Neutral Citation Number: [2019] EWHC 2305 (Fam)

Case No: MB19P00683

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/09/2019

Before :

THE HONOURABLE MR JUSTICE COBB

- -

Between :

Redcar & Cleveland Borough Council	**Applicant**
- and –	
PR	**First Respondent**
SR (father of PR)	**Second Respondent**
TR (mother of PR)	**Third Respondent**

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- -

Simon Burrows and Fay Collinson (instructed by **Cygnet Law**) for the Local Authority
Nageena Khalique QC and Alexander Ruck Keene (instructed by **BHP solicitors**) for the First Respondent (PR, subject)
Ella Anderson (instructed by **Punch Robson**) for the Second Respondent (father of PR)
Jacqueline Thomas (instructed by **Switalskis**) for the Third Respondent (mother of PR)

Hearing dates: **2 July 2019**

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Approved Judgment

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

.....

THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in private. 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 subject and members of her family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cobb :

Introduction and issues

1. This judgment brings to a conclusion proceedings launched earlier this year by Redcar & Cleveland Borough Council ("the Local Authority"), under the inherent jurisdiction, in relation to a capacitous but apparently vulnerable adult. The judgment further examines the circumstances in which interim orders under the inherent jurisdiction were made, and whether injunctive-type orders could and/or should have been made against the adult for whom protection was sought.

2. In this case, the subject of the proceedings is PR; she is 32 years old. She is the First Respondent. She is an intelligent woman who is studying in higher education for a PhD. She is unmarried and without a partner; she has been living with her parents and a sibling. In January 2019 she suffered a significant deterioration of her mental health, and was admitted as a voluntary patient to hospital. While on the acute admissions ward, she made a number of allegations about her personal and home life. In significant respects, these allegations related to SR. It is unnecessary, and not overall helpful to PR, for me to rehearse the allegations here in this judgment.

3. As PR's mental health improved to a point where she was well enough for discharge from hospital, the Local Authority's Adult Mental Health team became concerned that she was planning, and indeed expecting, to return home to live with her parents. The Local Authority has various duties towards PR including those under *section 42* of the *Care Act 2014* to protect her from abuse or neglect; in the exercise of those duties, the Local Authority felt compelled to issue an application under the inherent jurisdiction of the High Court on 25 March 2019, with a view to obtaining orders to protect her. PR had no knowledge that the application was being made; the Local Authority was of the view that she would be "increasingly anxious" if she knew of the application. Over the period of just over four weeks, three orders (set out at [7], [8] and [10] below) were made by HHJ Hallam sitting as a *section 9(1)*[1] Judge in the Teesside Combined Court. The case was then remitted to me for hearing on 2 July 2019.

4. At that hearing (2.7.2019), a large measure of agreement was achieved between the parties about the way forward. PR had not returned home following her discharge

[1] *Section 9(1) Senior Courts Act 1981*

from hospital and was no longer planning to do so; she had been provided with suitable accommodation by the Local Authority. PR's parents had agreed to have only limited contact with PR, and not to persuade her to return home. The parties all agreed that the orders made by HHJ Hallam under the inherent jurisdiction should be discharged. The issue arises, given in part that costs applications are threatened, whether the court should have exercised the inherent jurisdiction in relation to PR at all, and if so, whether it should have made the orders which it did. While I am not conducting any appeal against the orders earlier made, inevitably I am required to review the circumstances in which they were made. Given that (for reasons more fully explained in [9] and [30] below) SR and TR have so far had access to only very limited documentation, this judgment has been handed down in a state which is necessarily light on factual detail.

5. I identify the questions for determination as follows:

   i) Was it right for the court to use its inherent jurisdiction in these circumstances to make orders in relation to PR?

      If so …

   ii) Was it right for the court to make injunctive orders against PR herself to prevent her from having contact with her parents?

   iii) Could or should the inherent jurisdiction have been used to make orders which would have the effect of depriving PR of her liberty (if indeed she was so deprived)?

   iv) Was/is there a proper basis for withholding disclosure of evidence and/or information which has been filed by the applicant from the second and third respondents, SR and TR?

Was it right for the court to use its inherent jurisdiction in these circumstances to make orders in relation to PR? The background facts and arguments.

6. PR's in-patient treatment in early 2019 lasted for approximately eight weeks. While PR was hospitalised, she disclosed aspects of her home life with her parents which gave the professional safeguarding and care agencies considerable concern about her future well-being should she return there. A capacity assessment of PR was undertaken by the relevant mental health professional and clinical lead on the ward; this assessment revealed that PR was considered to be capacitous to make decisions about returning home, and about her contact with others (including her parents), albeit that she was (and still is to some degree) confused and vulnerable, and there was a suggestion that parental influence over her was disabling her from making true choices. Notwithstanding the outcome of the capacity assessment, the Local Authority social worker concluded that PR "needs the protection of the court ... immediate and urgent intervention is justified and proportionate". PR was threatening to end her life if she did not receive protection. The Local Authority accordingly sought "protective orders" in relation to PR.

7. So it was that on 25 March 2019, under considerable pressure of time given PR's imminent discharge from hospital, that the Local Authority appeared before HHJ

Hallam, without notice to PR or any other party, and applied urgently for protective orders. The application was supported by a detailed statement from the key social worker, exhibited to which were the minutes of a recent multi-disciplinary team meeting. Having heard argument, this application was granted albeit on an interim basis; the order reads as follows:

> "Upon the court considering the applicant's *Part 23*[2] application made urgently and without notice.
>
> And upon the court considering that it is necessary and proportionate to exercise its inherent jurisdiction until further order.
>
> And upon the applicant undertaking to issue a *Part 8*[3] claim within 3 days
>
> 1. The Respondent (PR) is restrained from living with and/or having contact with [SR] until further order;
>
> 2. [Provisions for service]…
>
> 3. The Court will consider whether this order should continue at the hearing listed on 28 March 2019…
>
> 4. …
>
> 5. Liberty is granted to [PR] to apply to vary or discharge the order herein on 48 hours notice to the solicitors for the Applicant".

8. Immediately following the hearing, PR was advised that the application had been made, and was told of the order and its terms. She appeared to be initially upset, and was fearful (said to be "petrified") of the consequences of not returning home, but was co-operative with plans to move her from the hospital to accommodation provided by the Local Authority. The move to her new accommodation on the following day was said to be "uneventful", and PR did not express any resistance. Over the next couple of days, PR had reasonably extensive contact with her mother, TR. Three days later, on 28 March, the matter was restored for hearing before HHJ Hallam. On that day, the Judge made the following order:

> 1. "[SR] (father) and [TR] (mother) are added as parties to this application.
>
> 2. [PR] is restrained from living with [SR] and [TR];
>
> 3. [SR] is prohibited (whether by himself or by instructing or encouraging any other person) from contacting [PR] by any means whatsoever which, for the avoidance of

[2] Part 23 Civil Procedure Rules 1998: General Rules about Applications
[3] Part 8 Civil Procedure Rules 1998: Alternative Procedure for Claims

> doubt, includes phone calls, text messages, letters, e-mails, or any form of electronic communication including social media. [SR] is permitted to communicate with [PR]'s solicitor.
>
> 4. [TR] is prohibited (whether by herself or by instructing or encouraging any other person) from contacting [PR] by any means whatsoever which, for the avoidance of doubt, includes phone calls, text messages, letters, e-mails, or any form of electronic communication including social media except for face to face one hour daily contact for six days per week in the communal areas of [PR]'s current residence.
>
> 5. [Service]…"

9. The application was re-listed again for 29 April 2019, and on that occasion HHJ Hallam made a yet more detailed order. The injunctive order against PR herself was not repeated, and therefore effectively lapsed. The injunctive orders against SR and TR were repeated and a Penal Notice was attached. The order reflected the fact that the hearing had been conducted partly in 'closed session' and partly in 'open session', issues of disclosure of information to SR and TR being discussed in the 'closed session'. PR was represented, and her representatives consented to the order on her behalf. PR recognised the benefits of remaining in the accommodation provided for her by the Local Authority where she has also benefited from reasonably extensive therapy and other associated supportive programmes.

10. The key provisions of the order made on 29 April are as follows:

> 1. "[SR] is prohibited (whether by himself or by instructing or encouraging any other person) from contacting [PR] by any means whatsoever which, for the avoidance of doubt, includes phone calls, text messages, letters, e-mails, or any form of electronic communication including social media.
>
> 2. [TR] is prohibited (whether by herself or by instructing or encouraging any other person) from contacting [PR] by any means whatsoever which, for the avoidance of doubt, includes phone calls, text messages, letters, e-mails, or any form of electronic communication including social media except for face to face contact on the following occasions: [detailed contact provisions set out].
>
> 3. [TR] is prohibited from discussing with [SR] her contact with [PR] and/or these proceedings.
>
> 4. These proceedings shall be held in private. [Detailed arrangements given for the identification of parties and witnesses by initials];

> 5. No person shall disclose any information relating to these proceedings or identify any person who is subject of these proceedings in which the parties are known solely by their initials and which the identities of the parties is kept confidential….
>
> 6. [Disclosure of documents to [SR] and [TR] is prohibited without the court's permission]
>
> 7. [Disclosure of documents by the Applicant to [PR]'s solicitors];
>
> 8. [Witness statement]
>
> 9. There will be a preliminary hearing before Mr Justice Cobb at 10.30am on 2 July 2019 … when the court will consider:
>
> a. What evidence should be disclosed to [SR] and [TR]
>
> b. Whether (in principle) the relief sought by the applicant as at the point of the hearing can be granted by the High Court in the exercise of its inherent jurisdiction;
>
> c. If, in principle, the relief sought can be granted by the High Court, whether in the instant case the terms of this order should continue;
>
> d. Such further directions as may be required to enable the determination of any or all of (a) to (c) in the event that such cannot be determined at that hearing.
>
> 10. [Directions for the preparation of the trial]
>
> 11. …"

11. On the same day (29 April) HHJ Hallam made a third-party disclosure order directed to the Police requiring them to disclose information relating to any investigation arising from PR's disclosures.

12. In the period since the last order, PR has started to withdraw her co-operation from the programmes and therapies designed to assist her, and has largely disengaged from professionals. It appears that she is worried that information she shares confidentially in the sessions and programmes will ultimately be disclosed to the court. In that sense, it is felt that the proceedings have become counter-productive. The social worker has reported for this hearing:

> "My professional view is that the current order is having a negative effect on [PR] and is causing her harm. She is consumed by the court process having, on a number of occasions, asked me for information about what the court

> documents say. It is my view that until this litigation ends, [PR] cannot and will not engage with the professionals who are trying to support her. I sense that she is now consciously making this decision because she does not wish for anything said to professionals to be used, as she sees it, against her.
>
> Presently I think that the order is preventing professionals from supporting [PR] to move forward with her life and start making concrete decisions about her future".

13. The social worker has filed a recent statement in which she indicates that she is "firmly" of the view that PR now has the capacity "to make decisions about all aspects of her life".

14. That was the position which was presented at the hearing on 2 July 2019. Given that the parties had reached agreement as to the way forward, there was no necessity to determine any of the allegations made. What, then, of the arguments about the use of the inherent jurisdiction in these circumstances, and on the facts as presented? Mr Burrows and Miss Collinson for the Local Authority contend that it was permissible, indeed entirely appropriate, for the court to invoke the inherent jurisdiction in this case, at least on an interim basis, until the question of PR's capacity and/or vulnerability could be properly assessed. In making this submission Mr Burrows refers to the increasing preparedness of the court to deploy the common law to protect vulnerable adults, founding his submission on Lord Donaldson's comments in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 (wherein he referred to the inherent jurisdiction as "the great safety net"), through the seminal judgment of Munby J (as he then was) in *Re SA (Vulnerable Adult with capacity: Marriage)* [2005] EWHC 2942 (Fam) ('*Re SA*') to McFarlane LJ's judgment in the Court of Appeal in *A Local Authority v DL* [2012] 3 All ER 1064 *('Re DL')* (*sub nom Re L (Vulnerable Adults with Capacity: Court's Jurisdiction)* [2013] Fam 1.

15. I have had cause to consider this line of authorities in the case of *Wakefield MDC & Wakefield CCG v DN & others* [2019] EWHC 2306 (Fam) (handed down simultaneously with this judgment), and I cross-refer here to paragraphs [19] to [27] of that judgment. As I there indicated, the inherent jurisdiction is no longer correctly to be understood as confined to cases where a vulnerable adult is disabled by mental incapacity from making his or her own decision about the matter in hand, and cases where an adult, although not mentally incapacitated, is unable to communicate his decision: "[t]he jurisdiction extends to a wider class of vulnerable adults" (*Re SA* at [76]).

16. Mr Burrows particularly emphasises judicial willingness to deploy the inherent jurisdiction at least as an *interim* 'holding' position, where there is *prima facie* evidence of vulnerability of the person to be protected, an immediate 'necessity' for intervention, but maybe insufficiently robust or authoritative evidence of capacity or vulnerability. In this regard I was referred specifically to:

    i) *In re S (Hospital Patient: Court's Jurisdiction)* [1995] Fam 26 at page 36 (per Hale J as she then was):

> "…what is sought in this case is the preservation of the status quo while proper inquiries are made. The appropriate way to achieve this is obviously by way of an interlocutory injunction ... if the position is not yet known, then as long as there is a serious question to be tried (in accordance with the principles laid down in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396), it may well be just and convenient to preserve the status quo while it is determined." (emphasis by underlining added);

ii) *Re SA* (citation above at [14]) at [47]:

> "… the jurisdiction is exercisable on an interim basis "while proper inquiries are made" and while the court ascertains whether or not an adult is in fact in such a condition as to justify the court's intervention: see *In re S (Hospital Patient: Court's Jurisdiction)* [1995] Fam 26 per Hale J (as she then was) esp at pages 33, 36." (emphasis by underlining added);

iii) *Re SA* at [79]:

> *"*The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent" (emphasis by underlining added);

iv) *Re SA* at [80]:

> "It will be noticed that I have referred to the inherent jurisdiction as being exercisable not merely where a vulnerable adult is, but also where he is reasonably believed to be, incapacitated. As I have already pointed out, it has long been recognised that the jurisdiction is exercisable on an interim basis "while proper inquiries are made" and while the court ascertains whether or not an adult is in fact in such a condition as to justify the court's intervention[4]. That principle must apply whether the suggested incapacity is based on mental disorder or some other factor capable of engaging the jurisdiction. As Singer J put it in *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230, at para [9], and I agree, the court has power to make orders and to give directions designed to ascertain whether or not a vulnerable adult has been able to exercise her free will in

[4] See *In re S (Hospital Patient: Court's Jurisdiction)* [1995] Fam 26 per Hale J (as she then was) esp at pages 33, 36

> decisions concerning her civil status". (emphasis by underlining added);

v) The judgment of Hayden J in *London Borough of Wandsworth v M & others* [2017] EWHC 2435 (Fam):

> "[82] It would be unconscionable and socially undesirable if, due to the weaknesses of an assessment which failed satisfactorily to resolve whether there are reasons to believe that J lacks capacity, he were to find himself beyond the reach of judicial protection. I am clear that he is not. The question that arises is how he can most effectively be protected with the least intrusive and most proportionate curtailment of his autonomy.
>
> [83] The starting point is that a thorough, *MCA* compliant assessment of capacity be undertaken immediately. All agreed in exchanges, that in the circumstances of this case, this should be undertaken by a Consultant Child and Adult Psychiatrist. This judgment should not be taken as requiring an assessment to be conducted by a psychiatrist in every case of this kind. Frequently, that will simply not be possible in the time available nor will it always be necessary.
>
> [84] When the report is available, it will be necessary to revisit the question of capacity and therefore jurisdiction. I am entirely satisfied that the inherent jurisdiction of this Court permits J to be protected whilst these investigations resume."

17. Ms Khalique QC and Mr. Ruck Keene, instructed for PR, argue that the court should not have invoked the inherent jurisdiction in this case at all. In short, they maintain that in circumstances such as these the court has stretched beyond acceptable limits the use of the inherent jurisdiction.

18. Their primary, and powerful, submission is that it would be wrong for the court to use the inherent jurisdiction where there is available a good statutory scheme to provide protection to their client. They illustrate the point by reference to the availability of injunctions achievable under statute to manage certain harmful behaviour within family relationships – for instance, under *section 42* of the *Family Law Act 1996* (non-molestation orders), the *Serious Crime Act 2015* (*section 76*: which creates a criminal offence of controlling or coercive behaviour where A and B live together and "are members of the same family"), or, for example, the *Protection from Harassment Act 1997*. They accept that, generally, effective relief under of any of these statutes depends upon the willingness of the person to be protected to take the initiative, and/or formally make a complaint and/or support a prosecution or the issuing of a Domestic Violence Protection Notice or Order. They further accept that the person to be protected may well be reluctant to do so. As it happens, in this case, PR did not

wish matters to proceed through police channels; the police in turn felt that they could take no action.

19. SR and TR, through counsel, have been constrained to make general but nonetheless helpful submissions about the use of the inherent jurisdiction; however, as they have not yet been privy (as the date of the hearing) to any of the evidence filed by the applicant, they are not in a strong position to make specific submissions on the merits.

Should orders have been made against someone who is vulnerable? The arguments.

20. As earlier indicated, the first order of 25 March (see [7] above) contained the following injunctive provision:

> "The Respondent (PR) is restrained from living with and/or having contact with [SR] until further order;

21. Mr Burrows argues that this was an appropriate and proportionate order for the court to have made to regulate PR's contact with her parents, particularly SR, while investigations were undertaken.

22. Ms Khalique argues that it was inappropriate to make any order directed against PR herself, given her vulnerability. She argues that before making such an order the court must have satisfied itself that a person would understand the injunction, including its terms and purpose; moreover, the respondent to the injunction must understand the remedy of the injunction and that she/he cannot stray into breach without intent. Ms Khalique says that there was insufficient clarity on the evidence that the court could be so satisfied. She makes the further point that given the coercive nature of an injunction, an order directed against a person so as to limit their choice of residence represented a deprivation of PR's liberty (see below).

23. Prompted by my specific enquiry, all counsel addressed me on the relevance to these facts of the decision of *Wookey v Wookey* [1991] 3 WLR 135. This was a case of a husband ("H") appealing against domestic violence orders and orders under the *Matrimonial Homes Act 1983*. The orders sought to prevent the husband from returning to his matrimonial home where his wife ("W") lived. H was suffering from the effects of early onset dementia and pathological jealousy which would cause him to attack his elderly wife. H had been admitted to hospital under *s.2 Mental Health Act 1983* and the principle to be considered was whether an individual without mental capacity should be made subject to injunctive orders. The court held that H should *not* be subject to such an order and the appeal was upheld.

24. In a passage in *Wookey v Wookey* which has obvious resonance here, Butler-Sloss LJ referred (at p.141) to the importance of the respondent understanding the proceedings and the nature and requirements of the order sought. Taken as a whole, the case of *Wookey v Wookey* established the following principles[5] of relevance to the instant facts:

[5] See [1991] 3 WLR 135 at *140H–141A, D, 142B–D, D–F, F–G, 143D–F, 144A–B*

i) the equitable discretionary remedy of an injunction was a remedy in *personam* granted only against those who were amenable to the court's jurisdiction;

ii) in the case of mental incapacity, the question was whether the respondent understood the nature and requirements of the order sought;

iii) an injunction ought not to be granted against someone found within the M'Naughton Rules as he is incapable of understanding what he is doing or that what he is doing is wrong; it would not achieve the desired deterrent effect nor would it act to control a person's conduct and any breach of the order could not be effectively enforced; (Butler-Sloss LJ: "An injunction should not, therefore, be granted to impose an obligation to do something which is impossible or cannot be enforced. The injunction must serve a useful purpose for the person seeking the relief and there must be a real possibility that the order, if made, will be enforceable by the process *in personam*");

iv) balancing the protection of W against the disability by reason of mental incapacity of H, and in light of the powers available under the *1983 Act*, it was inappropriate to grant the injunction.

25. It will be reasonably apparent that *Wookey v Wookey* lends some support to Ms Khalique's argument. What the Local Authority and/or court could or should have done, she submits, would have been to join SR and TR to the process from the outset, and for the court to have made the injunctive order against them at that stage.

26. In a separate but related part of the order, the Judge directed that:

> "Liberty is granted to [PR] to apply to vary or discharge the order herein on 48 hours notice to the solicitors for the Applicant".

Although this provision was not in fact engaged, and I have heard no argument on its appropriateness, I take the opportunity to observe that PR should have been given more immediate access to the court to apply to vary or discharge such an order. In my view, anyone served with or notified of an order made without notice should be given the opportunity to apply to the court *at any time* to vary or discharge the order (or so much of it as affects that person), having first informed the applicant's solicitors. To provide otherwise improperly impedes access to justice, in my view.

Should the inherent jurisdiction be used in relation to DoL cases? The arguments.

27. Did the order restraining PR from living with SR deprive her of her liberty? Mr Burrows maintains that there was no deprivation of PR's liberty in the orders made. He draws an analogy between PR and the situation of Mr Meyers in *Southend on Sea Borough Council v Meyers* [2019] EWHC 399 (Fam) at [56]:

> "Properly analysed, the ambition here is not to confine Mr Meyers to the Care Home, but to protect him from the grave danger that living in the bungalow with his son has already been demonstrated to represent. To safeguard him, by invoking the inherent jurisdiction of the High Court, it is

> necessary to restrict the scope and ambit of his choices, not his liberty. It is important to highlight that there remain a range of options open to him. The impact of the Court's intervention is to limit Mr Meyers's accommodation options but it does not deprive of his physical liberty which is the essence of the right guaranteed by Article 5." (emphasis by underlining added)

28. Ms Khalique, by contrast, argues that para.1 of the order of 25 March had the effect of depriving PR of her liberty. She asserts that insofar as PR may have been objecting to the plan for her to reside *otherwise than* with her parents there was a deprivation of liberty, and relies essentially on the comment of Munby J in *JE v DE* [2007] 2 FLR 1150, at [125] and [126]:

> "[125]… [the Local Authority] has no objection in principle to DE living elsewhere than at the Y home, for instance either with his daughter or in some other residential establishment. That may be, but it wholly fails to meet the charge that he is being "deprived of his liberty" by being prevented from returning to live where *he* wants and with those *he* chooses to live with, in other words at home and with JE…
>
> [126]. Just as HL was, in the view of the Strasbourg court, deprived of his liberty because (see *HL v United Kingdom* (2004) 40 EHRR 761 at para [91] …) he "would only be released from the hospital to the care of Mr and Mrs E as and when [the] professionals considered it appropriate", and because, had he tried to leave he would have been prevented from doing so, so in very much the same way DE, in my judgment, has been and is being deprived of his liberty. The simple reality is that DE will be permitted to leave the institution in which [the local authority] has placed him and be released to the care of JE only as and when – if ever; probably never – [the local authority] considers it appropriate. [The local authority's] motives may be of the purest, but in my judgment, [the local authority] has been and is continuing to deprive DE of his liberty".

29. Ms Khalique further emphasises that it is important, in this regard, not to be distracted by the question of whether the confinement (away from her home) is/was for a benign or protective purpose. She draws attention to the Supreme Court's emphasis in *P v Cheshire West & Cheshire Council & others* [2014] UKSC 19, at [42], of the need to distinguish between the *fact* of a deprivation of liberty (a neutral characterisation of a state of affairs) and its potential justification (an evaluative question depending, in particular, upon whether it is necessary and proportionate):

> "In none of the more recent [Strasbourg] cases was the purpose of the confinement – which may well have been for the benefit of the person confined – considered relevant to whether or not there had been a deprivation of liberty. If the

> fact that the placement was designed to serve the best interests of the person concerned meant that there could be no deprivation of liberty, then the deprivation of liberty safeguards contained in the *Mental Capacity Act* would scarcely, if ever, be necessary."

The appropriateness of the closed hearing

30. HHJ Hallam conducted the hearing on 29 April 2019 in two parts. In one part, she heard advocates for all parties including SR and TR (the 'open' hearing), and in the other part, SR and TR and their advocates were excluded (the 'closed' hearing). No one took any particular issue about this form of process, which was deemed necessary at that stage in order for the court to assess the extent (if at all) to which the evidence filed by the applicant should be disclosed to SR and TR. At the hearing on 29 April, HHJ Hallam specifically provided that I should determine the issue of disclosure of documents to SR and TR at the hearing on 2 July 2019. I adopted a similar procedure on 2 July 2019, dividing the hearing into two parts, again with the concurrence of the parties and their legal representatives.

31. In relation to issues of disclosure, this case gives rise to unusual considerations. PR did not bring these proceedings, and she objects to disclosure to SR and TR of information filed within the proceedings *by the applicant* which she wishes to keep confidential (and which, but for the proceedings, she would have been able to do). As Ms Khalique has pointed out, PR is not a child, nor a person lacking capacity to make decisions as to disclosure of confidential information. PR has not 'bowed to the jurisdiction of the court' to decide whether disclosure of confidential information should take place. She has not in fact filed any evidence at all, but a reasonable amount of evidence has been filed about her. It is not immediately obvious, Miss Khalique argues, that the court can proceed on the conventional basis upon which disclosure in relation to the subject of the proceedings has been justified in relation to children/adults with impaired capacity – i.e. considering the overall interests of the child/adult. Yet there are of course "very powerful" arguments against any form of closed material proceedings, even in cases concerning children or vulnerable people (see *Re A* [2012] UKSC 60 at [34] and *Al Rawi v Security Service (JUSTICE intervening)* [2011] UKSC 34, [2012] 1 AC 531).

32. All the respondents engaged in this legal process have *Article 6* rights and *Article 8* rights; these rights are to some extent in conflict with each other where they relate to the disclosure of confidential information. This is not a new problem. Munby J dealt with this in *Re B (Disclosure to other parties)* [2001] 2 FLR 1017 (where 'R' in the passage quoted is in the same situation as SR and TR in this case), holding:

> "In the first place, although R is entitled under *Article 6* to a fair trial, and although his right to a fair trial is absolute and cannot be qualified by either the mother's or the children's or, indeed, anyone else's rights under *Article 8*, that does *not* mean that he necessarily has an absolute and unqualified right to see all the documents."

33. Munby J went on to emphasise (at [89]) that those cases where information or documentation is withheld from a party:

> "…will remain very much the exceptions and not the rule. It remains the fact that all such cases require the most anxious, rigorous and vigilant scrutiny. It is for those who seek to restrain the disclosure of papers to a litigant to make good their claim and to demonstrate with precision exactly which documents or classes of documents require to be withheld. The burden on them is a heavy one. Only if the case for non-disclosure is convincingly and compellingly demonstrated will an order be made. No such order should be made unless the situation imperatively demands it. No such order should extend any further than is necessary. The test, at the end of the day, is one of strict necessity. In most cases the needs of a fair trial will demand that there be no restrictions on disclosure. Even if a case for restrictions is made out, the restrictions must go no further than is strictly necessary"

34. Sir James Munby P returned to this point in *Durham City Council v Dunn* [2012] EWCA Civ 1654 wherein he said this at [50]:

> "… particularly in the light of the Convention [ECHR] jurisprudence, disclosure is never a simply binary question: yes or no. There may be circumstances, and it might be thought that the present is just such a case, where a proper evaluation and weighing of the various interests will lead to the conclusion that (i) there should be disclosure but (ii) the disclosure needs to be subject to safeguards. For example, safeguards limiting the use that may be made of the documents and, in particular, safeguards designed to ensure that the release into the public domain of intensely personal information about third parties is strictly limited and permitted only if it has first been anonymised. Disclosure of third party personal data is permissible only if there are what the Strasbourg court in *Z v Finland* (1998) 25 EHRR 373, paragraph 103, referred to as 'effective and adequate safeguards against abuse'."

35. In the event, I received little argument on this issue at the hearing on 2 July 2019. Had the substantive application for further injunctive relief under the inherent jurisdiction proceeded on a contested basis, and particularly if there had been a need for any fact-finding hearing, there would have been a powerful case for SR and TR to see relevant documents in order to able to participate effectively and fairly in the proceedings so far as they relate to them. I would have been required to proceed on the basis that the rights of SR and TR to a fair trial are absolute; their rights to a fair trial cannot be qualified by PR's rights under *Article 8*, though that does *not* mean that they necessarily have an absolute and unqualified right to see all the documents. As Munby J went on to say in *Re B* at [67(v)]:

> "[A] limited qualification of R's right to see the documents may be acceptable if it is reasonably directed towards a clear and proper objective – in other words, if directed to

> the pursuit of the legitimate aim of respecting some other person's rights under *Article 8* – and if it represents no greater a qualification of R's rights than the situation calls for. There may accordingly be circumstances in which, balancing a party's prima facie Article 6 right to see all the relevant documents and the Article 8 rights of others, the balance *can* compatibly with the Convention be struck in such a way as to permit the withholding from a party of some at least of the documents".

36. I have outlined above the issues of confidentiality, and the procedural challenges, to give prominence to the range of difficulties which local authorities may face (as this Local Authority faced) in taking proceedings of this kind, in this way. However, given that the parties have reached agreement which effectively disposes of these proceedings, and there has been no application for disclosure to SR and TR of documentation not yet disclosed, there has been no need for me to hear detailed argument on the point, let alone reach any determination.

Discussion and conclusion

37. No-one doubts that cases concerning vulnerable adults raise extremely challenging issues – for the professionals 'on the ground' making clinical and/or skilled judgments in the exercise of their responsibilities towards the person who, it is felt, would benefit from protection – and for the judge who is asked, often urgently, sometimes out of ordinary court sitting hours, and often on a without notice basis, to make orders to protect the subject. There are invariably significant and far-reaching implications for the subject of the application if action *is* taken or is *not* taken in the name of their 'interests', whether an order *is* made or is *not* made.

38. As Butler-Sloss LJ observed in *Wookey v Wookey*, while there will be cases where the medical and/or psychiatric evidence is clear from the outset (enabling the court to make reasonably confident decisions about exercising a statutory jurisdiction, such as the *Mental Capacity Act 2005*), there are many cases where it is not. It is in those cases that the court is faced with the particularly difficult decision as to whether to make a 'holding' order/injunction (ibid. see p.142). The approach to an application for an injunction may well differ at different stages of the proceedings, and may depend upon the state of knowledge available to the judge. It is clear from the authorities relied on by Mr Burrows (see in particular [16] above) that there is, now, well-recognised access to the inherent jurisdiction for the making of *interim* orders in cases where there is evidence of vulnerability and a *need* to protect the vulnerable person, and in my view Judge Hallam was entitled to follow that line of caselaw.

39. Indeed, having reviewed the evidence as it obtained on 25 March 2019, I am not in the least surprised that HHJ Hallam felt herself compelled to exercise the inherent jurisdiction to protect PR when the application was first presented to her, while time was taken to assess the situation. I do not believe that the alternative statutory remedies referred to by Ms Khalique would have offered PR the level of protection she needed, and her co-operation with the relevant statutory process(es) was far from assured (indeed her reluctance to engage with any formal statutory process proved to be the case). PR appeared to be a vulnerable person because of her range of mental health difficulties, and she was believed to be susceptible to coercive or controlling

influence at home; the relationship of parent towards their child (even as an adult)[6] can readily involve 'persuasion' or 'coercion' or 'control', given the parent's superior position. Judge Hallam rightly in my view adopted a pragmatic but nonetheless considered, approach to this situation, appropriately recording in her 25 March order that she felt that the order was both "necessary and proportionate". When judges are presented, as Judge Hallam was, with situations of this urgency and apparent need, there is a strong imperative to oblige the applicant with an order; however, it is always important for judges to bear firmly in mind the risk that making such an order may be counterproductive:

> "… in rescuing a vulnerable adult from one type of abuse it does not expose her to the risk of treatment at the hands of the State which, however well intentioned, can itself end up being abusive of her dignity, her happiness and indeed her human rights"[7].

The first 'without notice' order was appropriately made for a very short duration, the judge imposing a return date within 3 days.

40. While I accept that an order restricting a person from living at a place that they want to live (in this case PR's home) *can* amount to a deprivation of liberty (per Munby J in *JE v DE* above), and potentially could have deprived PR of her liberty on the facts of this case, I am not satisfied on the evidence that the order *in fact* deprived PR of her liberty. When she moved from hospital to her accommodation on 26 March, the evidence reveals that she was perfectly acquiescent in doing so and there is no evidence that she objected. Furthermore, she seemed to settle reasonably easily. I may add that had there been a deprivation of liberty, I would have been loath to endorse that state using my discretionary powers under the inherent jurisdiction, for the reasons which I set out in the *Wakefield CC v DN* case at [48] to [50].

41. Even if I were wrong about that, the Judge's approach to the issues here, on an interim basis, was entirely compliant with that laid out in *Winterwerp v The Netherlands* [1979] EHRR 387 at [39], wherein by the European Court of Human Rights recognised that 'emergency cases' call for special measures:

> "… except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of "unsound mind". The very nature of what has to be established before the competent national authority - that is, a true mental disorder - calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder…"

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[6] See Lord Donaldson MR in *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 at p113, and Butler-Sloss LJ at p120

[7] Munby J (as he then was) in *Re MM (An Adult)* [2007] EWHC 2003 (Fam) at [118/119]

In the passage which follows in the *Winterwerp* judgment, it is useful to note the Court's view as to the likely maximum length of any *interim* order: "While some hesitation may be felt as to the need for such confinement to continue for as long as six weeks, the period is not so excessive as to render the detention "unlawful" (see *Winterwerp* para.42). It can therefore be readily inferred from this comment that the duration of any interim order in excess of six weeks would be vulnerable to challenge. On these facts, the order against PR made on 25 March 2019 was repeated in the order of 28 March "until further order"; it was not formally discharged in the order of 29 April 2019 but it was not repeated in that order (whereas, significantly, the orders against SR and TR were repeated in the 29 April 2019 order). It appears, therefore, that PR was subject of the order for a little over 4 weeks (25 March to 29 April 2019), i.e. well within the contemplation of the Court in *Winterwerp*.

42. Once the proceedings concerning PR had been launched, and protective orders made (as they were on 25 March 2019), the parties and the court could and should have focused on collating the evidence relevant to capacity and/or vulnerability so that an early decision could be taken about (a) whether there was a proper basis for continuing the exercise of the jurisdiction beyond the emergency interim, and (b) if so, whether this should be under the *Mental Capacity Act 2005* or the inherent jurisdiction. No specific orders were made in that regard. It may have been in HHJ Hallam's contemplation that this step would be taken at what was billed as the 'preliminary' hearing before me on 2 July.

43. Where I differ in approach from HHJ Hallam, is that I do not consider that it was appropriate to make orders against PR herself on 25 March 2019. While I am conscious that there is precedent in the case law of judges making orders against the vulnerable adults themselves in proceedings under the inherent jurisdiction[8], I prefer the argument advanced on PR's behalf in this case that it was illogical for the court to conclude that PR needed the protection of the court, yet required her, by order, to refrain from doing something which she wanted to do, backed with the punitive force of an injunction. To some extent, the appropriateness of this type of provision will always be a question of fact and degree. As Butler-Sloss LJ said in *Wookey*:

> "If it is clear that he is mentally ill, the extent of his ability to understand becomes crucial. If he may well understand the purpose of an injunction, no problem arises, and an interim order might be made whilst waiting for evidence" (emphasis added) (at p.143)

In this case, there was sufficient evidence that PR was confused in her thinking about her immediate future and/or was possibly being coerced and thus unable to make a decision of her own free-will; she was also suffering from a possible mental disorder. Accordingly, it would have been difficult for the court to conclude that any attempt to return to live with her parents in breach of the injunction would be a decision that could be classified as *deliberate*. Although distinguishing the *London Borough of Wandsworth v M & others* [2017] (above) on its facts, I agree with Hayden J when he said (in line with the comments in *Wookey* – see [24] above) at [85] that:

[8] See *Norfolk CC v PB* [2014] EWCOP 14 (although on the facts of the case, the order was made under the *MCA 2005*), and the *London Borough of Wandsworth v M & others* [2017] EWHC 2435 (Fam)

> "Injunctive relief is a discretionary remedy, it acts *in personam* and it is derived from equitable principles. Furthermore, it may only be granted to those amenable to its jurisdiction and it must be capable of being put into effect. It follows logically from these general propositions that the injunction must serve a useful purpose and have a real possibility of being enforced *in personam*".

44. Testing this point (i.e. whether it was right to make an order against PR herself) another way, I cannot conceive of a situation in which the court would have sought to enforce the order against PR herself, by way of committal or otherwise. In this regard, I was helpfully referred to the decision of *Fairclough v Manchester Ship Canal Co [1897] WN 7, CA*. Whilst considering the remedies for contempt of court, Lord Russel CJ said:

> "We desire to make it clear that in such cases no casual or accidental and unintentional disobedience of an Order would justify either a commitment or sequestration. Where the Court is satisfied that the conduct was not intentional or reckless, but merely casual and accidental and committed under circumstances which negatived any suggestion of contumacy, while it might visit the offending party with costs and might order an inquiry as to damages, he would not take the extreme course of ordering either of commitment or of sequestration." (emphasis in original)

45. This point was further addressed in *Wookey v Wookey*, wherein Butler-Sloss LJ said (at p.142) that:

> *"*In my judgment, an injunction ought not to be granted against a person found to be in that [M'Naughton Rules] condition, since he would not be capable of complying with it. Such an order cannot have the desired deterrent effect, nor operate on his mind so at to regulate his conduct." (emphasis added).

46. Insofar as lessons may be learned from the difficulties which arose in this case, it may usefully be suggested that before a local authority makes an application under the court's inherent jurisdiction which is designed to regulate the conduct of the subject by way of injunction, particularly where mental illness or vulnerability is an issue, it should be able to demonstrate (and support with evidence) that it has appropriately considered:

i) whether X is likely to understand the purpose of the injunction;

ii) will receive knowledge of the injunction; and

iii) will appreciate the effect of breach of that injunction.

If the answer to any of these questions is in the negative, the injunction is likely to be ineffectual, and should not be applied for or granted as no consequences can truly flow from the breach.

47. In conclusion, and on the basis that:

i) Counsel has now submitted a written agreement (regulating the contact issues between PR, SR and TR) which has been signed by SR and TR;

ii) The Local Authority has assured me that it will continue to exercise its powers in respect of PR to comply with its general duty under *section 42 Care Act 2014*;

iii) There is no further purpose to be served by continuing the proceedings;

I propose therefore to make no further substantive order.

48. That is my judgment.