts to chase the necessary documents and ensure compliance with the orders. The following is a summary of the attempts made:
>
> a. local authority was directed to confirm the parent's contact details within 48 hours of the hearing, this was chased on 19 July, and not received until 23 July – 6 days late.
>
> b. A number of emails were sent requesting the social care records and original application documents. These were due to be filed on 29 July. The email correspondence sent included an email to the Head of Legal Services in the local authority, following several unanswered emails.
>
> c. On 13 August, the local authority provided documents from the placement. The social care records were not included.
>
> d. On 14 August a further request for the documents was made. No response was received.
>
> e. On 16 August, a further email was sent requesting the document and reminding the local authority that the court directed the substantive witness statement to be filed by 5 August, and it had not been received.
>
> f. On 19 August an email was received from CK (head of social care legal team), to say that she had allocated the matter to a new solicitor within the team, Patricia McCausland: 'she is back in on Tuesday and will be able to pick this up then.'

g. On 20 August, a further email was sent chasing the documents. The concerns on behalf of Emma were set out in detail, including the fact that within the documents that had been provided was a capacity assessment conducted on 2 August, which concludes that Emma has capacity to make decisions as to where she should reside. Emma's representatives had not been alerted to this assessment, or notified of its conclusion at the time. An urgent update was requested as to whether the local authority sought to rely on the assessment and an update of the local authority's position generally.

h. A response was not received until 29 August. The local authority invited agreement to vacate the hearing on 9 September to allow time for the local authority to comply with the order and to permit time for Emma's representatives to consider the documents.

i. On 3 September Emma's representatives again requested confirmation of the local authority's position and requested further assessments as to Emma's capacity to conduct these proceedings and to make decisions as to her residence and care.

j. On 4 September, the local authority provided a draft witness statement. It did not answer any of the questions that had been posed, it was not signed and it contained comments from the local authority's legal representative. It was not a completed document.

k. On the same date, following a further email chasing a response the local authority wrote as follows: '*The LA is working to file and serve documents at 6, 7 & 8 of the order dated 15th July '24, tomorrow plus the bundle.*

l. On 5 September, the local authority served a completed witness statement, almost a month late.

I would add that the factual narrative above is not in significant dispute.

33. For that reason, the Official Solicitor complained that she had not been able to conduct proceedings on Emma's behalf, not being in a position to evaluate Emma's case on capacity and best interests. She also made an application for the costs of that hearing. I will deal with that application later. Firstly, I think it is important to outline what I consider to be a significant confusion in the approach taken by the LA towards care planning.

CAPACITY & CARE PLANNING

Capacity

34. Capacity and care planning are central to this case. Does Emma have capacity to consent to arrangements that may be put in place in order to provide her with support that meets her needs?

35. The issue of capacity in this case is complicated and difficult. It was clear from the written evidence of Dr Khan, Consultant Psychiatrist responsible for Emma' care, it is probable her capacity to make relevant decisions about her residence and care fluctuates. Dr Khan was clearly of that view having read the minute of the Round Table Meeting (RTM) on 3 October 2024.

36. The Official Solicitor and the Court were therefore confronted with a young woman whose capacity to make relevant decisions had been absent during a prolonged crisis, and which may be absent at certain times of crisis in the future. It was not clear to the Court whether in fact EM was still in a crisis during which her capacity to make relevant decisions was absent, at least some of the time. In such circumstances the Court needs to understand the nature of the fluctuating capacity, what triggers it and what is the scope of the incapacity when triggered. Although judgment had not yet been given at the time of the October hearing, the difficulties of such a case are perfectly illustrated in Leicestershire County Council v P & NHS Leicester, Leicestershire & Rutland ICB [2024] EWCOP 53 (T3), a judgment of the Vice Present, Mrs Justice Theis.

37. Interestingly, Dr Khan said in the RTM that she had been looking at Emma's capacity "to give advance directives within the MCA". It was clear Emma "wants to be somewhere that is less restrictive", and Dr Khan and Emma "had a very clear dialogue as to how she will work towards that". Dr Khan stated that she "was not looking at the care plan because that would have been outside the remit [of her assessment?] but clearly from the capacity

assessment, knowing the progress that Emma has made, [Dr Khan] considered the longitudinal nature of the capacity assessment and someone with autism".

38. What was clear at the hearing in October was that Emma and her psychiatrist were working together therapeutically, and the doctor and other care professionals were attempting to formulate an effective care plan for her. However, capacity was an unclear subject at that time. Since there was diagnostic evidence in support of the mental disorder the Court thought it appropriate for there to be further evidence to focus on the functional side of capacity. Hence an Independent Social Worker (ISW) was appointed to prepare a report for the next hearing in December.

39. Pending that, the Court was going to make a declaration that Emma lacked capacity to make decisions as to her residence and care. The Court was concerned to understand what the LA's position was in relation to care planning. A particularly troubling aspect of what Dr Khan said in the RTM was the following passage when she was asked about what restrictions would be put in place (my emphasis added):

> [EM's] welfare checks, especially when she struggles to seek help. It's about welfare checks, 1:1 support (we cannot enforce support on her), the door would be locked. There has been a discussion, but it has not been formalised. She could have a key and leave the premises as long as she tells the staff. If she does not tell the staff, it would be a welfare concern for the manager. There is a framework around capacity but there is also a framework around supporting a vulnerable adult who has autism.
>
> **If the Judge was minded to remove the deprivation of liberty safeguards, we could work with that.**
>
> This is a young lady who is highly vulnerable and lacks social skills. **Because of her autism, she is so fixed on DoLS, maybe it is better if she doesn't feel forced to do certain things.**
>
> **She has made significant progress but there is work to be done for her to live somewhere with less restrictions**. She was very clear that she was not ready to go home. She said that she would like to be somewhere with less restrictions. The restrictions she named were window restrictors…"

40. This passage troubled the Court. For reasons I will come to below, it was not clear during the hearing what plans the LA had in mind for Emma. The LA was applying to withdraw the application in this Court, and (to quote) "lift the DOLs".

41. During the hearing, the Court probed this application and the reasons for it. I asked counsel for the LA and the social worker to leave the issue of capacity to one side, because the Court needed to consider the issue at a later date and to concentrate on what care plan would best meet Emma's needs in the meantime. The Court's view was that, on the face of it, Emma was still likely at times to act in a dangerously dysregulated way and posed a significant risk to her own safety. Whilst keeping someone safe is not the only issue before this Court, it is a pretty significant one. The Court wanted to understand how the LA had reached its surprising decision to apply to withdraw proceedings, and for the interim orders authorising Emma's residence and care arrangements to be discharged.

42. Having heard from Counsel for the LA and the social worker, my understanding of their case is as follows. At that time, the restrictions at the placement were 24 hour supervision within a locked environment. There were significant restrictions over Emma's movements within that placement. There were also restrictions on her contact with other people, notably her family. At that time, other placements had been identified, and the intention was for less restrictive care plans to be put in place as and when Emma moved there. Pending that, nothing was going to change in the short term.

43. I was then told that there was concern on the part of the LA and prospective providers that while Emma was subject to a "DoLs order" from this court there may be a difficulty in obtaining a new placement for her.

44. That issue continued in the hearing on 10 October 2024. In dealing with the issue of the withdrawal of Court of Protection proceedings the LA's position statement said (my emphasis):

> "The court will however note that [EM's] current placement will not be derailed if the **Dols is withdrawn**, their services can continue to remain in place **without a Dols** for EM until she attains the age of 25".

45. In the social worker's statement, emphasised in the LA's position statement, is the following passage. Having stated that Emma was settled where she is, she wanted to move somewhere less restricted, the Social Worker then says:

> "Due to the [capacity?] assessment's findings, I have had conversations with the placement regarding EM's suitability to the service, if not subject to a Dols and the Local Authority has commenced a search for a less restrictive placement. I am mindful that sourcing the current placement was very difficult for children's services due to EM's complex presentation and risk history. At present one provider has come forward, who feel they may be able to meet EM's needs however this is an out of area provider."

43. In the position statement was also the following quotation from the social worker:

> "From the information provided by Dr Khan during the RTM it does not appear that the placement can manage EM in a way which would not be classed as restricting her liberties. Dr Khan suggested that "no restrictions" would be allowing EM out on her own but staff following behind her. As you will be aware this is still a restriction. They proposed stopping EM from leaving the premises if they feel she is dysregulated, which again is still a restriction. If EM was out of the placement on her own, they would expect her to text them every 5 minutes to confirm that she is safe. Again, this seems to be a restrictive practice. EM agreeing to restrictions when they deem she has capacity so that they can put in place restrictions for when she is dysregulated. Dr Khan referred to this as an advanced decision making.
>
> > "From the information provided by Dr Khan during the RTM it does not appear that the placement can manage EM in a way which would not be classed as restricting her liberties. Dr Khan suggested that "no restrictions" would be allowing EM out on her own but staff following behind her. As you will be aware this is still a restriction. They proposed stopping EM from leaving the premises if they feel she is dysregulated, which again is still a restriction. If EM was out of the placement on her own, they would expect her to text them every

> 5 minutes to confirm that she is safe. Again, this seems to be a restrictive practice. EM agreeing to restrictions when they deem, she has capacity so that they can put in place restrictions for when she is dysregulated. Dr Khan referred to this as an advanced decision making.
>
> In light of what Dr Khan has said regarding how they would manage EM without dols, I have continued to look at placements which have a more "open door" policy for person's who live with them. At present there are 3 options and two of these are at the stage in the assessment process where they would like to meet EM.
>
> It would be the local authority's view that another capacity assessment for EM would be unfair to her and not in her best interests. She has had two recent assessments and has engaged with both very well and found to have capacity on both occasions. There was no evidence brought by Dr Khan to the RTM, other than her verbal statement that "she should not be going to any other placement when the risks are so high" and that "I don't think she is ready to leave" (the placement).

44. The position statement then goes on that, in the light of Dr Khan's assessment and the nature of Emma's fluctuating capacity, "there is no longer a requirement for the continuation of the Dols".

"ON A DOLS"

45. Having read the documents in this case, including those concerned with Emma's own wishes and feelings, it seems to me the Court needs to be very clear in the language it uses.

46. The acronym DOL (or DoL) or its plural "DoLs" comes from the wording of Article 5 of the European Convention and refers simply to "deprivation of liberty". The term "DOLS" refers to Schedule A1 of the MCA, otherwise known as the Deprivation of Liberty Safeguards. Emma is therefore subject to an order that authorises her deprivation of liberty, which could be called a DoL or DoLs order. She is not on a DOLS.

47. I hope not to confuse things further by explaining my understanding of the law. The MCA requires decision makers to make decisions for people who cannot make those decisions for themselves, where necessary (see ss 1-4 MCA). That includes issues over residence and

care. It enables decision makers to decide on care plans that meet the best interests of the person concerned. That is the starting point. A care plan in P's best interests, and the one which adopts the least restrictive option is what the decision maker must choose. If that plan involves or may involve a deprivation of P's liberty, then it needs to be authorised and will be if it is necessary and proportionate in furthering P's best interests.

48. It can be authorised under Schedule A1 of the MCA if the person is 18 or older and is detained in a care home or hospital. These are the DOLS. If the person is not yet 18 or is somewhere other than a hospital or care home, the Court must decide whether to authorise the care plan under ss 15 and 16 MCA.

49. The inherent jurisdiction has been used in Emma's case to authorise her deprivation of liberty outside a statutory regime. These are also known as DoL or DoLs orders, with good reason.

50. Such authorisation, by any of these avenues, is permissive rather than mandatory. Or put another way, it enables the carer to use restrictions that amount to a deprivation of liberty, it does not require them to do so.

51. Therefore, the expression "on a dol" or "under a dol", whilst perfectly legitimate abbreviations, must be understood properly and within that context. To be "on" or "under a dol" means to be subject to an order (or authorisation) approving and authorising a care plan which allows the carer to use restrictions that amount to a deprivation of liberty in the best interests of P. Clearly, the emphasis here is on the care plan itself and not the legal status of the restrictions that can be used. The care plan to be used is still a decision to be made by the carer/clinician/MDT in charge on the basis of what they consider to be needed in the circumstances that arise, and what is in P's best interests.

52. Unfortunately, when the Court authorises such a care plan that amounts to a "dol" it is seen as being mandatory, like the Court has imposed a prison sentence. That gives rise to an unfortunate misconception on the part of the people who are the subject of these orders that the order, while it remains in place, requires those providing care to keep them actually locked in and locked up.

53. In some extreme cases coming before the National DOLs List and the Court of Protection it is easy to see why the misconception arises, particularly when the options for care are all inadequate, P's behaviour is extreme, and LAs are fighting a very difficult and seemingly endless battle to keep P safe.

54. However, the principle is always the same. The Court will ask questions like: what is the care plan and how has it been arrived at? What are the risk assessments of alternative plans compared with this one? What does P think? What do other relevant people under s. 4 MCA think? Does the LA/NHS provider (as the case may be) consider the care plan to be the least restrictive option that will address P's needs? What steps are being taken to reduce the need for such an intense care plan? The Court is obliged to scrutinise the answers given.

55. It is important to emphasise though that the care plan is King here. That is how Emma's case should be seen. Considering Dr Khan's engagement with Emma, an attempt is being made to give effect to what Emma wants in her care plan. She wants less restriction. If the clinicians, social workers, and other relevant professionals can work with Emma (and perhaps her family) to devise a care plan that does not amount to a deprivation of her liberty, and that care plan is in her best interests, then the Court will authorise it.

56. The LA in this case is (I think) planning to move Emma to a place where there will be no need for "a dols". However, through their counsel it was made clear to me that could only

happen if I "lifted the dols". This is incorrect. If the LA devises a care plan whereby Emma can move to another place where she will not be deprived of her liberty, there will be no need for the Court to authorise her deprivation of liberty. If a plan is devised at her present placement that does not amount to a deprivation of Emma's liberty, the Court will not need to authorise one.

57. So profound has the language and the law been confused in this area, that these two statements of what should be the blindingly obvious, appear necessary.

58. It is important to remember that the Court is in place to ensure that disputes about capacity, best interests and the proportionality of restrictions are resolved as well as ensuring that there is a consistent scrutiny of a care plan that imposes significant restrictions on P.

59. Once again, however, care planning and the assessments and consultations around that are what is most important. That means Emma is central to the process. By focusing on the Court and the making and un-making of a "dol", Emma and other people in her position are made to feel peripheral to the whole process. Many of them conclude that "getting off the dol" is essential before they can be part of the process. Many feel that when on a "dol" they are filed away and forgotten only to be taken out for scrutiny when someone else makes a fuss.

60. In fact, the whole MCA/Court of Protection process, particularly when concerned with Article 5 rights, is about ensuring that these care planning decisions are constantly reevaluated to ensure that P's best interests are served through the least restrictive option, and P is central to the whole process.

61. At the October hearing, I therefore approved the care plan I was invited to approve at the placement. That care plan amounts to a deprivation of Emma's liberty not because the

Court says it does, but because the restrictions imposed under the care plan are said to be necessary, proportionate and in her best interests according to those involved in her care, and they place Emma under continuous supervision and control and she is not free to leave the placement.

62. The Court approves the restrictions, it does not create them.

COSTS

63. As I have stated above, there were serial breaches of the order made in advance of the September 2024 hearing. As a result, it was a wasted hearing. A number of repeat directions were required in the order of that date. More importantly, the Official Solicitor was unable to represent her client by scrutinising the LA's case and putting forward any positive alternative case.

64. The hearing in October, in fact, was the hearing that should have taken place in September. The orders made in that hearing would have been made then had the directions for the September hearing been complied with.

65. I have read written submissions on this subject from Ms Waring and Ms Gardner, and I am grateful to them for those documents.

66. The relevant law is most recently and best summarised by Mr Justice Poole in Sandwell & Birmingham Hospitals NHS Trust v GH (by the Official Solicitor) [2023] EWCOP 50. The statutory and jurisdictional basis for a costs order is outlined in paragraphs [46] to [53] in that judgment, and these are provisions I have in mind when determining this application. In particular, I am conscious of the need for me to be satisfied of the matters outlined in COPR r.19.5, which I will quote.

67. The basic rule in COP welfare cases is that there is no order for costs (r. 19.3). That rule provides that the court may depart from that general rule if the circumstances so justify and in deciding whether departure is justified the court shall have regard to all the circumstances including:

> 19.5 (1)
> (a) the conduct of the parties;
> (b) whether a party has succeeded on part of that party's case, even if not wholly successful; and
> (c) The role of any public body involved in the proceedings.
> (2) The conduct of the parties includes—
> (a) conduct before, as well as during, the proceedings;
> (b) whether it was reasonable for a party to raise, pursue or contest a particular matter;
> (c) The manner in which a party has made or responded to an application or a particular issue;
> (d) whether a party who has succeeded in that party's application or response to an application, in whole or in part, exaggerated any matter contained in the application or response; and
> (e) any failure by a party to comply with a rule, practice direction or court order."

68. Mr Justice Poole makes reference to a number of cases in which these issues have been considered and determined. These cases are of limited use, however, and each application must be considered on its own merits: VA & Ors v Hertfordshire Partnership NHS Foundation Trust & Ors [2011] EWHC 3524 (COP). The Court of Appeal endorsed a "broad brush" approach to making costs orders in these cases in Manchester City Council v G & Ors [2011] EWCA Civ 939. He also referred to examples of costs orders which departed from the general rule including Re JB (Costs) [2020] EWCOP 49 per Keehan J, and A Local Authority v ST (by her litigation friend, the Official Solicitor) [2022] EWCOP 11, per HHJ Burrows.

69. As I said in September, Ms Waring has a difficult task arguing with a costs order being made against her client on this occasion. Nonetheless she has tried. She criticised the

Official Solicitor for her tardiness in becoming involved in these proceedings. However, even were I persuaded that the OS was tardy (and I am not), it seems to me that when the Order was made in July creating a timetable for the September hearing, it was agreed between the parties that compliance with that order was needed to make the September hearing worthwhile.

70. Ms Waring argues that there were no significant or repeated breaches in this case. In fact, the July hearing referred to failures on the part of the LA in providing information up to that point. But even ignoring that, and I do not, there was almost complete non-compliance with the July order, rendering the September hearing a waste. Furthermore, at no stage was any application made in advance of the hearing for an extension of time for compliance and to vacate the September hearing, which might have avoided a waste.

71. I have been invited by the LA to express my disapproval in my judgment as an alternative to making a costs order, supposedly following West Hertfordshire Hospitals v AX (by the OS) [2023] EWCOP 11. In that case, a medical treatment case, Mr. Vikram Sachdeva, K.C, sitting as a Deputy High Court Judge and at Tier 3 in this Court, said this (my emphasis):

> 72. In any event, even though the Applicant did not follow the guidance in *FG*, and that should have been obvious to the Applicant at the time (rather than simply with hindsight), and no separate assessment of litigation capacity was undertaken, and the mental health Trust notes were not in the court bundle, **I do not consider that it reaches the threshold where a costs order is called for on the facts of this case, whether it is described as "significantly unreasonable", or a "blatant disregard of the processes of the MCA", without treating these as legal tests which must be satisfied before a costs order can be made**. The way in which this application was approached signifies substandard practice. Whether to make an application to the Court of Protection, and the appropriate timing of an application, is not just a clinical question, but one which also involves a legal judgment. The Applicant, in identifying the need for training in this area, recognises its actions on 21 October 2022 were inappropriate.
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> 73. Although it is important to follow the guidance in *FG*, **there is no suggestion in the case itself that breach of the guidance automatically justifies a costs order against an applicant. Something more is needed.**

74. **It is incorrect that the only way a court can express its disapproval of a party's conduct of a case is by making a costs order: it can be expressed in a judgment, and the court's views of the Applicant's actions in this case should be tolerably clear**. Lieven J similarly voiced criticisms of the Trusts' conduct in *University Hospitals Dorset NHS Foundation Trust v Miss K* [2021] EWCOP 40 but there was no application for costs, or suggestion that one might have been justified.

72. I have come to the conclusion that the threshold in this case has been reached because of the wholesale breaches of the order made to ensure the hearing in September was not wasted. As a result, it was wasted. That non-compliance took place within the context of the earlier complaints made by the OS in July. The October hearing went someway towards ensuring the case was back on track, but that simply emphasises the waste the September hearing was. For those reasons I am satisfied that I should depart from the general rule and make an order for costs against the LA.

73. I have decided that the LA should pay the OS's costs of an incidental to the September hearing, and the very limited additional costs, if any, caused by the need to make this application for costs. I would add that the sum involved here will be very modest, and I hope the parties can agree a figure without the need for adjudication my me, or an assessment.

74. That is the judgment.