Neutral citation number: [2023] EWCOP 15 Case Numbers: 13-6664-98

IMPORTANT NOTICE

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Court of Protection

First Avenue House
42-49 High Holborn,
London, WC1V 6NP

DESCRIPTION

This judgement was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 11:23 on 14th April 2023.

Heard on 13th October 2022

Judgement given on 14th April 2023

Before

HER HONOUR JUDGE HILDER

Between

(1) EG
(2) DG

Appellants

and

(1) AP
(2) IP
(3) SB

Respondents

- - - - - - - - - - - - - - - - - - - -

COURT OF PROTECTION

Representation:
For the Appellants: Ms. F. Collinson (instructed by Stephensons Solicitors)
For the Respondents: Mr. J. Buck (instructed by Topstone Solicitors)

The hearing was conducted in public subject to a transparency order made on 5th August 2022.
The written judgment was handed down to the parties in this form by e-mail on 14th April 2023.
It consists of 23 pages, and has been signed and dated by the judge.
The numbers in square brackets and bold typeface refer to pages of the hearing bundle.

JUDGMENT

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1. This appeal concerns the scope of the Court of Protection's property and affairs jurisdiction.

2. A Deputy District Judge granted injunctions prohibiting capacitous persons from disposing of assets in which others allege a protected person has an interest. This judgment sets out the basis of my conclusion that the Court of Protection has no jurisdiction to make such orders.

A. Factual background

3. MMP is presently 86 years old and suffers from Alzheimer's dementia. Since December 2020 she has lived in residential care. Her husband died in 2018. She has three children – EG, AP and IP. She has eight grandchildren, one of whom is SB.

4. On 25th August 2020 MMP apparently executed Lasting Powers of Attorney both for property and for welfare ("the August LPAs"). In each, she appointed her sons AP and IP jointly and severally as her attorneys. In September 2020 Anthony Gold Solicitors on behalf of MMP applied to the Office of the Public Guardian to register the instruments. On 29th September 2020 an LPA006 application apparently by MMP was lodged with the Office of the Public Guardian, and a COP7 application by EG was filed at court, each objecting to registration of the August LPAs on grounds of alleged fraud or undue pressure.

5. On 15th October 2020 MMP apparently executed further Lasting Powers of Attorney both for property and for welfare ("the October LPAs"). In each, she appointed SB – who is the daughter of EG – as her sole attorney.

6. On 8th December 2020 MMP apparently wrote to the Office of the Public Guardian objecting to the October LPAs and asking for registration of the August LPAs instead.

7. In January 2021 the October LPAs were registered by the Office of the Public Guardian. The August LPAs presently remain unregistered. (The rationale behind this situation is unclear.)

8. Behind all the activity with Lasting Powers of Attorney there is a property dispute.

9. It is common ground that:

    a. MMP and her husband sold their home at 17 H Road in August 2001 and moved to live at 50 C Road;

    b. the purchase price of 50 C Road was £240 000 and the title was registered in the names of EG and her husband DG;

    c. in December 2013, the property at 50 C Road was remortgaged;

    d. in April 2021 the property at 50 C Road was sold for £658 000. EG and DG each received net proceeds of sale of £151 372. MMP received nothing.

10. By the time 50 C Road was sold, the dispute as to its ownership was already well entrenched. In November 2019 AP and IP had attended a firm of solicitors with MMP seeking advice. The differing positions may be summarised thus:

    a. AP and IP say that their parents contributed £120 000 to the purchase of 50 C Road and thereby acquired a 50% beneficial interest in the property. They consider that SB and EG 'pose a financial threat' to MMP. AP and IP wish to act as attorneys so that they can take steps on her behalf to recover her alleged share of the proceeds of sale.

    b. EG and DG say that 50 C Road was purchased by them on 11th July 2001, with a mortgage in their joint names. MMP and her husband contributed nothing to the purchase of 50 C Road and never had any interest in the property. They lived at 50 C Road rent-free for the rest of MMP's husband's life (ie more than 16 years) and in MMP's case, longer. They say that MMP and her husband loaned £120 000 to their church (where EG and/or DG is a pastor, and DG is a Director) but that loan has been repaid in full. EG asserts that it is her brothers who present a 'financial risk' to MMP if they are permitted to act as her attorneys. She asserts that execution of the August LPAs was procured by undue influence. She opposes registration of the August LPAs on the basis that her daughter, SB, has been properly appointed under the October LPAs.

B. These proceedings

11. By COP7 application dated 25th January 2021, EG applied to the Court to object to registration of the August LPAs. On 15th February 2021 an order [**D1**] was made in standard terms listing the application for a dispute resolution hearing. There were complications of issue/service which delayed matters and required further orders so that the DRH did not in fact take place until 21st July 2021.

12. The DRH was conducted by Deputy District Judge Chahal QC (Hons), remotely by telephone because of pandemic circumstances. There are a number of features of the order from that hearing [**D6**] which are difficult to understand or, to say the least, unusual:

    a. it is said to be agreed that "*there is a need for further evidence of capacity to be adduced*" but also that "*there is presently no need for a determination of the disagreement [as to] the capacity of the donor at the time of the granting of the disputed LPAs/correspondence with the Office of the Public Guardian…*"

        So what was the scope of the capacity issue? The main order from the dispute resolution hearing refers to a report from "the Public Guardian" pursuant to section 49 of the Mental Capacity Act 2005 in the terms of a separate order but that separate order in fact requires that the report is by a Special Visitor. The capacity issue to be considered is "*whether [MMP] has capacity …to have granted an LPA in respect of the respondents and dealt with the OPG*."

    b. the issues for determination are identified as

        "*a. whether the donor should be joined as a party and if so, will be a protected party*
        b. whether the disputed LPAs should be registered."

        It is not stated <u>which</u> LPAs are disputed or by whom or on what grounds.

    c. it is "*recorded*" that "*Deputy District Judge Chahal who heard the Dispute Resolution Hearing (which was not effective as a Dispute Resolution Hearing) may hear any further applications and the further Dispute Resolution Hearing in this case but may not hear the final hearing of this case*". A "*further dispute resolution appointment*" was listed before her.

        Clearly final resolution of the litigation was not reached and in that sense the DRH was not successful but there is no explanation as to how or why the hearing was not "effective as a Dispute Resolution Hearing" or why the outcome of the DRH was not simply directions for final hearing before a different judge, as Practice Direction 3B paragraphs 3.4(6) and (7) provide.

    d. directions were given that the parties file evidence as to the donor's capacity "*includ[ing] any information from the Donor's GP and the donor's social worker/social services department*". Seemingly to achieve this, the relevant Council was "*invited to provide to the applicant's solicitor…copies of all records in relation to their dealings with* [MMP]….".

        Capacity to what? There is no indication of what decision-making capacity this direction was intended to address, and no limit imposed on the medical or social work records apparently considered within its scope. If this direction were effective, it would be a very significant incursion into MMP's privacy without any representation of her interests.

e. directions were given as to the filing of evidence by EG, AP and IP addressing the property dispute;

f. it was ordered that "*There shall be no dealing by [EG] with the proceeds of [50 C Road], which must be preserved in the bank account jointly held with [DG], until further order. [EG] must forthwith serve this order on [DG] so he is aware of the terms of this order.*" (I shall refer to this below as "**the first injunction**".)

> It is agreed between the parties that the first injunction was granted of the court's own motion. EG was present and represented and did not object. DG was not present or represented. No provision was made for him to challenge the order.

13. On 5th November 2021 a Special Visitor's report was filed. The Special Visitor concluded that MMP had capacity to execute the August LPAs, and that there was nothing to rebut the presumption that MMP had capacity to enter into the October LPAs. MMP was said to be expressing wishes that IP is involved in her finances, with AP helping but SB having no involvement at all.

14. The anticipated second DRH was vacated because of a number of procedural difficulties. It was relisted before a different judge on 8th February 2022. Meanwhile, by COP9 application dated 4th February 2022 [**D13**], DG applied to set aside the first injunction.

15. The second DRH was again conducted by telephone. In so far as is material, the main order from the hearing [**D18**]:

a. records agreement that

i. MMP currently lacks capacity to manage her property and affairs or to grant/revoke LPAs;
ii. MMP's estate is limited to approximately £60 000, from which she is required to contribute to the costs of her care;
iii. the proceedings should be conducted in a reasonable and proportionate manner having regard to the size of MMP's estate;

b. identifies the remaining issues as

i. whether the order from the first DRH should be "reconsidered" and in particular whether the first injunction and joinder of DG should be discharged;
ii. whether each of the LPAs (individually specified) is "valid and the effect of the same";
iii. whether MMP's interests can properly be secured without being joined as a party and/or what directions should be made concerning her participation;

c. lists the matter for hearing before a third judge for hearing of the remaining issues.

16. An application was subsequently made to vacate the hearing. That application was considered, not by the judge before whom the hearing had been listed, but by Deputy

District Judge Chahal at a hearing on 13th April 2021 in which representatives of EG, AP and IA were heard. On that occasion she made an order [**D25**] directing the filing of an agreed chronology, updating position statements and an agreed bundle of authorities. "*The issue of whether or not to set aside*" the first injunction and joinder of DG was then to be determined "*without a further hearing*." Effectively she was reconsidering her own order, notwithstanding that it had originally been made at a hearing and therefore well outside the provisions of Rule 13.4.

17. On 24th May 2022 Deputy District Judge Chahal handed down the written judgment [**D27**] which is the root of this appeal. The judgment sets out paragraphs 34 – 39 inclusive of a decision by Keehan J in *SF Injunctive Relief* [2020] EWCOP 19, after which there follows a section headed "Principles derived from SF's case applied to MMP's case" which include the following paragraphs:

    a. para 41: "The provisions of s8 *(sic)* of the MCA 2005, means the court has the power to make interim orders or directions pending the final determination of the application if it is in P's best interests to do so. In MMP's case the issues remain to be determined at a final hearing, but the issue of MMP's beneficial interests have arisen and they are in dispute and require action to protect them. There is a possibility that they could be disposed of, leaving MMP bereft of a substantial sum of money…"

    b. para 42: "The power to make injunctive orders derives from the provisions of s16(2) of the 2005 Act which empowers the court to make decisions on behalf of P and s16(5) which enables the court to "make such further orders or give such directions…as it thinks necessary and expedient for giving effect to, or otherwise in connection with, an order…made by it under subsection (2)."

    c. para 43: "By virtue of s.47(1) the Court of Protection has the same powers, rights, privileges and authority as the High Court. The High Court has the power to make interlocutory injunctions by virtue of the provisions of s.37(1) of the 1981 Act."

18. There is then a subheading "Why an injunction is necessary", after which follow a further five paragraphs including:

    a. para 47: "…it would therefore be surprising if the Court of Protection was powerless to protect MMP's beneficial interest where a dispute lies about them before a final hearing, where there is a possibility that she might be deprived of them…. "

    b. para 48: "My decision is that there is sufficient evidence, before a final determination, for the court to be concerned that MMP may have a beneficial interest in the proceeds of sale of [50 C Road] which requires preservation and protection. She does not have the mental capacity to instruct solicitors any longer and to take action herself to safeguard her assets. It is this court's responsibility to preserve the status quo and to protect the vulnerable and in this case her assets, even though ultimately the issue will require determination in another court. The balance of convenience lies in favour of making an injunction. Particularly, when the applicant's assets are tied up until October 2022 in a high interest bearing

account and the 4th respondent by his counsel has stated that he has no specific call for his alleged share of the proceeds of sale."

c. para 51: "…There is a real and live dispute about the beneficial interests of MMP in the proceeds of sale [of 50 C Road]. Although this court cannot determine that dispute, it can protect any beneficial interests MMP may be able to establish so that they are not disposed of in the interim. The court did enquire of counsel for [DG] whether he had any urgent need to deal with the funds which he holds from the process of sale of [50 C Road] and the answer given at the hearing on 13th April by his counsel was no. No question arises of any detriment in [DG] not having access to those funds to date.""

19. After handing down her judgment, Deputy District Judge Chahal asked the parties to submit a draft order in the light of here conclusions, which she then approved on 1st June 2022. That order [**D45**]:

a. (at paragraph 7) sets aside the first injunction;

b. (at paragraph 8) provides that *"[EG] and [DG] may not deal with the proceeds of sale of the Property in the sum of £151 372 held by each or other lesser sum held by [DG] arising from the sale ("the Sums") wheresoever held*" (I shall refer to this below as "**the Proceeds of Sale Injunction**");

c. (at paragraph 10) directs that DG "*shall forthwith file a statement explaining where his share of the proceeds of sale of the Property are held*" (I shall refer to this below as "**the Disclosure Order**");

d. (by way of recital) records an undertaking by AP and IP that "if the court later finds that paragraph 8 of this order has caused loss to [EG] and/or [DG], and decides that [EG] and/or [DG] should be compensated for that loss, [AP] and [IP] will comply with any order the Court may make."

20. The order also joins the Public Guardian and MMP as parties. The Official Solicitor is invited to act as Litigation Friend for MMP "and to consider what further steps should be taken on behalf of [MMP] as are necessary to protect any interest [MMP] may have in the proceeds of sale of [50 C Road]…". The Public Guardian was directed to file a statement "concerning his position of the registration of the lasting powers of attorney". Various other evidence was directed, and the matter was listed for a final hearing, with a time estimate of two and a half days, before Deputy District Judge Chahal.

21. EG and DG then filed COP35 notices dated 14th June 2022 [**D48** & **D62**] seeking permission to appeal the written judgment and seeking orders to set aside the Proceeds of Sale Injunction and the joinder of DG (paragraphs 8 and 10 of the order made on 1st June 2022.)

22. By order made on 18th July 2022 [**D76**] I listed this matter for an in-person attended hearing to consider permission to appeal and, if granted, to determine the appeal. It is recited in the order that "it presently appears to the Court that the costs of proceedings to date are likely to be disproportionate to the size of MMP's estate, including any interest she may have in the proceeds of sale of [50 C Road]." The parties were reminded that the

Court may order any of them to pay the costs of these proceedings, in whole or in part, if the circumstances so justify.

23. Subsequently, on 23rd August 2022, Deputy District Judge Chahal has made a further order dealing with various procedural issues which have arisen. In particular, the joinder of the Public Guardian has been discharged. Since then, the Official Solicitor has also declined the invitation to act for MMP.

C. Matters considered

24. I have considered the agreed bundle for the appeal hearing which includes:

    a. those orders identified in the summary above;

    b. the written judgment by Deputy District Judge Chahal;

    c. "proposed grounds of appeal" on behalf of EG [**D59**];

    d. "proposed grounds of appeal" on behalf of DG [**D73**];

    e. a skeleton argument on behalf of EG and DG [**J1**];

    f. a "position statement and skeleton submissions" of AP and IP.

25. I have also had the benefit of oral submissions from Ms. Collinson and from Mr. Buck.

D. Law and Procedure: Appeals

26. The appeals procedure is set out in Part 20 of the Court of Protection Rules 2017. In so far as is relevant:

> **20.6 Permission to appeal – other cases**
>
> (1) Subject to rules 20.5 and 20.7, an appeal against a decision of the court may not be made without permission.
> …
> (4) Where the decision sought to be appealed is a decision of a Tier 1 judge, permission may also be granted or refused by –
> a) a Tier 2 Judge…
>
> **20.8 Matters to be taken into account when considering an application for permission**
>
> (1) Permission to appeal shall be granted only where –
> (a) the court considers that the appeal would have a real prospect of success; or
> (b) there is some other compelling reason why the appeal should be heard.
> ….
>
> **20.13 Power of appeal judge on appeal**

(1) In relation to an appeal, an appeal judge has all the powers of the first instance judge whose decision is being appealed.
(2) In particular, the appeal judge has the power to –
(a) affirm, set aside or vary any order made by the first instance judge;
(b) refer any claim or issue to that judge for determination;
(c) order a new hearing;
(d) make a costs order.
(3) the appeal judge's powers may be exercised in relation to eh whole or part of an order made by the first instance judge.

20.14 Determination of appeals

(1) An appeal shall be limited to a review of the decision of the first instance judge unless - ….
(2) Unless the appeal judge orders otherwise, the appeal judge shall not receive –
(a) oral evidence; or
(b) evidence that was not before the first instance judge.
(3) The appeal judge shall allow an appeal where ethe decision of the first instance judge was –
(a) wrong; or
(b) unjust, because of a serious procedural or other irregularity in the proceedings before the first instance judge.

E. Law and Procedure: Jurisdiction

27. The Court of Protection has a statutory jurisdiction set out in the Mental Capacity Act 2005 ("the Act"). In particular the Court may:

a. make declarations as set out in section 15 of the Act;

b. on behalf of a person ('P') who lacks capacity to make such for themselves, make decisions as to P's welfare or property and affairs, or appoint someone else to make those decisions, as set out in section 16 of the Act;

c. in respect of Lasting Powers of Attorney, determine questions of validity and operation as set out in sections 22 and 23 of the Act.

28. In so far as is relevant, section 16 of the Act provides that:

"(2) The court may –
(a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or
(b) appoint a person (a 'deputy') to make decisions on P's behalf in relation to the matter or matters.
….
(5) The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by under subsection (2)."

29. In so far as is relevant, section 22 of the Act provides that:

> (2) The court may determine any question relating to –
> (a) whether one or more of the requirements for the creation of a lasting power of attorney has been met;
> (b) whether the power has been revoked or has otherwise come to an end
> (3) Subsection (4) applies if the court is satisfied –
> (a) That fraud or undue pressure was used to induce P –
> (i) to execute an instrument for the purpose of creating a lasting power of attorney, or
> (ii) to create a lasting power of attorney, or
> (b) that the donee (or, if more than one of them, any of them) of a lasting power of attorney –
> (i) has behaved, or is behaving, in a way that contravenes his authority or is not in P's best interests, or
> (ii) proposes to behave in a way that would contravene his authority or would not be in P's best interests.
> (4) The court may –
> (a) direct that an instrument purporting to create the lasting power of attorney is not to be registered, or
> (b) if P lacks capacity to do so, revoke the instrument or the lasting power of attorney.

30. It is important to note how the s22 jurisdiction is limited. The fundamental question of whether an LPA was validly created rests – pursuant to section 10(2)(c) – on capacity to execute the instrument. (The other aspects of validity are compliance with formal requirements.) The Court's power to revoke a validly created LPA only arises where the donor lacks capacity to revoke the instrument herself. (It is very much part of the way Lasting Powers of Attorney operate that a *capacitous* donor may consider that her attorneys have misbehaved or acted beyond their powers and still choose *not* to revoke the power.)

31. As to how the Court of Protection realises its remit, section 47(1) of the Act provides that:

> "The court has **in connection with its jurisdiction** the same powers, rights privileges and authority as the High Court." (emphasis added)

32. The first case under the Mental Capacity Act 2005 to come before the Supreme Court was *Aintree University Hospitals NHS Foundation Trust v. James* [2013] UKSC 67, in which Lady Hale unequivocally began by stating

> "That Act provides for decisions to be made on behalf of people who are unable to make decisions for themselves. Everyone who makes a decision under the Act must do so in the best interests of the person concerned."

33. The context of *Aintree* was very different to the matter currently before the Court - the hospital where a gravely ill man was being treated asked for a declaration that it would be in his best interests to withhold life-saving treatment from him. At paragraph 18, Lady Hale explained that

> "This Act is concerned with enabling the court to do for the patient what he could do for himself if of full capacity, but it goes no further. On an application under this Act, therefore, the court has no greater powers than the patient would have if he were of full capacity. The judge said: 'A patient cannot order a doctor to give a particular form of treatment, although he may refuse it. The court's position is no different.'"

34. Subsequently and in another context, Lady Hale reiterated the nature of the jurisdiction. In *N v A Clinical Commissioning Group* [2017] UKSC 22, the context was a dispute as to the welfare of an incapacitous person where the provider refused to fund the care package sought by some parties. The litigation confirmed that the Court of Protection can only choose from "available options". As Lady Hale said in the opening paragraph:

> "The Mental Capacity Act 2005 established a comprehensive scheme for decision-making on behalf of people who are unable to make the decision for themselves. The decision-maker - whether a carer, donee of a power of attorney, court-appointed deputy or the court - stands in the shoes of the person who is unable to make the decision - known as P - and makes the decision for him. The decision has to be that which is in the best interests of P. But it is axiomatic that the decision-maker can only make a decision which P himself could have made. The decision-maker is in no better position than P."

35. This understanding of the Mental Capacity Act 2005 underpins the generally uncontentious proposition that the Court of Protection cannot determine disputes about whether or not P has a beneficial interest in a property or the proceeds of its sale. If a capacitous person ('X') is in dispute with another capacitous person ('Y') about the beneficial interest in a property, the forum for determination of that dispute is the County Court or the appropriate division of the High Court. The civil judge hears the competing claims and decides the issues according to the evidence. Determination of the dispute is not a decision which X or Y can make for themselves.

36. In *London Borough of Enfield v. Matrix Deputies Limited* [2018] EWCOP 22 I have previously observed at paragraph 15b that:

> "It is now widely understood that the determination of third party claims is outside the jurisdiction of the Court of Protection."

The Deputy District Judge in this matter acknowledged that starting point no fewer than three times in her judgment (paragraphs 9, 48 and 51). The parties in these proceedings all accept it too.

37. As to the extent and the limits of the Court of Protection's jurisdiction to authorise the conduct of litigation elsewhere on behalf of a person who lacks capacity to conduct such proceedings, the decision in *Re ACC* [2020] EWCOP 9 sets out the position at paragraphs 43 – 44. In particular, it is to be noted that the ultimate control of who acts as litigation friend lies with the court seized of the proceedings. Authorisation by the Court of Protection is one route to conducting proceedings elsewhere on behalf of a person lacking capacity to conduct those proceedings for themselves but it is neither necessary (for the purposes of the court seized of the litigation, as opposed to for the purposes of using P's funds) nor an absolute entitlement. Pursuant to CPR Rule 21.7 and FPR Rule 15.7

respectively, both civil and family courts may direct that a person with such authorisation by the Court of Protection is not to act as litigation friend in the proceedings elsewhere, discharge their appointment and appoint a replacement.

38. How then is section 47(1) of the Act to be understood? A person of full capacity cannot decree prohibitions on the actions of others (except in the sense of withholding consent to actions which require it according to civil or criminal law); but the powers and authority of the High Court indisputably include the making of injunctive orders. How is the Court of Protection both limited to doing for P what he could do for himself if he had full capacity, and yet also able to grant injunctions?

39. This question was first authoritatively considered by Keehan J in *Re SF* [2020] EWCOP 19. He pointed (at paragraph 31) to various other decisions where Tier 3 judges of the Court of Protection had clearly taken the view that "the Court of Protection does have the power to grant injunctions to support and ensure compliance with its best interests decisions and its orders…" He concluded (at paragraph 32) that "the Court of Protection does indeed have the power to grant injunctive relief *in support of and to ensure compliance with its best interests decisions and its orders*." (emphasis added)

40. Shortly before the appeal hearing in this matter, the Court of Appeal handed down judgment in *Re G (Court of Protection: Injunction)* [2022] EWCA Civ 1312. At first instance the Vice-President of the Court of Protection made a 'bests interests' decision that G should live in residential care placement, A House. He subsequently made injunctions against three of G's family members, the exact terms of which the Court of Appeal considered it unnecessary to set out (paragraph 21) but seemingly concerning their presence at/conduct towards the staff of A House. The Court of Appeal concluded (as summarised at paragraph 82) that there was jurisdiction to make those injunctions because G had an interest in the decision about his residence being given effect and the injunctions were ancillary orders to prevent that decision being frustrated.

41. Notable milestones to this conclusion were:

    a. (at paragraph 38) that, where the Court has made an order under section 16(2)(a) of the Act, s16(5) enables the Court to make such further orders as it thinks necessary or expedient to give effect to, or otherwise in connection with, that order;

    b. (at paragraph 43) that, among other orders that the Court might make under s16. (5) of the Act, are injunctive orders;

    c. (at paragraphs 49 and 50) that, although the Court can indeed grant injunctions for the purposes specified in s16(5) of the Act, when it does so "it is exercising its ordinary injunctive powers which it has by virtue of s.47". Therefore the requirement in s37(1) of the Supreme Court Act 1981 applies and the test for granting an injunction is that it be "just and convenient.";

    d. (at paragraph 55) that the two requirements of "just and convenient" are (i) an interest of the claimant which merits protection and (ii) a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something;

e. (at paragraphs 67 and 68) that there was no doubt why the Vice-President's injunctions were imposed, namely "to protect the decision he had made…that G should move to A House." There was a risk that otherwise the family's conduct would sabotage the placement at A House. This "plainly" met the just and convenient test.

f. (at paragraph 69) that G's interest which the injunctions sought to protect was "self-evidently…an interest in seeing that the decision [that she move to A House] was given effect to."

g. (at paragraph 71) that the principle which justified exercise of injunctive powers was "the general principle that a Court may grant ancillary orders, including injunctive orders, to ensure that its orders are effective."

42. Two examples were given in support of the general principle (that a Court may grant ancillary orders to ensure that its orders are effective) found to satisfy the second part of the 'just and convenient test':

a. the transfer example (at paragraph 72):

> "… suppose that the Court decided under s16(2) that a fund held by A should be transferred to be held by B for P instead. If there is no reason to suppose that A will be obstructive, it may well be enough for the Court to decide that it is in P's best interests that the funds be transferred from A to B and make an order to that effect in the expectation that A would duly co-operate. If however there is a risk that A will seek to frustrate the order, the Court can undoubtedly add an injunction ordering A to transfer the fund. That would be an example of an ancillary order intended to make the s16(2) order effective."

b. the enforcement example (at paragraph 73):

> "… a useful analogy can be found in *Broad Idea* itself. There Lord Leggatt identified the rationale for the grant of freezing injunctions as the so-called "enforcement principle", namely the principle that the essential purpose of a freezing order is to facilitate the enforcement of a judgment or order for the payment of a sum of money by preventing assets against which such judgment could potentially be enforced from being dealt with in such a way that insufficient assets are available to meet the judgment. Then, having identified the relevant interest as the claimant's (usually prospective) right to enforce through the court's process a judgment or order for the payment of a sum of money, he continued at [89]:
>
> "A freezing injunction protects this right to the extent that it is possible to do so without giving the claimant security for its claim or interfering with the respondent's right to use its assets for ordinary business purposes. The purpose of the injunction is to prevent the right of enforcement from being rendered ineffective by the dissipation of assets against which the judgment could otherwise be enforced."

43. In respect of the second example, Baker LJ went on to note (at paragraph 74) that the relevant principle applied "even though the order (i) may not yet exist but may only be a potential future order and (ii) may not be an order of the relevant court at all but may be that of a foreign court." If the Court can do that, he concluded, "it can in our judgment certainly grant an injunction to prevent its own existing order from being frustrated."

44. The judgment of the Court of Appeal also specifically addressed "other points" which had been raised, including (at paragraphs 77 – 78) the contention that it was "important to be clear whether the injunction was made under s16(5) or s47 of the Act because the former was a 'best interests' decision which did not adequately take account of the rights of others." The point was dealt with shortly. The Vice-President's injunctions were *both* "in accordance with s16(5)" *and also* "an exercise of the power conferred on the Court by s47" and the "unsurprising" conclusion that an order made to give effect to a "best interests" order would itself meet the "best interests" test did not mean that the Court should, or will, ignore the rights of others:

> "It is trite law that injunctions are discretionary, and the Court will take account of all the circumstances. Very frequently the Court's decision as to whether to grant an injunction will involve balancing the rights of P against the rights of others, including Convention rights such as those under Article 8 or Article 10. This is a familiar and well understood process, and *we would not want our judgment in the present case to cast any doubt on it or lead to any significant change in practice*." (emphasis added)

45. As to how the power to grant injunctions is squared with the limit of the Court of Protection's jurisdiction to making only decision for P that he could make for himself if capacitous, it was said (at paragraph 79):

> "…although we accept of course that decisions made for P by the Court under s16(2)(a) are limited to the available options, we do not think this limits the power of the Court under s16(5) to grant injunctions *to give effect to those decisions* (something that P could of course not do for himself.)" (emphasis added)

46. The Court of Appeal easily dismissed an argument that the Vice-President's injunctions amounted to restraint of harassment without considering the safeguards of the Protection from Harassment Act 1997 (paragraph 81):

> "The basis of the judge's grant of the injunctions was not the protection of the employees of the trust or of the CCG from harassment in accordance with the 1997 Act. The basis of the judge's grant of the injunctions was the protection of G's placement. The difference was well illustrated by … the example of a hypothetical situation in which G had left the care home but a family member continued to write abusive letters to the home. In such a case an injunction could no longer be granted under s16(5) as it would do nothing to protect G or her placement, and if an injunction were sought, it would indeed have to be sought on the basis of protection from harassment in accordance with the 1997 Act, and no doubt in another court."

F. <u>The Parties' positions</u>

47. Both the Appellants and the Respondents filed detailed written submissions in advance of the hearing and before *Re G* was handed down.

48. The written position of the Appellants was that the court had no jurisdiction to make either the Proceeds of Sale Injunction or the Disclosure Order, so they are 'wrong':

    a. the parties accepted, and the court concluded, that there is an ongoing dispute about what, if any, beneficial interest [MMP] has in the sale proceeds of the Property. The power to grant an injunction pending determination of that dispute rests with a civil court only. It is open to AP and IP to issue a Part 7 claim in the county court, seeking their appointment as litigation friend by filing a certificate of suitability. Within those proceedings, they may seek injunctive relief if they wish. The Court of Protection should not be used to circumvent the civil court's established jurisdiction and Part 44 costs regime.

    b. the Court of Protection has power to make an injunction but such power can only be used in exercise of the court's power to make best interest decision about **P's** affairs; it cannot be used to prevent **them** from using **their** property (emphasis in the skeleton argument).

    c. neither the Proceeds of Sale Injunction nor the Disclosure Order is "aimed at enforcing a best interests decision by the court".

    d. the judge accepted that resolution of the property dispute was a matter for another court. If the Court of Protection cannot make a final order concerning the proceeds of sale, which the judge accepted, then it cannot grant interim relief in respect of the monies.

    e. in any event, the Proceeds of Sale Injunction was not necessary. For a court to grant a freezing injunction, there must be a risk of dissipation. The judge accepted DG's submission that he had no present need or intention to use his part of the proceeds of sale. In absence of evidential foundation, the judge made orders which were contrary to established principles to which she made little reference in her judgment.

    f. the absence of cross-undertaking or evidence of ability to meet the undertaking if called upon to do so is usually fatal to an application for interim injunction. There was no evidence before the court the AP and IP have the means to pay any sum that the court might order in the event it transpires that the Proceeds of sale Injunction was granted wrongly. The requirements of paragraph 5.1 of PD 25 of the CPR were not met.

    g. If the Proceeds of Sale injunction is set aside, the disclosure order must fall with it.

    h. DG has no interest in the validity or otherwise of the LPAs. There is no need for him to be party. Such status only serves to increase the cost of litigation which, under the general rule, MMP will bear.

49. The written position of the Respondents was that "the combined effect of sections 16,18 and 47 of the MCA 1973 (*sic)* is to provide the Court of Protection with an unfettered

discretion to grant an injunction provided it exercise its powers in line with those of the High Court" …. There is no doubt that the High Court has the power to grant a quia timet injunction to restrain the imminent disposal of assets which are the subject of future litigation. The Court of Protection should by virtue of s47 of the MCA 1973 (*sic)* be able to do likewise." So,

a. AP and IP's "case is that so long as [SB] remains MMP's attorney no claim will be made on MMP's behalf" in relation to the property dispute. MMP has been joined as a party to the proceedings "so that this court can decide whether to make a decision authorising her to bring a claim herself."

b. the property dispute is acknowledged to be "not a dispute the Court of Protection can resolve" but "that is not a good reason for it not to make an injunction pending the litigation of that dispute elsewhere."

c. EG's account of the property dispute is "unsupported by any documentary evidence and is indeed contradicted by such evidence as is available….";

d. the sale proceeds of [50 C Road] "is property the Court of Protection can and should be injuncted (*sic)* because there is a seriously arguable case that they form part of MMP's estate."

e. it was necessary to join DG because it is in MMP's best interests for the Court of Protection to exercise it jurisdiction to preserve assets in which she has a beneficial interest.

f. if the joinder of D[G] and the making of the injunction were procedurally unfair on D[G], he took no steps to set it aside for some five months. EG was present when the injunction was granted yet did not object.

g. in so far as undertakings are required, they can be provided by AP and IP (although no details of their financial circumstances are provided.)

h. the Court was right to make the Disclosure Order because it "must be within the exercise of its powers to be able to establish both the extent and whereabouts of assets in which it is alleged a protected party had a beneficial interest."

50. Having read the hearing bundle and the written position statements, at the beginning of the hearing I invited the parties to consider whether they wished to make submissions in the normal order or to hear my preliminary observations first so that oral submissions could be more targeted. The targeted approach was agreed, as was Mr. Buck making his oral submissions first.

51. In <u>oral submissions</u> Mr. Buck acknowledged that he could not "oppose the proposition that the Court of Protection cannot determine third party rights" and it is "plainly for the civil court to determine the property dispute" but he relied on section 18 of the Mental Capacity Act 2005. His argument seemed to be that - notwithstanding his acceptance that no such application is presently before the Court - the Court of Protection will be considering whether to authorise someone to conduct civil proceedings on behalf of MMP. That, he says, is because the issue of who acts as attorney will effectively determine whether a property claim is brought. The Proceeds of Sale injunction was

therefore to be considered as in support of that 'best interests' decision. The Court of Protection can consider "whether there is an arguable case" that MMP has an interest in the proceeds of sale of 50 C Road and, provided that it is so satisfied, it can use its powers to "prevent dissipation of those assets."

52. After the lunch time break, Ms. Collinson explained that there had been discussions between the parties as to an agreed way forward but those discussions needed further time. Meanwhile, the appeal should be determined. EG and DG were both prepared to give undertakings not to dispose of the proceeds of sale, otherwise than in payment of MMP's care home fees, for 12 months or until final determination of the property dispute by the civil court, whichever is sooner.

53. Then in her oral submissions, Ms Collinson submitted that the Court of Protection can only make decisions about P's property - it does not have power to determine or make orders that take effect on the property of third parties. Where there is an alleged legal course of action elsewhere, the extent of the Court of Protection's power is to authorise a person to bring proceedings. She pointed out that Mr. Buck's position would mean going much further. She pointed to *Re G* as authority that the Court of Protection's powers of injunctive relief do have a limit, namely the furtherance of best interests decisions. It cannot use its powers to "preserve the status quo" pending resolution of a dispute elsewhere because that would usurp the powers of the civil court.

54. Ms.Collinson submitted that "what ought to happen" here is that proceedings be taken in the civil court – as MMP has been taken to solicitors to consider. The civil court would consider injunctive relief, applying all the usual tests of civil proceedings, including as to the appointment of a litigation friend for MMP. There is nothing to stop AP and/or IP bringing those proceedings, as they well know because they helped take MMP to consult solicitors. So, when the judge concluded that she "had to step in because otherwise there was no one to protect MMP", she was wrong. The judge's approach would lead to bizarre conclusions, namely that the only court which could determine the property dispute would have its hands tied on the question of interim relief because the Court of Protection may already have made injunctive orders. It would be absurd if a court could finally determine a dispute but not give interim relief. It would set a dangerous precedent – what if no one ever brought the civil proceedings? And it would leave third parties at serious disadvantage because the Court of Protection will always prioritise P because that is what it is there to do.

55. Ms. Collinson pointed to the application before the court being for orders under s22 of the Act but *if* there is consideration of authorisation to bring proceedings, the court would be limited by the decision MMP could make for herself if she had capacity, namely shall I bring a claim or not?

56. Ms. Collinson had much to say about the procedural inadequacies around the Proceeds of Sale order but she agreed that, if I was satisfied that fundamentally the Court had no jurisdiction to make such order, it was not necessary for me to consider those points further.

57. Both Counsel were willing for the undertakings offered by EG and DG to be taken after explanation by me of the consequences of such, with the undertakings to be recorded in an order (rather than on form N117) in view of the remote conduct of the hearing. Both Counsel also asked for written judgment.

G. Discussion

58. Before considering the point of appeal, it is necessary to make some observations on matters of procedure.

59. The purpose of a dispute resolution hearing, as spelled out in paragraph 3.4(3) of Practice Direction 3B, is "to enable the court to determine whether the case can be resolved and avoid unnecessary litigation." It should be a singular opportunity for the court to "gives its view on the likely outcome of the proceedings" so that the parties can take a realistic view at an early stage of the merits of further litigation.

60. In order to achieve that purpose, the judge conducting the dispute resolution hearing needs to focus on what is in issue before the court, and to ensure that the parties do too. Often, this exercise leads to sensible compromise and proceedings can be brought to an end with a final order made by consent. However, at least at the central registry it is about as often the case that one party or another does not accept judicial insight and no agreement is reached.

61. A dispute resolution hearing may be considered *successful* if parties reach a position where proceedings can be concluded. It may nonetheless be *effective* as a dispute resolution hearing even if no concluding agreement is reached, in that the judge will have expressed a view about the likely outcome and the parties had an opportunity to consider their next steps in the light of such insight. It is only generally considered *ineffective* as a dispute resolution hearing if in fact no such opportunity for judicial explanation arises because, for example, one of the parties or one of the representatives for some reason fails to attend.

62. Once a judge has engaged in dispute resolution, whether *successfully* or not, that judge cannot properly engage in substantive decision-making in the case beyond what the parties agree. It would be procedurally unfair to do so because the judge has expressed views without any party having had the opportunity to give their evidence. Accordingly, paragraph 3.4(6) of Practice Direction 3B explicitly provides that if the parties do not reach agreement, the court will give directions for the management of the case and for a final hearing; and paragraph (7) specifies that the final hearing must be before a different judge.

63. In passing, I note that a question has previously arisen as to what the court may do where a dispute resolution hearing has been *ineffective* as defined above. It is indeed frustrating if an objecting party fails to attend a dispute hearing. An applicant may reasonably ask why the court cannot infer from non-attendance that the objection is abandoned, and go on to make final orders rather than give directions for further hearing. For practical reasons, it may be unsafe to infer abandonment of objection from non-attendance (not least because explanation of a good reason for non-attendance may reach the court only after the hearing). However, there is formal reason too in the wording of Practice Direction 3B. The preliminary words of paragraph 5 ("If the parties reach agreement to settle the case…") not being made out, the second half of the sentence ("the court will make a final order if it considers it in P's best interests") does not apply. In the absence of agreement, paragraph 6 applies. Any change to this approach would require amendment of the Practice Direction, which is not presently under active consideration by the Rules Committee.

Meanwhile, any frustration about non-attendance is better dealt with as a costs consideration.

64. In the matter currently before me, there is nothing in the order made on 21st July 2021 to explain why the dispute resolution hearing was considered "ineffective" as opposed to unsuccessful. It is expressly recorded that the applicant and both the respondents (jointly) were represented by counsel, SB and DG only being joined as parties by order made at conclusion of the hearing. Moreover, the identification of matters which were agreed and not agreed clearly indicates some judicial engagement. In accordance with Practice Direction 3B, the directions should therefore have been simply for case management and final hearing before another judge. Regrettably, in my judgment the Deputy District Judge went procedurally astray in providing for "a further dispute resolution appointment" before herself. There is no provision in the Rules or Practice Direction for multiple dispute resolution hearings, and adopting such a practice would not serve the purposes for which such a hearing was devised, namely *early* conclusion of unnecessary litigation. The court is not a mediation service. If a dispute resolution hearing is unsuccessful, normal procedure should thereafter apply.

65. Now turning to the substance of the appeal, I have difficulty discerning from the order made at the July 2021 dispute resolution hearing any confirmation that the court or the parties were focussed on the application actually before the court, namely the COP7 application to object to registration of the August LPAs:

    a. Recital 2 records that there is continuing disagreement about, but no need to determine, the issue of MMP's capacity "at the time of the granting of the disputed LPAs/corresponding with the Office of the Public Guardian" :

        i. if there is no need to determine MMP's capacity at the time of granting the disputed LPAs, the parties were presumably accepting that, at the relevant time, MMP had capacity to execute both the August and the October LPAs and so each was validly created pursuant to section 9 of the Mental Capacity Act 2005;

        ii. if there is no need to determine MMP's capacity at the time of corresponding with the OPG, the parties were presumably accepting *both* her LPA006 objection to the registration of the August LPAs on grounds of fraud or undue pressure *and* her objection to the October LPAs when she also asked for registration of the August LPAs. Such communications by MMP are mutually inconsistent. Trying to find a workable interpretation, I infer that all MMP's children were effectively abandoning any contention that fraud or undue pressure was used to induce her to create any of the LPAs;

        iii. it follows from (i) and (ii) that the only question in respect of the validity of the LPAs which could remain for determination by the court is whether any of the would-be attorneys has behaved, is behaving or intends to behave in a way that contravenes their authority or would not be in MMP's best interests, pursuant to section 22 (3)(b) of the Mental Capacity Act.

b. From (a), it is difficult to make sense of the subsequent direction that all parties file documentary or witness evidence in respect of MMP's capacity, including from the GP and social services.

c. The first injunction (at paragraph 5) and the directions (at paragraphs 8, 9 and 10) that the parties file statements addressing dealings with the property at 50 CR all strongly suggest that the court and the parties were in reality focussed on the property dispute.

d. How could focus on the property dispute advance the court's determination of the objection to registration of the August LPAs or even the only remaining disagreement about validity of any of the LPAs? From Mr Buck's submissions, and perhaps with some benefit of hindsight, the intention seems to have been that the merits of the property dispute would cast light on the behaviour of would-be attorneys. However, this overlooks the agreed fact that the Court of Protection cannot determine the property dispute. If it cannot determine the dispute, it would be wrong for the Court of Protection to base its determination of LPA validity on its own perception of the merits of such dispute. The appropriate course would have been to stay the COP proceedings pending determination of the property dispute in the appropriate forum.

66. By the time of the second dispute resolution hearing, the basis of challenge to any of the LPAs is still not spelled out but it is clear that the first injunction and the joinder of DG are challenged. Hence we get to the Deputy District Judge's written judgment. Returning to the paragraphs set out above, I make the following observations:

a. Paragraph 41: it does not follow from the arising of a dispute about MMP's beneficial interest in a property or the proceeds of its sale, or indeed the possibility that such sums could be disposed of, either that action to protect them is required from the Court of Protection or, if it is, that such action should be injunctive relief.

b. Paragraph 42: the principle is properly identified but there is no identification here of any order which was or could be made in the matter before the court pursuant to s16(2), to which s16(5) could apply.

c. Paragraph 47: it is not surprising that the Court of Protection cannot cure all ills. It is a specialist court to make decisions for P which P cannot make for herself because of mental incapacity. It is not a court to determine any dispute which happens to involve a person who lacks mental capacity. The courts of all other jurisdictions remain open to persons who lack capacity, and rightly so. The need for a litigation friend is a practical requirement (which may give rise to practical difficulties) but it is not a reason either to favour the incapacitous with an alternative tribunal or to disadvantage them by denying access to ordinary justice.

d. Paragraph 48: It does not follow from a concern that P "may have a beneficial interest … which requires preservation and protection" that the Court of Protection has a "responsibility to preserve the status quo." Preserving a status quo is not a neutral act. It is a significant interference in the rights of someone

who may turn out to be fully entitled to the frozen asset. The Court of Protection's responsibility is to use its proper powers in the best interests of P. Where there is concern that P has a property interest which is denied, the proper power for the Court of Protection to exercise is that which enables the dispute to be determined and P's interest enforced. It is not a "balance of convenience" matter. It is a question of what power does the Court have.

e. Where there is concern that P has a property interest which is being denied, the proper power for the Court of Protection to exercise is that which enables the dispute to be determined and P's interest enforced.

f. Paragraph 51: there is no basis offered for what is in fact mere assertion that "[a]lthough this court cannot determine [the property] dispute, it can protect any beneficial interests MMP may be able to establish so that they are not disposed of in the interim."

67. I am grateful to Counsel for considering *Re G* at short notice. Sensibly, neither side in the matter before me sought to distinguish this case. In particular Mr. Buck rolled back from his written contention of the Court of Protection having an unfettered discretion to grant injunctions. However there remained considerable lack of clarity as to the basis of his position that the proceeds of sale injunction fell within the conclusion of *Re G*: what would be the decision which MMP has an interest in being given effect, and how are the injunctions ancillary to preventing that decision being frustrated?

68. On the application formally before the Court, orders were sought pursuant to section 22 of the Mental Capacity Act, not section 16. That section has no direct equivalent of section 16(5). Instead s22(4) specifies the court's powers. In my judgment it would stretch the s47 concept of 'connection with' the s22 jurisdiction beyond what it can bear to suggest that a freezing injunction is so linked to a determination of validity of lawful authority as to be ancillary to preventing frustration of the validity decision. Both of the powers of s22(4) can be fully implemented irrespective of what happens to disputed assets. (I shall refer to this below as **Conclusion 1**.)

69. If I accept that the Deputy District Judge was considering – despite no such application having been made and apparently not immediately – granting someone authority to conduct proceedings on behalf of MMP in respect of the property dispute, then at least there is potential for a section 16 order (as provided by section 18(1)(k) of the Act) so section 16(5) would apply. Can it be said that a freezing injunction is 'necessary or expedient' for giving effect to, or otherwise 'in connection with' the granting of authority to conduct proceedings? Again, in my judgment the answer to that question must be negative. Litigation can be properly *conducted* irrespective of what happens to disputed assets. A freezing injunction goes materially beyond the *conduct* of litigation, into its *determination*. It is not within the realms of effectively *conducting* litigation to freeze disputed assets, even when the conduct of litigation has reached the point of enforcement; so such an order cannot be ancillary to preventing frustration of such authority. In substance and intent, a freezing injunction is ancillary to a power to *determine* the dispute, which the Court of Protection does not have. (I shall refer to this below as **Conclusion 2**.)

70. I have found it helpful to test **Conclusions 1** and **2** against the examples given by Baker LJ in *Re G* :

a. The transfer example: the clear assumption of the example is that the funds in question are held "for P" ie there is no dispute about P's beneficial entitlement; it is merely a question of who holds them for P. So the example tells us nothing directly about whether the Court of Protection can grant freezing injunctions against assets in which P *may* have an interest.

   The s16 decision contemplated is that B should hold P's funds. The ancillary order contemplated is an injunction to compel the current holder, A, to transfer the funds to the intended holder, B. Clearly the transfer is necessary to the decision, and clearly if A will not make it voluntarily, an order compelling him to make the transfer is ancillary to preventing frustration of the decision. The very clarity of connection between the decision and the injunction in this example reinforces my conclusion that a freezing injunction cannot be considered ancillary to either a determination of validity of LPAs or a decision to authorise conduct of litigation.

b. The enforcement example: to Baker LJ the usefulness of this example was by analogy. He offered it as an illustration of meeting the 'just and convenient' test. The principle is that the purpose of a freezing injunction is to facilitate enforcement of an order. The decision to which that principle applies must therefore be that assets in the control of X are payable to Y. So far, this confirms my conclusions because, as all parties agree, the Court of Protection cannot decide the property dispute.

   However, Baker LJ went on to note that the principle applied "even though the order (i) may not yet exist but may only be a potential order and (ii) may not be an order of the relevant court at all but may be that of a foreign court."

   Deputy District Judge Chahal clearly had enforcement issues in mind, as evident for example from paragraph 48 of her judgment. So does the enforcement example, and particularly Baker LJ's note of the extent of it, suggest that she *can* make an injunction to prevent frustration of an order which the *civil* court *may* make?

   After anxious reflection I am satisfied that the enforcement example does not import such suggestion. In my judgment, the reason for that lies in section 47 of the Act. The Court of Protection's recourse to High Court powers is, pursuant to section 47, *limited* to use "*in connection with its [own] jurisdiction*." Baker LJ's analogy to the enforcement example is useful as an illustration of the principle of preventing frustration of an order but it is not – and on my understanding of the *Re G* judgment, was never intended to be - an illustration of when the Court of Protection is acting "in connection with its jurisdiction."

   The Court of Protection does not have jurisdiction to determine the property dispute so an injunctive order to prevent frustration of that determination elsewhere cannot reasonably be understood as made "in connection with" Court of Protection jurisdiction.

71. Finally, I have cross-checked **Conclusions 1** and **2** against Baker LJ's stated intention (at paragraph78) that the judgment in *Re G* does not "cast doubt on or lead to any significant change in practice" in respect of discretionary injunctions. Throughout my 12+ years

sitting in the Court of Protection, the general approach has always been that third party disputes require a different forum, including for interim measures. I am not aware of any instances where freezing injunctions against third parties have been considered or even requested from the Court of Protection, and neither counsel referred me to any such instances. Contrariwise, I am aware that freezing injunctions were obtained against the former deputies in *Matrix* via parallel proceedings in the High Court. So, it seems to me that my conclusions are in accordance with existing practice, and in accordance with Baker LJ's stated intentions for the *Re G* judgment.

72. Since I have concluded that the Proceeds of Sale Injunction was not made 'in connection with' the Court of Protection's jurisdiction, it is not necessary for me to consider Ms. Collinson's submissions about *how* the decision to grant the injunction was made. I did however, at the end of the hearing, take the offered undertakings from EG and DG and then discharge the injunction. In my judgment, where the granting of an injunction is properly within the court's powers, willingness to offer voluntary undertakings would be a relevant consideration. And where the granting of an injunction is outside the court's powers, it is nonetheless open to the court when it has concerns to explore whether voluntary undertakings may be offered to 'hold the ring' where appropriate.

73. The Disclosure Order was made to provide the court with evidence as to where DG's share of the proceeds of sale was being held. Clearly this was further to the Proceeds of Sale Injunction, with a view to determination of the property dispute and preventing frustration of any order which may be made upon such determination. It seems to me clear therefore that Ms. Collinson was right to contend that, if the injunction was improperly made, then the Disclosure Order should fall with it. Indeed Mr. Buck made no serious attempt to argue otherwise.

74. DG was only joined as a party at the first dispute resolution hearing. Looking at that order as a whole, it is clear that he was considered relevant to the court's focus on the property dispute and prevention of dissipation of assets in which MMP might have an interest. He has never been an attorney and there has never been any suggestion that he would be. He is not concerned in the validity or otherwise of any of the LPAs. There is no suggestion that he would be authorised to conduct proceedings on behalf of MMP to determine the property dispute. Indeed any such possibility would no doubt fill the Respondents with horror. All in all, he is peripheral to all matters actually or potentially to be determined by the Court of Protection. Accordingly I agree with Ms. Collinson that his joinder as a party only serves to increase costs and should be discharged.

H. Conclusions

75. I have no doubt that the Deputy District Judge proceeded with the best of intentions, to prevent loss of assets which may yet be found to be MMP's. I acknowledge that she did not have the loadstar of *Re G*, as I have had. Regrettably however, she was seemingly led astray by the parties', or more probably the Respondents', focus on the property dispute.

76. The Court of Protection does not have jurisdiction to determine third party property disputes because it can only make on behalf of P decisions which P could make for herself if she had capacity to do so.

77. The Court of Protection may grant injunctions but only in connection with its jurisdiction (s47) or specifically (s16(5)) where necessary and expedient to give effect to a best interest decision made pursuant to section 16(2) of the Act.

78. The application before the Deputy District Judge was for an order pursuant to section 22 in relation to validity of LPAs. Both of the powers of the court pursuant to section 22(4) may be fully implemented irrespective of what happens to P's assets. Accordingly, a freezing injunction would not be 'in connection with' the jurisdiction of section 22.

79. If the Deputy District Judge was considering an exercise of powers pursuant to section 16(2), it was apparently to authorise someone to conduct proceedings on behalf of MMP to determine the property dispute, which may include enforcement of any decision. A freezing injunction goes beyond *conduct* of litigation. It may be ancillary to *determination* of the litigation but the Court of Protection does not have such jurisdiction. Accordingly a freezing injunction would not be "for giving effect to, or otherwise in connection with" the s16(2) order.

80. It follows that I am satisfied that the Proceeds of Sale Injunction which the Deputy District Judge granted was 'wrong' within the meaning of Rule 20.12(3)(a), and so this appeal must be allowed.

81. It is therefore not necessary for me to consider Ms. Collinson's further contentions about *how* the decision was made to grant the Proceeds of Sale Injunction.

82. At the conclusion of the hearing, having taken undertakings from DG and EG and agreed to counsels' request for a written judgment to explain the decision, I made an order which discharged the Proceeds of Sale Injunction and the Disclosure Order. I varied Deputy District Judge Chahal's remaining directions so that the matter be listed on a specified date before a different (resident) judge. I encouraged the parties, before then, to take a realistic look at the nature of the issues between them and the costs of continued litigation, and to use all best endeavours to agree a way forward.

HHJ Hilder

14/4/23