Neutral Citation Number: [2023] EWCOP 29

Case No: 13452747

IN THE COURT OF PROTECTION
ON APPEAL FROM DISTRICT JUDGE BECKLEY

Date: 10 July 2023

Before:

Mr Justice Poole

- -

Esper v NHS NW London ICB (Appeal: Anonymity in Committal Proceedings)

Between:

PHILIP ESPER **Appellant**

- and -

(1) NHS NORTH WEST LONDON INTEGRATED CARE BOARD

(2) AB (By his Litigation Friend, the Official Solicitor) **Respondents**

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Nicholas O'Brien (instructed by **Miles and Partners**) for **the Appellant**
Benjamin Tankel (instructed by **Capsticks LLP**) for **the First Respondent**
Sophy Miles (instructed by **Edwards Duthie Shamash** for the Official Solicitor) for **The Second Respondent, AB**

Hearing date: 20 June 2023

- -

JUDGMENT

Mr Justice Poole:

Introduction

1. This appeal concerns transparency in committal proceedings in the Court of Protection. The Appellant is Dr Philip Esper who is the Defendant in committal proceedings in the Court of Protection in which his relative, AB, is the protected party. During the course of the Court of Protection proceedings the Court made an order restricting the Appellant's contact with AB and attached a penal notice to that order. The Respondent to this appeal made an application to commit the Appellant to prison for contempt of court by way of breaches of the order restricting contact. The Appellant admitted three such breaches and on 1 March 2023 the Court recorded findings of contempt of court. On 7 June 2023 DJ Beckley decided that no sanction should be imposed for the contempt of court. The transcript of his judgment shows that the reasons he gave for not imposing a penalty were,

> "1) The length of time since the last proven or admitted breach of the order.
>
> 2) The fact that whilst the sentence for contempt of court is very punitive and preventative in nature, the focus in this case is getting Dr Esper to comply with court orders, something that he has repeatedly and deliberately refused to do.
>
> 3)There does appear to have been greater compliance."

2. Neither the finding of contempt nor the decision on sanction are appealed. There is no challenge to the decision to hear the contempt proceedings in public. Furthermore, there is no appeal against DJ Beckley's refusal to recuse himself after a recusal application was made on 7 June 2023 on behalf of the Appellant. In his skeleton argument for the appeal, Mr O'Brien on behalf of the Appellant states that the appeal is brought against DJ Beckley's decisions:

   i) To publish a judgment naming Dr Esper as a contemnor; and

   ii) To permit the publication of Dr Esper's name, while restricting the identification of AB, and two other relatives of AB who are respondents in the Court of Protection proceedings.

   These may appear to be narrow issues but their consideration has revealed some difficulties with the interpretation and application of the court rules and practice directions relating to committal applications in the Court of Protection.

3. Directions have been given listing the appeal before a Tier 3 judge in the Court of Protection for a "rolled up" hearing at which permission to appeal will be considered and, if permission is given, the substantive appeal will be determined. When making the directions order, Senior Judge Hilder also directed that the Appellant's anonymity should be preserved pending the outcome of the appeal.

4. The grounds of appeal are,

   i) "The judge was wrong to decide that he was obliged to permit the publication of the Appellant's details and publish them in accordance with the Lord Chief Justice's Practice Direction: Committal for Contempt of Court - Open Court, March 2015 (as amended in 2020).

   ii) "The judge was wrong to decide that Court of Protection Rule 21.8(5) permitted him to direct the anonymity of the other parties to the application in proceedings for contempt of court but prevented him directing the anonymity of the appellant.

   iii) "The judge was wrong, to the extent that he had a discretion, as to whether he directed the anonymity of the appellant, when he:

   (a) decided that it was in the interests of justice that a contemnor who had been found to be in breach should be identified, even though no committal order was being made;

   (b) had indicated by his observations and conduct during the hearing, apparent bias against the appellant."

5. I have received submissions from Mr O'Brien for the Appellant, Mr Tankel for the Respondent ICB, and Ms Miles on behalf of the Official Solicitor as AB's Litigation Friend. I also received written and oral submissions from Professor Kitzinger of the Open Justice project and written submissions, which were those he also provided to DJ Beckley, from Mr Farmer of PA Media.

6. Within the Court of Protection proceedings, a Transparency Order has been made which prevents information being published or communicated that identifies or is likely to identify AB, and his relatives who are the other respondents in those proceedings, including Dr Esper. That order remains in force. However, as is standard form, the Transparency Order expressly excludes any committal proceedings from its ambit. In the current committal proceedings, DJ Beckley has made a further order which applies to the committal proceedings, and which prevents the reporting of the names and some other specific details of AB and two of his relatives identified in his order, but which he did not extend to prevent the identification of Dr Esper. That decision not to prevent the disclosure of Dr Esper's identity is the decision central to this appeal.

7. There has been no opposition to the orders in the committal proceedings or in these appeal proceedings that prevent the reporting of the identity of AB or the other relatives who were parties, or the publication or communication of the other details DJ Beckley identified as being unsuitable for reporting or disclosure. Furthermore, DJ Beckley permitted the Appellant's age and profession to be reported.

8. In relation to the issues raised by this appeal, I have been referred to my own judgment in *Sunderland City Council v Macpherson* [2023] EWCOP 3, and the decision of Mostyn J in *EBK v DLO* [2023] EWHC 1074 (Fam). Mostyn J's judgment was on an application for permission to bring contempt proceedings for breach of s. 12 of the Administration of Justice Act 1960 within family proceedings under s.8 of

the Children Act 1989, but in a comprehensive review he also considered the question of the naming of a defendant to committal proceedings in the Court of Protection.

9. Recently, the rules governing committal proceedings in the Civil Procedure Rules (CPR), Family Procedure Rules (FPR), and Court of Protection Rules (COPR) have all been amended with the intention of achieving consistency within all three sets of rules. Previously, there were differences between the sets of rules but the Lord Chief Justice's Practice Direction: Committal for Contempt of Court - Open Court, March 2015 (PD 2015) covered all committal proceedings to which those sets of rules applied. Examination of the transparency provisions within the relevant rules and practice directions during this appeal has revealed some anomalies and inconsistencies:

i) Whereas PD 2015 was amended in 2020 to reflect the new committal rules in the CPR, no such amendment was been made in the light of similar amendments to the FPR and COPR.

ii) As a consequence, there are some apparent inconsistencies between the requirements of PD 2015 and those of the COPR and FPR in relation to the circumstances in which the publication of the name of a defendant in committal proceedings may be forbidden.

iii) Whereas the COPR provide wide powers to protect the anonymity of P in Court of Protection proceedings, there are only narrow circumstances in which P or any other party's identity will be protected in contempt proceedings arising out of Court of Protection proceedings, namely those set out at COPR r21.8(5).

iv) Whereas COPR r21.8(5) requires the court to order the non-disclosure of the identity of any party or witness only if certain conditions are met, the equivalent rule in the CPR, applies to "any person".

v) The requirements as to the listing of a committal application in the Court of Protection, and the requirement to publish a transcript of a judgment in committal proceedings are less than clear.

PD 2015 and COPR r21.8(5)

10. The preamble at paragraph 1 of the *Practice Direction: Committal for Contempt of Court – Open Court* [2015] 1 WLR 2195 (PD 2015) makes it clear that it applies to proceedings for committal for contempt of court under the Court of Protection Rules 2007. PD2015 continues,

> **"Open Justice**
>
> 3. Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are made in, public. This rule applies to all hearings, whether on

application or otherwise, for committal for contempt irrespective of the court in which they are heard or of the proceedings in which they arise.

4. Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. Derogations shall, where justified, be no more than strictly necessary to achieve their purpose.

Committal Hearings – in Public

5. (1) All committal hearings, whether on application or otherwise and whether for contempt in the face of the court or any other form of contempt, shall be listed and heard in public.

[But] …

9. In considering the question whether there are exceptional circumstances justifying a derogation from the general rule, and whether that derogation is no more than strictly necessary the fact that the committal hearing is made in the Court of Protection or in any proceedings relating to a child does not of itself justify the matter being heard in private. Moreover, the fact that the hearing may involve the disclosure of material which ought not to be published does not of itself justify hearing the application in private if such publication can be restrained by an appropriate order.

10. Where the court decides to exercise its discretion to derogate from the general rule, and particularly where it decides to hold a committal hearing in private, it shall, before it continues to do so, sit in public in order to give a reasoned public judgment setting out why it is doing so.

…

Judgments

13. (1) In all cases, irrespective of whether the court has conducted the hearing in public or in private, and the court finds that a person has committed a contempt of court, the court shall at the conclusion of that hearing sit in public and state:

(i) the name of that person;

(ii) in general terms the nature of the contempt of court in respect of which the committal order, which for this purpose includes a suspended committal order, is being made;

(iii) the punishment being imposed; and

> (iv) provide the details required by (i) to (iii) to the national media, via the CopyDirect service, and to the Judicial Office, at judicialwebupdates@judiciary.gsi.gov.uk, for publication on the website of the Judiciary of England and Wales.
>
> (2) There are no exceptions to these requirements. There are never any circumstances in which any one may be committed to custody or made subject to a suspended committal order without these matters being stated by the court sitting in public.
>
> 14. In addition to the requirements at paragraph 13, the court shall, in respect of all committal decisions, also either produce a written judgment setting out its reasons or ensure that any oral judgment is transcribed, such transcription to be ordered the same day as the judgment is given and prepared on an expedited basis. It shall do so irrespective of its practice prior to this Practice Direction coming into force and irrespective of whether or not anyone has requested this."

11. On the introduction of the new CPR Part 81 concerning applications to commit for contempt of court, PD 2015 was amended so that the preamble now begins,

> "Except in relation to proceedings for contempt of court to which Part 81 of the Civil Procedure Rules 1998 apply, this practice direction applies to all proceedings for committal for contempt of court …."

12. COPR r21.9 provides,

> 21.9. - (1) If the court finds the defendant in contempt of court, the court may impose a period of imprisonment (an order of committal), a fine, confiscation of assets or other punishment permitted under the law.

COPR r21.1 provides that,

> "order of committal" means the imposition of a sentence of imprisonment (whether immediate or suspended) for contempt of court;

In the present case, Dr Esper was found to have been in contempt of court but was not made subject to a committal order.

13. The new COPR r21.8, effective from 1 January 2023, provides:

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

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

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

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

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

(b) it involves matters relating to national security;

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

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

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

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

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

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

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

> proceedings may apply to attend the hearing and make submissions or apply to set aside or vary the order.
>
> (7) Advocates and the judge shall appear robed in all hearings of contempt proceedings, whether or not the court sits in public.
>
> (8) Before deciding to sit in private for all or part of the hearing, the court shall notify the national print and broadcast media, via the Press Association.
>
> (9) The court shall consider any submissions from the parties or media organisations before deciding whether and if so to what extent the hearing should be in private.
>
> (10) If the court decides to sit in private it shall, before doing so, sit in public to give a reasoned public judgment setting out why it is doing so.
>
> (11) At the conclusion of the hearing, whether or not held in private, the court shall sit in public to give a reasoned public judgment stating its findings and any punishment.
>
> (12) The court shall inform the defendant of the right to appeal without permission, the time limit for appealing and the court before which any appeal must be brought.
>
> (13) The court shall be responsible for ensuring that judgments in contempt proceedings are transcribed and published on the website of the judiciary of England and Wales.

14. In *Sunderland City Council v Macpherson* (above) I wrestled with trying to reconcile PD 2015 with the new COPR r21.8. There is an apparent conflict between the mandatory requirement in PD 2015 paragraph 13 that a defendant who has committed a contempt of court must be named and their name published, and COPR r21.8(5) which requires the court not to disclose the identity of a party (which would include a defendant) if the two tests of necessity within that rule are met. In *EBK* (above) Mostyn J held that "if a defendant in proceedings governed by FPR Part 37 or COPR Part 21 is found to have committed a contempt then that defendant must be named in open court" [101]. He rested his conclusion on the mandatory nature of the wording of PD 2015 paragraph 13. At [100] he noted that this obligation will arise once the defendant has been found guilty of contempt. Before then, in the Court of Protection, the court may afford the defendant anonymity by applying COPR r21.8(5) and considering the balance of Art 8 and Art 10 rights.

15. With respect, insofar as it relates to defendants in committal proceedings, which it clearly does, I do not read COPR r21.8(5) as applying only to those who have not, or not yet, been found guilty of contempt of court. Further, in relation to defendants who have been found in contempt of court, I do not agree that PD 2015 takes precedence over the COPR Part 21 such that publication of the name of the defendant is

mandatory even if the necessity conditions of COPR r21.8(5) are met. In my view, where they are incompatible, COPR r21.8(5) prevails over PD 2015. COPR r21.8(5) applies to all parties and witnesses in committal proceedings in the Court of Protection, and at all stages – before and after any findings of contempt and/or the making of any committal order. I shall seek to explain those conclusions in the following paragraphs.

PD 2015, Paragraph 13 – When does it apply?

16. PD 2015 paragraph 13 refers to two different stages of contempt proceedings: (i) a finding that a person has committed a contempt of court, and (ii) the making of a committal order. As set out above, the COPR (in line with the CPR and FPR) make it clear that a committal order is the passing of an immediate or suspended sentence of imprisonment. As in the present case, a defendant might be found to have committed a contempt of court but not be made subject to a committal order. PD 2015 Paragraph 13(1) sets out what the court must do in all cases where it "finds that a person has committed a contempt of court." The first requirement is for the court to state in public the name of the defendant. The second is to state in public the nature of the contempt "in respect of which the committal order … is being made." That would not appear to apply where no committal order has been made. The third is to state publicly "the punishment being imposed". If there is no punishment being imposed, then there is no punishment to pronounce publicly. The fourth is to provide the details referred to in the first three requirements to the media and for publication on the judiciary website.

17. PD 2015 paragraph 13(2) sates that there are no exceptions to the requirements in paragraph 13(1), "There are never any circumstances in which anyone may be committed to custody or made subject to a suspended committal order without these matters being stated by the court sitting in public." Although the requirements of paragraph 13(1) are triggered by a finding of contempt, not by the making of a committal order, paragraph 13(2) is directed only to the case of a person against whom a committal order has been made. Do the first and fourth requirements of 13(1) of the Practice Direction apply even to a defendant found to have been in contempt but against whom no committal order is made? If so, then their name must be given in open court, provided to the media and published on the judiciary website. On the face of it, PD 2015 paragraph 13(1) does apply to all defendants found to have been in contempt, but Mr O'Brien contends that, read as a whole, PD 2015 does not require the court to state publicly, and publish, the name of a contemnor who has not received a committal order.

18. In contrast to PD 2015 paragraph 13, COPR r21.8(5) applies at every stage of a committal application. It applies whether the defendant has or has not been found guilty of contempt of court, and whether they have or have not been made the subject of a committal order. Nowhere in the COPR or COP PD 21A is the rule said to apply only at certain stages of committal proceedings.

19. The internal inconsistency within PD 2015 paragraph 13, and the external inconsistency between that paragraph and COPR r21.8(5) are discussed below but,

first, a short diversion is required into the requirements to deliver and publish a judgment in committal proceedings.

The Requirements to Give and Publish a Judgment in Committal Proceedings

20. COPR r21.8(11) provides, without qualification, that the court shall give a reasoned public judgment at the conclusion of "the hearing" and r21.8(13) requires that the court shall ensure that "judgments in contempt proceedings" are published on the judiciary website. Both these rules appear to apply to all committal proceedings irrespective of whether a finding of contempt and/or a committal order has been made. However, the new COP PD 21A paragraph 4 states,

> "While paragraph (13) of rule 21.8 makes the court responsible for the publication of transcripts of judgments in contempt proceedings, it does not require the court to publish a transcript of every judgment, but only in a case where the court makes an order for committal."

COP PD 21A(4) does not qualify the requirement to give a reasoned public judgment at the conclusion of the hearing but does restrict the requirement to publish transcripts of judgments in committal proceedings to those that follow a committal order.

21. PD 2015 paragraphs 14 and 15 similarly require "in addition to the requirement at paragraph 13", a written judgment or transcript of an oral judgment "in respect of all committal decisions" to be published on the judiciary website. That wording begs the question, what is a "committal decision"?

22. I note that CPR Part 81 requires that,

> "6) At the conclusion of the hearing, whether or not held in private, the court shall sit in public to give a reasoned public judgment stating its findings and any punishment.
>
> …
>
> (8) The court shall be responsible for ensuring that *where a sentence of imprisonment (immediate or suspended) is passed* in contempt proceedings under this Part, that judgment is transcribed and published on the website of the judiciary of England and Wales." [emphasis added]

Hence, CPR Part 81 only requires judgments to be published in cases where a committal order is made. For some reason, the same requirement in the Court of Protection was set out in COP PD 21A(4) rather than in COPR r21(13) itself.

23. In my view, PD 2015, paragraphs 14 and 15, and COPR 21 (11) and (13) as explained or qualified by COP PD 21A(4), are consistent in requiring a reasoned judgment to be given in public at the conclusion of *all* committal proceedings in the Court of Protection but only to require judgments to be published on the judiciary website in those cases where a committal order has been made. The making of a committal order is, in my view, a "committal decision" for the purposes of PD 2015, paragraph 14. COP PD 21A(4) qualifies COPR r21.8(13), it is not inconsistent with it.

Identifying the Defendant

24. These requirements to give a reasoned judgment in public at the conclusion of a hearing and to publish that judgment when a committal order has been made, are not, however, requirements to name the defendant, P, or anyone else within a judgment. This is clear upon considering the different stages of the committal application.

25. Where the hearing concludes with a finding that the defendant is not in contempt of court, there is a requirement to give a reasoned judgment in public but there is no requirement in PD 2015 paragraphs 13 or 14, or COPR r21.8(11) and (13) that the defendant must be named in that judgment and, as explained, there is no requirement for the judgment to be published. Nevertheless, COPR r21.8(5) applies to all stages of a committal application and so requires a direction not to disclose the identity of the defendant *if and only if* the two necessity conditions within that rule are met.

26. Where a defendant is found to have committed a contempt of court there are inconsistencies within PD 2015 paragraph 13 and as between that provision and COPR R r21.8(5). As to the apparent internal inconsistency within PD 2015 (see paragraph 17 above), I am satisfied that, without straining the meaning of the words, it is possible to read paragraph 13 as imposing the requirements to name the defendant in public and to publish their name when they have been found to be in contempt of court, whether or not they have been made subject to a committal order. The explanation in paragraph 13(2) underlines that the court should never withhold the name of a defendant it has made subject to a committal order, but it does not follow that the first and fourth requirements of paragraph 13(1) do not apply when no committal order is made. I reject Mr O'Brien's submission to the contrary. However, the resolution of the internal inconsistency does not resolve the external inconsistency between PD 2015 paragraph 13 and COPR r21.8(5).

27. In *EBK*, Mostyn J appeared untroubled by any apparent inconsistency between PD 2015 and COPR r21.8(5), and found that PD 2015 imposes an absolute requirement that the defendant found to have been in contempt of court must be named. With respect, such an absolute requirement is difficult to reconcile with COPR r21.8(5) which *requires* the non-disclosure of the defendant's identity if and only if certain narrowly defined conditions are met. COPR r21.8(5) is not qualified – it applies to all parties and witnesses in contempt proceedings in the Court of Protection and so includes defendants who have been found to have committed a contempt of court, including those who have made subject to committal orders. If COPR r21.8(5) requires non-disclosure of a defendant's identity in certain circumstances, then it is inconsistent with PD 2015 paragraph 13 which requires disclosure of the defendant's name in all cases where a contempt has been found proved.

28. Is there a hierarchy of provisions such that PD 2015 has precedence over the COPR or vice versa? The Explanatory Memorandum to the COPR states,

> "4.1 The power to make Court of Protection Rules is contained in section 51 of the Mental Capacity Act 2005 ("the 2005 Act"). The power is a broad one, similar to the powers to make Civil Procedure Rules and Family Procedure Rules, and as with those Rules, the Court of Protection Rules are supported by practice directions, made under section 52 of the 2005 Act.
>
> 4.2 Court of Protection Rules are made in accordance with the procedure in Part 1 of the Schedule 1 to the Constitutional Reform Act 2005, which provides for rules to be made by the Lord Chief Justice or a judicial office holder nominated by the Lord Chief Justice, and approved by the Lord Chancellor. The President of the Family Division (who is also the President of the Court of Protection), is the judicial office holder nominated for this purpose."

The Lord Chief Justice has power under the Part 1 of Schedule 2 of the Constitutional Reform Act 2005 to make or give designated directions or to nominate a judicial office holder to perform his functions with regards to making designated directions. Thus there appears to be an equal statutory power to make the COPR and PD 2015.

29. Unlike PD 2015 however, the COPR were introduced and have been amended by statutory instrument. The new COPR Part 21 was introduced by the Court of Protection (Amendment) Rules 2022, the explanatory note to which reads,

> "These Rules amend the Court of Protection Rules 2017 (S.I. 2017/1035) to substitute for Part 21 of those Rules a new Part 21, for the purpose of making provision for a consistent approach in relation to contempt proceedings having regard to the relevant provisions of the Civil Procedure Rules 1998 (S.I. 1998/3132 – see Part 81 as substituted by S.I. 2020/747) and the Family Procedure Rules 2010 (S.I. 2010/2955 – see Part 37 as substituted by S.I. 2020/758)."

As Mostyn J observed in *EBK* at [97] the newly introduced COPR r21.8(5) is in the same terms as CPR r39.2(4) and FPR r 37.8(5) (although the terms of CPR r39.2(4) are not now "identical" as he stated - see below). Clearly, the intention was to achieve consistency across the different rules which had previously included some differences, including in relation to issues of transparency in committal proceedings. However, as Mostyn J also pointed out, whereas PD 2015 was amended to exclude its application to CPR Part 81, no such exclusion has been carved out for FPR Part 37 or COPR Part 21. As Mr Tankel for the Respondent ICB has observed, paradoxically at a time when there were different regimes for transparency within committal proceedings under the CPR, the FPR, and the COPR, PD 2015 treated them as if they

were the same. Now that the three sets of rules are the same, the amended PD 2015 implies that they are different.

30. Having noted this paradox and the inconsistency between the COPR r21.8(5) and PD 2015 in relation to anonymity, it is my judgment that the former must take precedence. In *R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346, a case concerning costs in judicial review proceedings, Auld LJ considered a difference in emphasis between a rule under the CPR, and a practice direction. He held that "in the case of any conflict between the two, the CPR prevails" [67]. At [68] Auld LJ said,

> "As to Practice Directions, what is important is that all involved in the areas of administration of justice for which they provide, including claimants in judicial review proceedings, should be able to rely upon them as an indication of the normal practice of the courts unless and until amended. However, they differ from the CPR that: 1) in general they provide guidance that should be followed, but do not have binding effect; and 2) they should yield to the CPR where there is clear conflict between them."

31. In that case, Auld LJ was considering practice directions made in association with the CPR. Here, the practice direction in question was issued by the then Lord Chief Justice. In *Bovale Ltd v SSCLG* [2009] 1 WLR 2274 (CA) the Court of Appeal considered practice directions issued by the Lord Chief Justice and those that are associated with rules of court. The Court held at 27(i):

> "Since the rules have the force of delegated legislation, [the judge] has no power to alter them whether by judgment or practice direction; in particular cases a judge will be free to exercise case management powers under CPR Pt 3. Those powers are given by the statutory rules, but a judge cannot simply alter the rules or practice directions with general effect."

I am satisfied that where court rules which have the force of delegated legislation conflict with a practice direction, the rules should prevail. In the present case, PD 2015 was issued long before COPR r21.8(5) and that fact emphasises the need to give precedence to the later rule over the former practice direction. The rule was introduced in the full knowledge of PD 2015 and should be taken to modify or override it where they are incompatible. Furthermore, the new COPR Part 21 was introduced by statutory instrument with the express intention of achieving consistency with CPR Part 81 and the FPR Part 37. To give precedence to PD 2015 would be to undermine that intention. Accordingly, the conflict between COPR r21.8(5) and PD 2015 must be resolved by giving precedence to the COPR. I am giving this judgment in the Court of Protection, but the same reasoning would appear to apply to FPR Part 37.

32. Having been more tentative in *Macpherson*, I would now conclude that notwithstanding the provisions of PD 2015, judges in the Court of Protection should apply COPR r21.8(5) when considering an order for the non-disclosure of the identity of any party or witness in committal proceedings, including the defendant. Insofar as PD 2015 indicates that there is no power to order non-disclosure of the defendant's name, it should yield to COPR r21.8(5) which requires non-disclosure of the defendant's name if and only if the two tests of necessity set out in that rule are met. COPR r21.8(5) applies at all stages of a committal application in the Court of Protection, it applies to a defendant, any other party or a witness, and it applies to the disclosure of the identity of a party or witness by way of their being named in court, in a judgment and/or in a report of the proceedings.

Ancillary Directions

33. If the Court orders non-disclosure of the identity of the defendant or any other party or witness in committal proceedings, then the Contempt of Court Act 1981, s11 would appear to apply:

> "Publication of matters exempted from disclosure in court.
>
> 11. In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

In *Khuja v Times Newspapers Ltd*, [2017] UKSC 49, Lord Sumption said at [14]:

> "Where a court directs that proceedings before it are to be conducted in such a way as to withhold any matter, section 11 of the Contempt of Court Act 1981 allows it to make ancillary orders preventing their disclosure out of court. Measures of this kind have consistently been treated by the European Court of Human Rights as consistent with article 6 of the Convention if they are necessary to protect the interests of the proper administration of justice: *Doorson v The Netherlands* (1996) 22 EHRR 330, para 71; *V v United Kingdom* (2000) 30 EHRR 121, para 87; cf *A v British Broadcasting Corpn* [2015] AC 588, paras 44-45 (Lord Reed). But necessity remains the touchstone of this jurisdiction. In *R v Legal Aid Board, Ex p Kaim Todner* [1999] QB 966, 977, Lord Woolf MR, delivering the judgment of the Court of Appeal, warned against "the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as exceptions are applied by analogy to existing cases". Lord Woolf's warning was endorsed

> by the House of Lords in *In re S (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 29 (Lord Steyn)."

If the court makes a non-disclosure order under COPR r21.8(5), then s.11 Contempt of Court Act 1981 allows the court to make ancillary orders preventing disclosures out of court. In a Court of Protection case those orders might prevent the disclosure of information that would be likely to reveal the identity of the person whose identity is not to be disclosed, such as information about their address or their precise relationship with another person in the case.

To whom does COPR r21.8(5) apply?

34. So far as the committal proceedings are concerned a r21.8(5) order can only be made in respect of a party or witness. Another inconsistency in the sets of rules governing contempt applications is that whilst identical provisions to COPR r21.8(5) *were* found in CPR 39.2(4) and FPR 37.8(5), the CPR provision has now been amended following the judgment of Falk J in *Brearley v Higgs and Sons* [2021] EWHC 1342 Ch, so that CPR 39.2(4) now reads,

> "The court must order that the identity of *any person* shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person." [emphasis added].

Giving her judgment prior to the amendment of CPR 39.2(4), Falk J appears to have relied on her general case management powers to make an order prohibiting the disclosure of the name of a person who was neither a party nor a witness. The same latitude to make a restrictive order does not appear to be afforded to a judge of the Court of Protection hearing a committal order application.

35. The narrowness of COPR r21.8(5) means that it is particularly important to identify who is a party to whom such an order might apply. COPR r21.3 requires a contempt application made in existing proceedings before the Court of Protection to be made by an application under Part 10 in those proceedings. Under Part 10, the court must give notice of the hearing to all parties in the proceedings. It seems to me that applying the overriding objective at COPR r1.3, and in particular the requirement to ensure that P's interests and position is properly considered, I should interpret the rules as providing that those persons who are parties in the Court of Protection proceedings, will be the parties in the committal proceedings made within those Court of Protection proceedings. COP r 21.8(5) may be applied to any of those parties.

The Tests under COPR r21.8(5)

36. Accordingly, in my judgment COPR r21.8(5) requires the court to order non-disclosure of the identity of any party or witness if the two necessity conditions within the rule are met. Section 11 of the Contempt of Court Act 1981 allows for ancillary orders to ensure that the purpose of such a non-disclosure order is not defeated. However, it will be a rare case in which the two limb test allowing the court to order non-disclosure of a *defendant's* identity will be satisfied, and an extremely rare case where they are met in respect of a defendant found to have committed a contempt of court and/or who has been made the subject of a committal order.

37. The first test under COPR r21.8(5) is that non-disclosure is necessary to secure the proper administration of justice. In the decision of the House of Lords in *Scott v Scott* [1913] AC 417, where the principle of open justice was reaffirmed, at page 446 Earl Loreburn considered what was meant by "securing the administration of justice" in the context of orders for hearings to be conducted in private:

> "In all cases where the public has been excluded with admitted propriety the underlying principle … is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeing it at the hands of the court."

In *SMO v TikTok Inc.* [2020] EWHC 3589 (QB), Mr Justice Warby added at [14],

> "… by virtue of the Human Rights Act 1998 there is now, effectively, a statutory exception. The Court must act compatibly with the Convention Rights, including the right to respect for private life protected by Article 8."

38. In *XXX v Camden London Borough Council* [2020] EWCA Civ 1468, Dingemans LJ, giving the lead judgment in the Court of Appeal, with which McCombe and Moylan LJJ agreed, considered the terms of CPR r39.2(4) which is in very similar terms to COPR r21.8(5):

> [16] The Human Rights Act 1998 gives domestic effect to the provisions of the ECHR. Section 12 of the Human Rights Act applies whenever a Court is considering whether to grant any relief which might affect the exercise of the right to freedom of expression. In this case the relief sought is a prohibition on publishing certain material so section 12 of the Human Rights Act is engaged. Section 12(4) of the Human Rights Act directs the Court to have "particular regard" to: the importance of freedom of expression protected by article 10 of the ECHR; the extent to which material has, or is about, to become public; the public interest in publishing the material; and any privacy code.

[17] CPR 39.2 reflects the fundamental rule of the common law that proceedings must he heard in public, subject to certain specified classes of exceptions, see *Scott v Scott* [1913] AC 417. In *Scott v Scott*, which concerned the publication of a transcript containing details about whether a marriage had been consummated, it was stated that:

"The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect".

The passage of time has not undermined the importance of open justice: "The principle of open justice is one of the most precious in our law", see *R(C) v Justice Secretary* [2016] UKSC 2; [2016] 1 WLR 44.

[18] In addition to the exceptions set out in CPR 39.2(3) there are also automatic statutory reporting restrictions, which cover, for example, victims of sexual offences, family law proceedings and the identities of children in certain situations. As Lord Steyn recorded in *In Re S (A Child)* [2004] UKHL 47; [2005] 1 AC 593 at paragraph 20 "the Court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice". In *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966 at 977 Lord Woolf MR explained why courts needed to be careful to prevent extensions of anonymity by analogy saying:

"the need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted … with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely …".

[19] CPR 39.4 recognises that orders for anonymity of parties and witnesses may be made. The common law has long recognised a duty of fairness towards parties and persons called to give evidence, see *In Re Officer L* [2007] UKHL 36; [2007] 1 WLR 2135, and balanced that against the public interest in open justice in specific cases. Under the common law test subjective fears, even if not based on facts, can be taken into account and balanced against the principle of open justice. This is particularly so if the fears have adverse impacts on health, see *In Re Officer L* at paragraph 22 and *Adebolado v Ministry of Justice* [2017] EWHC 3568 (QB) at paragraph 30.

[20] With the advent of the Human Rights Act 1998 the Courts have also been able to give effect to the rights of parties and witnesses who may be at "real and immediate risk of death" or a real risk of inhuman or degrading treatment if their identity is disclosed, engaging articles 2 and 3 of the ECHR. A person's private life may also be affected by court proceedings, engaging article 8 of the ECHR. The common law rights of the public and press to know about court proceedings are also protected by article 10 of the ECHR, see *Yalland v Secretary of State for Exiting the European Union* [2017] EWHC 629 (Admin) at paragraph 20. The importance of the press interest in the names of parties was explained by Lord Rodger in *Re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697 at 723. At paragraph 22 of *In re S (a child)* the House of Lords affirmed that the inherent jurisdiction of the High Court to restrain publicity was the vehicle by which the Court could balance competing rights under articles 8 and 10 of the ECHR.

[21] Lord Steyn addressed the way in which competing human rights should be balanced in *In re S (A child)* at paragraph 17. He stated that when considering such a balancing exercise four principles could be identified.

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

[22] It is also necessary to have particular regard to: the importance of freedom of expression protected by article 10 of the ECHR; the extent to which material has, or is about, to become public; the public interest in publishing the material; and any privacy code; pursuant to section 12 of the Human Rights Act 1998. Many of these principles were rehearsed by Haddon-Cave LJ in paragraphs 20 to 29 of *Moss v Information*

Commissioner [2020] EWCA Civ 580, a case in which issues not dissimilar to those in this case arose."

39. Thus, non-disclosure of a party's identity would be a derogation from the principle of open justice which it must be established is necessary to secure the administration of justice. The requirement of necessity means that there must be no lesser measure that will secure that end – only a non-disclosure order will do. Having regard to the authorities, it seems to me that in the case of an order that the identity of a party or witness in contempt proceedings in the Court of Protection should not be disclosed, it would have to be established that,

i) Without a non-disclosure order, the application to commit could not effectively be tried or the purpose of the hearing would be effectively defeated; or

ii) The purpose of the proceedings within which the committal application was made would be effectively defeated; or

iii) The parties seeking justice – which would be the applicant for the committal and any persons on behalf of whom the application was made – would be deterred from bringing their application, or

iv) The order is necessary to protect the human rights of the party or witness, having regard to the importance of the protection of the freedom of expression protected by Art 10 of the ECHR and the extent to which the person's identity has, or is about, to become public, and the public interest in publishing their identity pursuant to section 12 of the Human Rights Act 1998; or

v) In some other way the proper administration of justice would be undermined.

40. The second limb of the test under COPR 21.8(5) enjoins the court to consider whether non-disclosure of the identity of a party or witness is necessary to protect *that person's* interests. Application of this test will include consideration of the protection of their Convention rights.

41. So far as a party who is P in the Court of Protection proceedings is concerned, it might readily be established that ordering the non-disclosure of their identity will be necessary to secure the administration of justice and to protect their interests. Depending on the particular circumstances of each case, an order for non-disclosure might be necessary:

i) To protect the integrity of orders made in the Court of Protection proceedings including the Transparency Order.

ii) To avoid disclosure of the identity of P defeating the purpose of the Court of Protection proceedings to protect P.

iii) To avoid disclosure of the identity of P defeating the purpose of the committal application to enforce the orders of the Court of Protection which will be designed to protect P.

iv) To avoid deterring the applicant from bringing a committal application (the naming of P in the committal proceedings would be a deterrent to the application to bring those proceedings).

v) To avoid deterring P from giving evidence whether in person or to their Litigation Friend, the police or someone else (if P's evidence were relied upon).

vi) To protect the Art 8 rights of P who had not chosen to bring the committal proceedings, without any corresponding significant interference with the Art 10 right of freedom or expression and without any adverse impact on the overall openness of the proceedings and the public interest.

vii) To protect P's other Convention rights.

42. So far as relatives of P who may be witnesses or parties are concerned, it may often be established that ordering the non-disclosure of their identity will be necessary to secure the administration of justice and to protect their interests. Depending on the particular circumstances of each case an order for non-disclosure might be necessary:

i) To protect the integrity of orders made in the Court of Protection proceedings including the Transparency Order.

ii) To avoid the likelihood of the disclosure of the identity of P by means of jigsaw identification, thereby defeating the purpose of the Court of Protection proceedings to protect or of the committal application to enforce the orders of the Court of Protection designed to protect P.

iii) To avoid deterring the applicant from bringing a committal application (the jigsaw identification of P in the committal proceedings would be a deterrent to the application to bring those proceedings).

iv) To avoid deterring family members from giving evidence (if their evidence were relied upon).

v) To protect the Art 8 rights of family members who had not chosen to bring the committal proceedings and whose alleged conduct had not prompted committal proceedings, without any corresponding significant interference with the Art 10 right of freedom or expression, and without any adverse impact on the overall openness of the proceedings and the public interest.

vi) To protect the other Convention rights of the family members.

43. So far as the defendant to committal proceedings is concerned, it will rarely be established that the tests under r21.8(5) are met. Some, but not all, of the same considerations as set out above might well apply but, in most cases:

i) There will be a very much greater public interest in knowing the identity of the defendant who may have or has been found to have committed a contempt of court, and who may be, has been, or may have been at risk of being made subject to a committal order.

ii) The non-disclosure of the defendant's identity and at least some information about them would be far more likely to render a judgment or reports about the committal proceedings, empty of meaning, thereby undermining the Art 10 right to freedom of expression and the public interest in knowing about committal proceedings in the Court of Protection.

iii) A defendant whose conduct has been found to have been in contempt of court, will have brought the contempt proceedings on themselves, a fact which alters the balance between protecting their Art 8 rights and protecting the Art 10 right to freedom of expression. There will be an even greater importance in ensuring freedom of expression about proceedings concerning conduct in contempt of court. There would be less importance given to protecting the private life of a person whose conduct has been in contempt of court. Those made subject to court orders with penal orders attached have been warned that they may be sent to prison if they breach those orders. They must be taken to know that the courts pass sentences of imprisonment in public (or do so save in the most exceptional circumstances) and so if a court sentences a contemnor to prison (whether an immediate or suspended sentence) their names will be made public. It would be going too far to say that they have waived any right to a private or family life by being in contempt of court, but their claim to protection of their anonymity is very much weakened.

Transparency Orders and Reporting Restrictions

Transparency Orders

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

45. COPR r4.2 governs the court's control of the publication of information in relation to proceedings held in private. COPR r4.3 governs the court's control of the publication of information in relation to proceedings held in public subsequent to an order under r4.3(1) that the proceedings be held in public.

COPR r4.3 provides that,

> 4.3. - (1) The court may make an order—
>
> (a) for a hearing to be held in public;
>
> (b) for a part of a hearing to be held in public; or
>
> (c) excluding any person, or class of persons, from attending a public hearing or a part of it.

> (2) Where the court makes an order under paragraph (1), it may in the same order or by a subsequent order—
>
> (a) impose restrictions on the publication of the identity of—
>
> (i) any party;
>
> (ii) P (whether or not a party);
>
> (iii) any witness; or
>
> (iv) any other person;
>
> (b) prohibit the publication of any information that may lead to any such person being identified;
>
> (c) prohibit the further publication of any information relating to the proceedings from such date as the court may specify; or
>
> (d) impose such other restrictions on the publication of information relating to the proceedings as the court may specify.
>
> (3) A practice direction may provide for circumstances in which the court will ordinarily make an order under paragraph (1), and for the terms of the order under paragraph (2) which the court will ordinarily make in such circumstances.

The relevant Practice Direction is COP PD 4C which begins,

> "1.1. This practice direction is made under rule 4.3. It provides for the circumstances in which the court will ordinarily make an order under rule 4.3(1) and for the terms of the order under rule 4.3(2) which the court will ordinarily make in such circumstances.
>
> 1.2. This practice direction applies to hearings in all proceedings except applications for a committal order…"

46. The order under COPR r4.3(2) which the court will ordinarily make is called a Transparency Order. As COP PD 4C makes clear, the standard Transparency Order does not cover contempt proceedings. The Transparency Order may be the form of order the court will ordinarily make to restrict reporting of public hearings in the Court of Protection, but it is not the only reporting restrictions order that may be made. COP PD 4A provides,

> "2. Part 1 of this practice direction applies to any application for an order under rules 4.1 to 4.3, but not to any case where

> the court makes an order pursuant to Practice Direction 4C.
>
> 3. Part 2 of this practice direction makes additional provision in relation to orders founded on Convention rights which would restrict the publication of information. Part 2 does not apply where the court makes an order pursuant to Practice Direction 4C, but will apply if different or additional restrictions on the publication of information relating to the proceedings are imposed in a subsequent order.
>
> (Section 1 of the Human Rights Act 1998 defines 'the Convention rights')"

47. Since the standard Transparency Order does not apply to committal proceedings, and committal proceedings are nearly always heard in public, it would appear that any reporting restrictions made in committal proceedings would be "different or additional restrictions" for the purposes of paragraph 3 of COP PD 4A. However, paragraphs 9 and 12 of COP PD 4A state,

> "Court sitting in public
>
> 9. Where a hearing is to be held in public as a result of a court order under rule 4.3, the court may restrict or prohibit the publication of information about the proceedings. Such restrictions may be imposed either on an application made by any person (usually a party to the proceedings) or of the court's own initiative.
>
> …
>
> 12. In summary, the requirements to notify in accordance with the requirements of Part 2 of this practice direction will apply in any case where—
>
> …
>
> (b) the court has already made an order for a hearing to be held in public and—
>
> (i) an application founded on Convention rights is made to the court for an order under rule 4.3(2) which would impose restrictions (or further restrictions) on the information that may be published, or
>
> (ii) of its own initiative, the court is considering whether to vary or impose further such restrictions

48. Committal proceedings are to be held in public unless the court directs otherwise – COPR r28.1(1). No court order is required for a hearing of a committal application to be held in public. Hence, committal proceedings are not held in public "as a result of a

court order under rule 4.3" and the provisions of COP PD 4A in relation to public hearings do not appear to apply.

49. Given that the standard Transparency Order does not extend to committal proceedings, and that other or further reporting restrictions in committal proceedings would not be made "as a result of a court order under r4.3", it appears to me that the court must rely solely on COPR r21.8(5) in relation to non-disclosure of the identity of any party or witness in the committal proceedings. Hence, if, and only if, the tests within r 21.8(5) are met, the court will order the non-disclosure of the identity of a party or witness. If so, the court can make ancillary orders to protect their identities from being disclosed, as permitted by the Contempt of Court Act 1981 s11. The most convenient mechanism for making a r21.8(5) order and ancillary orders might be by extending the Transparency Order (as I did in *Macpherson*) so that there is an additional part of the order that applies to the committal proceedings. An extended Transparency Order can be made at any stage of the committal proceedings.

50. It is important to distinguish between different stages of committal proceedings. COPR r21.8(5) applies throughout the proceedings but factors making it necessary for the court to order non-disclosure of a party's or witness's identity may well change during the proceedings. What may be necessary before a finding of contempt, might not be necessary after such a finding has been made. At each committal hearing the court will have to consider whether any r21.8(5) orders must be continued – do the two necessity tests continue to apply? If there has been a finding of contempt or a committal order, does that now mean that no order should be made?

Listing Committal Hearings in the Court of Protection

51. An issue of importance arises in respect of the listing of committal proceedings and the reporting of public lists. Whether or not the committal hearing is listed in public or in private, PD 2015 requires the full name of the defendant to appear on the list. As Professor Kitzinger informed the court, the Open Justice project routinely reproduces the public court lists of COP cases on its web page or via Twitter. Thus, the names of defendants to committal proceedings in the Court of Protection will be published and then re-produced online prior even to the first time a judge hears the case. Accordingly, were a judge to determine that COPR r21.8(5) did require an order for the non-disclosure of the defendant, it may well be too late if Open Justice, or any other person, has published the court list. Furthermore, applying s12 of the Human Rights Act 1998, the fact of publication of the defendant's as it has appeared on the list, would be a matter that ought to be taken into account when deciding whether to order a derogation from the principle of open justice.

52. Given that PD 2015 should yield to COPR r21.8(5), my view is that COPR r21.8(5) must allow the Court of Protection to make a non-disclosure order regarding the identity of the defendant or any party or witness in committal proceedings in the Court of Protection, even before the first hearing, and regardless of the mandatory terms of paragraph 13 of PD 2015. Hence, ancillary directions may be given at the same time, under s11 of the Contempt of Court Act 1981. If the tests under COPR r21.8(5) are met then the court must order the non-disclosure of the defendant's name in the court list, notwithstanding the mandatory terms of paragraphs 5 and 11 of PD

2015 to the contrary. Not only should the court rules take precedence over the practice direction, but it is necessary in order to give effect to the overriding objective to interpret COPR r21.8(5) as allowing the court to order the non-disclosure of the defendant's name in the court list. If not, then by the time the court comes to consider the application of COPR r21.8(5) at the first hearing, the horse will have already bolted.

53. As a matter of practicality, and pending any clarification by the COP Rule Committee, I suggest that every committal application in the Court of Protection should be put before the appropriate judge prior to the first hearing so that the question of whether COPR r21.8(5) must prevent the identification of the defendant's name in the public court list can be considered. In the absence of any order to the contrary, the defendant's full name must appear in the list. Court listing offices need to be fully aware of that requirement. However, if the court is satisfied that the necessity tests in r21.8(5) are met, then it must direct that the defendant's name shall be anonymised in the court list. The press should be notified and may make representations at the first hearing.

Conclusions on PD 2015 and COPR r21.8(5)

54. The anomalies and inconsistencies identified ought to be considered by the Court of Protection Rule Committee and perhaps also by the Family Procedure Rule Committee. Until such time as the COP Rule Committee acts, I offer the following suggestions in relation to committal proceedings within the Court of Protection.

i) Open justice is a fundamental principle and the general rule is that hearings should be carried out and judgments and orders made in public. Derogations from the general principle can only be justified in exceptional circumstances when strictly necessary as measures to secure the proper administration of justice.

ii) Committal hearings may be heard in private but if the court is considering doing so it must follow the procedures set out at paragraphs 8 to 12 of PD 2015.

iii) Immediately upon issue committal applications in the Court of Protection should be referred to a judge to consider prior to the first hearing:

a) Whether COPR r21.8(5) requires that the defendant's name should not appear in the court list. In the absence of any such order, committal proceedings should be listed with the full name of the defendant appearing, in accordance with paragraphs 5 or 11 of PD 2015 depending on whether they are to be heard in public or in private. Anonymisation of the defendant on the court list would be a derogation from open justice. Notice of any such decision should be given to the press and the continuation of any r21.8(5) order considered at the first hearing.

b) Whether the existing Transparency Order may need to be extended to cover the non-disclosure of the identity of any party or witness in the committal proceedings. A Transparency Order made in Court of Protection proceedings will not extend to committal proceedings unless there is an express order of the court to that effect. COP PD 4C does not apply to committal proceedings. COP PD 4A only applies if a hearing in public is the result of a court order under COP R r4.3 and so does not apply to committal hearings which are heard in public unless otherwise ordered. The court in committal proceedings in the Court of Protection cannot therefore rely on an existing Transparency Order or use COP PD 4A to restrict reporting. COPR r21.8(5) appears to be the only basis for ordering non-disclosure of the identity of the defendant, other party, or witness in a committal application. It applies at all stages of a committal application in the Court of Protection. If the court is considering making a r21.8(5) order, other than in relation to the anonymisation of the defendant in the public list for the first hearing, it should adopt the procedure at paragraphs 3, 4, 8, 9, 10 and 12 of PD 2015.

iv) Unless ordered otherwise, the parties in the Court of Protection proceedings are the parties to the committal application within those proceedings. Accordingly, COPR r21.8(5) applies to those parties as well as to any witness in the committal proceedings. Unlike CPR r39.2(4), COPR r21.8(5) does not apply to someone who is neither a party nor a witness.

v) COPR r 21.8(5) requires the court to order the non-disclosure of the identity of a party or witness if the two necessity conditions within the rule are met. The Contempt of Court Act 1981 s11 applies to allow ancillary directions to be given if a r21.8(5) order is made. Such ancillary directions may include restrictions on publishing or communicating specific identifying information to prevent the disclosure of the identity of the particular party or witness to whom the r21.8(5) order applies.

vi) The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice *and* in order to protect the interests of *that* party or witness - COPR r21.8(5). Therefore the non-disclosure of the name of the defendant, or any other party or witness, *must* be ordered if it meets both those requirements but *cannot* be ordered if it does not meet them. If a lesser order will suffice, then the order for non-disclosure may not be made. The wording of COPR r21.8(5) reflects paragraphs 3 and 4 of PD 2015, namely that open justice is a fundamental principle, derogations from which can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. It adds a second requirement to be met before the court may order non-disclosure of the name of a party or witness, namely that non-disclosure is necessary to protect the interests of *that* party or witness. The procedural requirements at paragraphs 3, 4, 8, 9, 10 and 12 of the PD 2015 apply.

vii) The court must consider the application of the tests in COPR r21.8(5) separately in respect of P, the defendant, and other parties or witnesses in the

committal proceedings. Where P is a party, the court may readily find that the necessity tests in r21.8(5) are met so that it must direct the non-disclosure of the identity of P. In such a case the court may make ancillary orders under s 11 of the Contempt of Court Act 1981 to protect P's identity.

viii) If the conditions in COPR r21.8(5) are met in respect of the defendant, then the court must anonymise the defendant in any published judgment and must direct that disclosure of the defendant's identity shall be prohibited. The court may make ancillary orders under Contempt of Court Act s11. A convenient mechanism for making these orders would be by extending the relevant parts of the Transparency Order to the committal proceedings.

ix) COPR r21.8(5) is not triggered to prevent the disclosure of the identity of the defendant if the sole purpose is to protect the interests of P. It must be the interests of the defendant that need protecting. In the event of a committal order it will be exceptionally rare for the court to find that the r 21.8(5) conditions are met in respect of the defendant. In the event of a finding of no contempt of court, it will be relatively more likely that the court will find that the r 21.8(5) conditions are met in respect of the defendant, but it will still be an exception for the identity of a defendant to committal proceedings not to be disclosed.

x) Subject to an order for non-disclosure of the identity of the defendant being made under COPR r21.8(5), in which case the defendant must be anonymised in any published judgment and reporting of their identity prohibited, the following practice should be adopted in relation to giving judgment and naming the defendant in committal proceedings:

a) If the court finds the defendant not guilty of contempt of court, then COPR r21.8(11) requires the court to give a reasoned judgment in public but there is no requirement for that judgment to be published on the judiciary website, nor would the requirements of PD 2015 paragraph 13 apply so as to require the defendant to be named and his name to be published on the judiciary website. Nevertheless, the court may decide to name the defendant and to publish their name by inclusion in a published judgment or otherwise.

b) If the court finds the defendant in contempt of court but does not make a committal order, then a reasoned judgment must be given in public and the defendant must be named in court and their name published on the judiciary website, but there is no requirement for a transcript of the judgment to be published on the judiciary website, although the court may choose to do so.

c) If the court finds the defendant in contempt of court and imposes a committal order then a reasoned judgment must be given in public, the defendant must be named in court and their name and the judgment must be published on the judiciary website. The requirement to publish the defendant's name will be met by naming them in the published judgment.

Submissions

55. I am grateful to Counsel for their submissions. For the ICB Mr Tankel took a neutral position in the appeal, but his careful submissions were very helpful. Ms Miles helpfully put forward submissions on behalf of AB. Mr O'Brien submits that not only was DJ Beckley not obliged to name Dr Esper but that he was wrong to have done so given the need to protect Dr Esper's Art 8 rights. DJ Beckley protected the anonymity of other members of AB's family, and of AB, and so should have done so for Dr Esper. Mr O'Brien contends that at paragraph [37] of my judgment in *Macpherson,* I wrongly held that COPR r21.8(5) operated to qualify the powers in COPR r4.2 (and implicitly PD4A) in contempt proceedings. He contends that r4.2 is concerned with contempt proceedings and nothing in its terms excludes the alleged contemnor. COPR r4.2 reads,

> 4.2. - (1) For the purposes of the law relating to contempt of court, information relating to proceedings held in private (whether or not contained in a document filed with the court) may be communicated in accordance with paragraph (2) or (3).
>
> (2) The court may make an order authorising—
>
> (a) the publication or communication of such information or material relating to the proceedings as it may specify; or
>
> (b) the publication of the text or a summary of the whole or part of a judgment or order made by the court.
>
> (3) Subject to any direction of the court, information referred to in paragraph (1) may be communicated in accordance with Practice Direction 4A.
>
> (4) Where the court makes an order under paragraph (2) it may do so on such terms as it thinks fit, and in particular may—
>
> (a) impose restrictions on the publication of the identity of—
>
> (i) any party;
>
> (ii) P (whether or not a party);
>
> (iii) any witness; or
>
> (iv) any other person;
>
> (b) prohibit the publication of any information that may lead to any such person being identified;

> (c) prohibit the further publication of any information relating to the proceedings from such date as the court may specify; or
>
> (d) impose such other restrictions on the publication of information relating to the proceedings as the court may specify.
>
> (5) The court may on its own initiative or upon request authorise communication—
>
> (a) for the purposes set out in Practice Direction 4A; or
>
> (b) for such other purposes as it considers appropriate, of information held by it.

56. The opening words of COPR r4.2(1) do not indicate that the following rules apply to contempt proceedings as Mr O'Brien has contended, but rather that they apply for the purposes of the law of contempt of court. These rules apply when proceedings, including contempt proceedings, have been heard in private. Committal proceedings will almost always be held in public, for reasons discussed in this judgment. However, contempt proceedings may be heard in private (provided the relevant parts of PD 2015 and COPR r21.8 are followed) in which case the court must then comply with both COPR r4.2 and r21.8(5) in relation to the non-disclosure of the identity of a party or witness. If so, then COPR r 4.2 is more widely drawn than 21.8(5) and the point I was seeking to make in *Macpherson* was that in contempt proceedings held in private, COPR r21.8(5) circumscribes the court's powers under COPR r4.2.

57. Mr O'Brien contends that at paragraph [38] of *Macpherson* I interpreted COPR r21.8(5) as allowing the court to maintain anonymity of all parties other than the defendant, and that I failed to give reasons for that interpretation. Perhaps I did not express myself sufficiently clearly because at [98] of *EBK* Mostyn J reached a different but equally wrong conclusion about [38] of my judgment. I did not conclude that COPR r21.8(5) could not apply to a defendant in committal proceedings as Mr O'Brien submits, nor did I doubt that it could apply to protect the interests of P, as Mostyn J supposed. Rather, the issue I sought to raise was that COPR r21.8(5) only allows the court to order the non-disclosure of the identity of a party or witness in order to protect the interests of that party or witness. So, as I said at [38], COPR r21.8(5) "does not appear to allow the court to restrict the disclosure of the identity of the Defendant if necessary to secure the administration of justice and to protect the interest of P." It would allow the restriction of disclosure of the defendant's identity if necessary to secure the administration of justice and to protect the interests of the defendant. It would allow anonymity to be afforded to P if necessary to secure the administration of justice and to protect the interests of P. But a defendant cannot contend that he should be afforded anonymity in order to protect the interests of P. The person afforded anonymity must be the person whose interests are being protected.

58. On reflection I would not now say, as I did in *Macpherson*, that COPR 21.8(5) "allows" the court to order non-disclosure of the identity of a party or witness. COPR

r21.8(5) does not give the court a discretion. Rather, it provides two tests of necessity to be met and if, and only if, those tests are met then the court has an obligation to order that the defendant's identity should not be disclosed.

Conclusions on the Decisions under Appeal

59. An appeal may be allowed where either the decision was wrong or it was unjust for serious procedural or other irregularity. The court may conclude a decision is wrong because of an error of law, because a conclusion was reached on the facts which was not open to the judge on the evidence, because the judge clearly failed to give due weight to some significant matter or clearly gave undue weight to some other matter, or because the judge exercised a discretion which exceeded the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong – for example, see *G v G (Minors: Custody Appeal)* [1985] FLR 894.

60. The appellate court must consider the judgment under appeal as a whole. In *Re F (Children)* [2016] EWCA Civ 546 Munby P summarised the approach as follows:

> "22. Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law…
>
> 23. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):
>
> > "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

> It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".”

61. The first decision that is challenged is the decision to publish a judgment naming Dr Esper. As I have explained earlier, COPR r21.8(11) requires the court to give a judgment in committal proceedings in public but, where no committal order has been made, that judgment does not have to be published on the judiciary website. As I have explained in detail above, COPR r21.8(5) required the Judge to order the non-disclosure of Dr Esper’s identity if and only if the two necessity tests in that rule were met. It was not for the Judge to exercise a discretion to permit or prevent Dr Esper’s identity being disclosed – his identity would be disclosed unless those tests were met, in which case the court was obliged to order that it should not be disclosed. I have considered the transcript of DJ Beckley’s reasoning and his judgment. Correctly in my view, he proceeded on the basis that Mostyn J’s judgment in *EBK* did not bind him so as to mandate the disclosure of Dr Esper’s name. He said,

> “I do not find that the judgment of Mostyn J would preclude me from restricting the reporting of Dr Esper’s name and other personal details around him.”

Ground 1 of the grounds of appeal, namely that DJ Beckley regarded himself as bound by EBK to name Dr Esper, is therefore not made out.

62. He then noted my judgment in *Macpherson* and adopted a precautionary approach by weighing the factors for and against the non-disclosure of Dr Esper’s name and applying COPR r21.8(5). He concluded,

> “I simply cannot find that it can be in the interests of the administration of justice or to secure the proper administration of justice as required by 21.8(5) for Dr Esper’s name not to be disclosed.”

The Judge examined the circumstances of the case and determined that COPR r21.8(5) did not apply to require the non-disclosure of Dr Esper’s name. He took into account that Dr Esper had been found guilty of contempt of court but had not been made subject to a committal order. The Judge had a detailed knowledge of the proceedings in the Court of Protection. As he had noted at the hearing on 1 March 2023, a transcript of which I also have, the contact arrangements had taken a long time to conclude and were of great importance in protecting AB’s best interests given the very difficult history of the case. The breaches by Dr Esper were not inconsequential. He had previously entered AB’s room when he ought not to have done and, DJ Beckley records, there had been serious consequences. The breaches did amount to contempt of court and they were, DJ Beckley found, deliberate and serious. The reasons he did not proceed to make a committal order were as set out above and were to do with the perceived absence of any purpose in passing a prison sentence in

all the circumstances, including the time that had elapsed since the breaches had taken place.

63. DJ Beckley identified the correct rule, COPR r21.8(5) and applied the correct first test under that rule. Both tests have to be met in order for there to be a non-disclosure order. There is no doubt that DJ Beckley was entitled in the circumstances to find that the first test in COPR r21.8(5) was not met and therefore that the order should not be made. Indeed, it would have been extremely surprising had he found that one or both tests were met. In the circumstances, he could not order the non-disclosure of Dr Esper's identity.

64. DJ Beckley rightly gave a reasoned judgment in public, albeit a short one. He was not required to publish a transcript of the judgment on the judiciary website, but he was free to do so in his discretion. Upon doing so he was required to disclose the identity of the Defendant for the reasons already given.

65. The second decision that is challenged is the decision to permit the publication of Dr Esper's name while restricting the identification of AB, and two other relatives of AB who are respondents in the Court of Protection proceedings. It is suggested by the way the challenge is mounted in this appeal, that DJ Beckley was inconsistent by deciding to direct that the names of AB's other relatives, who were regarded as parties to the committal proceedings, should not be named. There is no appeal against DJ Beckley's orders in respect to the non-disclosure of the identities of those persons, or of AB. For the reasons set out above, the considerations for the court when deciding whether the two necessity tests in COPR r21.8(5) are met in respect of parties other than the defendant, or witnesses, will be different from those that apply to the defendant. There is no logical inconsistency in the decisions made by DJ Beckley. Again, it would have been surprising if he had not found that the tests were not met in respect to AB, and he was clearly entitled to find that they were met in relation to AB's relatives other than the Defendant. Grounds 2 and 3(a) are not made out.

66. Finally, I shall briefly address the appellant's case that DJ Beckley conducted the proceedings and his decision-making unfairly having refused to recuse himself as the Appellant had invited him to do. There is no appeal against the non-recusal decision and I proceed on the basis that it was the correct decision to make. Indeed, having read the transcript of the proceedings on 7 June 2023 as well as the judgment, I am quite satisfied that DJ Beckley was perfectly right not to recuse himself. Having made that decision, it is problematic for the Appellant to suggest that in some way the Judge was biased against him or unfair in his decision-making regarding anonymity. In any event, the transcript shows no sign of judicial animosity or ongoing ill-will to the Defendant. Ground 3(b) is not made out.

67. DJ Beckley expressly permitted reporting of Dr Esper's age and profession. For the reasons already given, DJ Beckley was right to not to make an order for the non-disclosure of Dr Esper's identity under COPR r21.8(5). However, where a COPR r21.8(5) order is made directing the non-disclosure of the identity of P, it might be possible to make ancillary directions under s11 of the Contempt of Court Act 1981 preventing the reporting of identifying features in order to protect the identity of P. Here, the Defendant's profession might be information that could lead to AB's identification but, on the other hand, his profession is a matter of public interest. Having decided that Dr Esper should be named, it seems to me that the judge was

entitled to decide that it was not necessary to protect AB to restrict the reporting of Dr Esper's profession. Disclosure of Dr Esper's age would not be likely to lead to the identification of AB.

68. I do regard the appeal herein as giving rise to an important point in relation to interpretation of the COPR and PD 2015. Accordingly, I give permission to appeal on the grounds that there is a compelling reason that the appeal be heard. However, given the tests to be applied on an appeal of this kind, I have no hesitation in dismissing the appeal. The Judge's decisions were ones he was entitled to make, indeed it was not open to him to make an order for non-disclosure of Dr Esper's identity given the strict tests of necessity under COPR r21.8(5) and the fundamental importance of open justice, including in relation to committal proceedings. I therefore dismiss the appeal.

69. The reporting restrictions order made by DJ Beckley in respect of AB and other relatives shall remain in force. Dr Esper may be named as the Defendant to the committal proceedings and may be identified as a relative of AB, but the name of AB, the names of the other family members named confidentially by DJ Beckley in his order, and the identifying information he set out, may not be published or communicated.