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Case No: COP12621732

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2015

Before :

MR JUSTICE NEWTON

- -

Between :

A Healthcare NHS Trust	**Applicant**
- and -	
P	**First Respondent**
(by his litigation friend, the Official Solicitor)	
- and –	
Q	**Second Respondent**

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Parishil Patel (instructed by **Hempsons**) for the **Applicant**
Bridget Dolan (instructed by **The Official Solicitor**) for the **First Respondent**
Vikram Sachdeva QC (instructed by **Irwin Mitchell**) for the **Second Respondent**
Mike Dodd for the **Press Association**
Hearing dates: 25 February 2015

- -

Approved Judgment

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

.....

MR JUSTICE NEWTON

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Newton :

Introduction and Background

1. On 28 November 2014 P suffered a major cardiac arrest. There was a period of 25 minutes between his arrest and spontaneous circulation. As a result he sustained severe hypoxic brain injury which is considered by the doctors to be severe and irreversible. Since that time he has remained totally dependent on intensive care. Medical opinion suggests that he is unlikely ever to recover any level of consciousness. The second respondent representing P's family disagrees strongly with the medical opinion. The Trust therefore applied to the Court for a declaration in P's best interests firstly, not to escalate his care and secondly to discontinue some care, inevitably leading to his demise. Therefore the question is of the utmost and crucial private and public importance leading to the Health Trust making an application on 20 January 2015. At the same time they also applied for a reporting restriction order with accompanying documentation. When they sought to serve that material on the Press Association through the service known as CopyDirect, but now in fact called the Injunctions Alert Service, the second respondent objected to the disclosure of any identity either of P or of P's family. That objection was maintained at the first hearing on 22 January 2015.

2. As a result I listed a hearing on 25 February 2015 for the Court to consider four questions:

   Generally

   1. Whether in applications for reporting restrictions orders the applicant, when notifying the Press of the application, is required to identify the parties and or P.

   Specifically in this application

   2. Whether further hearings in these proceedings should be heard in public.

   3. Whether there should be any reporting restrictions in relation to these proceedings and if so those restrictions.

   4. Such further directions as seemed appropriate to the Court.

   I gave permission also for Mr Dodd of the Press Association to make any written or indeed oral submissions that he wished to do and he has done both, which have been of considerable assistance to the Court.

3. In effect the position taken both by the Health Trust, the Official Solicitor and the Press Association is as one and it is on behalf of the second respondent that Mr Sachdeva QC seeks to argue that there is a lacuna in the legislation and supporting rules that occurs between the notification to the Press of the impending application together with the associated documents and the subsequent making of a Reporting Restrictions Order (RRO) if such an order is made.

4. I am grateful to all counsel who have argued their cases with focus. Mr Patel on behalf of the Authority, Mr Sachdeva QC on behalf of the second respondent and Ms Dolan on behalf of the Official Solicitor. I have also heard, as previously indicated,

very helpfully from Mr Dodd of the Press Association, his submissions being made specifically on behalf of the Times Newspapers, Trinity Mirror, Independent Print Ltd, Evening Standard Ltd, Associated Newspapers, Guardian News and Media and the Telegraph Media Group. I have also read a submission in an email from the Guardian Newspaper which I take into account.

5. At the conclusion of the hearing Mr Sachdeva, who raises and argues this point, asked for time to consider the submissions of the Authority and the Official Solicitor (who were in agreement). I carefully timetabled submissions in order to provide time for the preparation of this judgment. A Joint Note from the Trust and Official Solicitor was received in accordance with the Court Order. Nothing was received, nor was there any communication from Mr Sachdeva by way of apology, or even as to whether something was likely to be received, until chased on my behalf by my clerk. Mr Sachdeva's lamentably late short supplementary document was not received until 5 March, by which time it must have been obvious that the outline of this judgment had already been completed and the time available to the Court had been lost. As a result the hearing listed has had to be vacated and relisted at no little inconvenience to everyone else in the case.

6. I have read the bundle of papers. I turn immediately to the law. It will also be apparent that this judgment owes more than a passing reference to the leading judgment and seminal exposition of the law by Baker J in W v M [2011] EWHC 1197 upon which I draw heavily.

7. The Court of Protection is concerned with the weak and the vulnerable. Its jurisdiction arises out of the need to make decisions on behalf of those who lack the capacity to make decisions for themselves. For understandable reasons Parliament decided that hearings in the Court of Protection should usually be held in private.

8. The Lord Chief Justice explained the rationale in Independent News Media v A [2010] EWCA Civ 343:

> "17. The Court of Protection was created by the Mental Capacity Act 2005. The Court has been vested with significant powers to assist those who, for whatever reason, lack the capacity to make decisions themselves. The background to the new legislative structure arose from the need to address the interests of those individuals who did not fall within the ambit of successive Mental Health Acts. The Family Division of the High Court gradually developed structures appropriate to provide the protection necessary to meet those needs. The 2005 Act replaces this jurisprudence by introducing a self contained legislative structure, largely based on the practices of the Family Division where judges dealt with welfare matters. The matters historically dealt with by the Office of the Supreme Court (under the name of the Court of Protection) involved property and financial affairs. The two jurisdictions dealing with both welfare and property and financial affairs are now vested in one court: the Court of Protection.

> 18. The jurisdiction is regulated exclusively in accordance with the new Act. The result is that the affairs of those who are incapacitated for the purposes of the Act are examined before a judge in court. The affairs of those who are not incapacitated are, of course, decided and handled privately, usually at home, sometimes with, but usually without confidential professional advice. None of these decisions is the business of anyone other than the individual or individuals who are making them. And that, as we emphasise, represents an entirely simple, and we suggest self-evident aspect of personal autonomy. The responsibility of the Court of Protection arises just because the reduced capacity of the individual requires interference with his or her personal autonomy.
>
> 19. The new statutory structure starts with the assumption that just as the conduct of their lives by adults with the necessary mental capacity is their own affair, so too the conduct of the affairs of those adults who are incapacitated is private business. Hearings before the Court of Protection should therefore be held in private unless there is good reason why they should not. In other words, the new statutory arrangements mirror and rearticulate one longstanding common law exception to the principle that justice must be done in open court."

9. Rule 90(1) of the Court of Protection Rules 2007 provides "the general rule is that a hearing should be heard in private".

Exceptions to the general rule

10. The Rules do however provide for exceptions to this general rule. Rule 92(1) provides that the Court may make an order

> a) for a hearing to be held in public
>
> b) for a part of the hearing to be held in public or
>
> c) excluding any person or class of persons from attending a public hearing or part of it.

11. Paragraph 16 of the Practice Direction 9E makes further provision relating to applications to the Court concerning serious medical treatment (a phrase which includes decisions about the withholding of nutrition and hydration from persons in a permanent vegetative or minimally conscious state). It provides that "the Court will ordinarily make an order pursuant to Rule 92 that any hearing shall be held in public, with restrictions to be imposed in relation to publication of information about the proceedings".

12. So, until any order is made pursuant to Rule 92 the proceedings are conducted and held in private.

13. In Independent News Media v A the Court of Appeal held that before any order is made under Rule 92 the Court has first to be satisfied that there is "good reason" for making the order. The provisions of Practice Direction 9E recognise that cases involving serious medical treatment usually amount to a good reason for conducting the hearing in public subject to appropriate reporting restrictions.

Power to make reporting restriction orders and other injunctions

14. Rule 92(2) provides that where the Court makes an order under Paragraph (1) it may in the same order or by 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."

15. As above, paragraph 16 of the Practice Direction 9E makes clear that when hearing applications to the Court concerning serious medical treatment in open court the Court will ordinarily impose reporting restrictions.

Historical context

16. Prior to the implementation of the Mental Capacity Act 2005 applications for orders restricting publication of information concerning incapacitated adults were heard in the Family Division and were subsequently, following a period of uncertainty, governed by the President's Practice Direction and accompanying Practice Note issued by the Official Solicitor and Deputy Director of Legal Services, CAFCASS, dated 18 March 2005 which continues to govern such orders in cases concerning children. These documents and practices were the product of a long period of consultation and collaboration. The latter Practice Note included a draft of a reporting restriction order which hereafter has been used in the Family Division.

17. The procedure for such applications in cases concerning incapacitated adults in the new Court of Protection is set out now in Practice Direction 13A. The provisions of the new direction largely follow those in the 2005 Direction and Practice Note but it does not however include a model form of order. The Practice Direction proceeds to describe the detailed procedure for service on the media using the CopyDirect service

administered by the Press Association which has now been used for several years under the 2005 Direction and Practice Note.

18. That notification is founded on the basis that reporting restriction orders affect the exercise of the right to freedom of expression under Article 10 of the European Convention for Protection of Human Rights and Fundamental Freedoms (ECHR), governed by section 12 of the Human Rights Act 1998. Paragraph 10 of the Practice Direction at 13A explains:

> "This means that where an application has been made for an order restricting the exercise of the right to freedom of expression, the order must not be made where the person against whom the application is made is neither present nor represented unless the court is satisfied:
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified."

19. So the current system established in the Spring of 2005 by the then President of the Family Division (the Practice Direction accompanied by the Practice Note issued by the Official Solicitor and Director of Legal Services, CAFCASS) sets out the procedure that should occur, which is that when an application for a reporting restriction order is made the National Print and Broadcast News Media are alerted through the Injunctions Alert Service run by the Press Association. In all the documents this is referred to as CopyDirect, having started under that name. The Practice Note states that the applicant should prepare:

> "(a) an application claim form;
>
> (b) a witness statement justifying the need for an order;
>
> (c) any legal submission;
>
> (d) a draft order; and
>
> (e) an explanatory note."

Those documents are sent to the Injunctions Alert Service for onward transmission for subscribing media organisations. Those organisations are listed on

http://www.medialawyer.press.net/courtapplications/mediaorganisations.jsp

20. The injunctions Alert Service website under the heading "notification" states:

> "The purpose of the notification system is to provide applicants for reporting restriction orders in the Family Division (and their solicitors) with a simple secure and verifiable method of sending national media organisations notice of proposed applications for injunctions, together with supporting documentation."

21. The disclosure is founded on a straightforward contract signed by IAS subscribers:

> "The customer may only use any Application it receives from the [Press Association] for the purpose of evaluating whether or not the customer should object to the proposed no party subscription contained within the Application. The customer agrees that it will not use any Application for any editorial purpose or otherwise exploit, publish or make available for the public any Application. The customer will indentify and keep indentified the [Press Association] ….. in relation to any list, reproduction, distribution or making available to the public by the customer".

22. The media subscribers thus are under an express contractual obligation. The obligation however is to the Press Association. Whilst no doubt such an obligation has a deterrent effect, it would not be enforceable through the Court of Protection, but in the context of a civil action by a contracting party. Whilst it might be possible to argue an implied contractual undertaking to the applicant, it seems to me such a proposition would be tenuous. There is no express obligation (there being no contract between the applicant and the subscriber) and whilst the subscribers receive the material for the purpose of deciding whether to oppose an application, it is difficult to identify any sound basis that there is an intention to create legal relations between them, especially given disclosure is made pursuant to the requirements of PD13A.

23. Mr Dodd submitted in court that that quite complex arrangement was reached as a result of negotiations which commenced as long ago as 2002 when media organisations complained that they were being made subject to non-publication injunctions but had not been given prior notification of those applications or any opportunity to make representations or submissions about them, contrary to the requirement of section 12 of the Human Rights Act 1998.

24. The "old system" was that the case proceeded, the Court imposed reporting restrictions, and then it was left to the media to justify their arguments against such restrictions. It was then being maintained by applicants that they feared notifying the media would trigger reporting or publication on the very material or information which they wished to protect and keep private. In addition, orders were issued when it is said that arguably they were unnecessary or in a form which substantially imposed restrictions on the ability of the Press to report on other Court proceedings. Mr Dodd specifically drew my attention to Re S [2005] 1AC 593, a case which ultimately went to the House of Lords but started with an order made on a without notice application.

25. The CopyDirect service, now the Injunctions Alert Service, was intended to provide a convenient and safe vehicle for potential applicants to notify the media of their applications, serve the relevant documentation and enable the subscribing members to make a properly informed decision about whether they wished to challenge any particular application. I am told that very few cases notified to the Injunctions Alert Service have led to such challenges.

26. However, the trajectory has not been completely without hiccup. The relationship, no doubt founded in the philosophy of anxiety and concern for privacy of children derived from many years of practice in the Family Courts has led to difficulties. As a result, in September 2006 the Family Division introduced a check list which counsel

making applications was required to complete, to demonstrate to the Court that media notifications had been made with the correct documentation. That had followed complaints through the Injunctions Alert Service that applicants were frequently withholding documents and details, e.g. the names of parties, which made it impossible for them to make sensible and properly informed decisions, and subsequent submissions about whether they wished to challenge the imposition of such restrictions.

27. The Injunctions Alert Service was of course established before the Court of Protection came into being in October 2007. However, the Practice Direction and Practice Note which led to the Service's creation were clearly intended to cover the cases now dealt with by the Court of Protection. The Practice Direction states in paragraph 1:

> "This direction applies to any application in the Family Division including those founded on convention rights for an order restricting publication of information about children or incapacitated adults."

28. The requirement to give proper notification of an application for reporting restrictions is set out in Practice Direction 13A of the Rules, it reads:

> "15. A person who has made an application founded on Convention rights should give advance notice of the application to the national media via the Press Association's CopyDirect service. He should first telephone CopyDirect (number). Unless an order pursuant to rule 19 has been made, a copy of the following documents should be sent either by fax or to the e-mail address provided by CopyDirect:
>
> (a) the application form or application notice seeking the restriction order;
>
> (b) the witness statement filed in support;
>
> (c) any legal submissions in support; and
>
> (d) an explanatory note setting out the nature of the proceedings in the form set out in the Annex to this practice direction.
>
> 16. It is helpful if applications are accompanied by an explanatory note from which persons served can readily understand the nature of the case (though care should be taken that the information does not breach any rule or order of the court in relation to the use or publication of information). In any case where notice of an application has not been given, the explanatory note should explain why.
>
> 17. Unless there is a particular reason not to do so, <u>copies of all the documents referred to above should be served</u> (my emphasis). If there is a reason for not serving some or all of the documents (or parts of them), the applicant should ensure sufficient detail is given to enable the media to make an

> informed decision as to whether it wishes to attend a hearing or be legally represented.
>
> 19. The Court may dispense with any of the requirements set out in paragraphs 15-18."

29. The wording of the Practice Direction therefore suggests that there may be circumstances where non-compliance with paragraphs 15-17 would be justified, subject of course to the Court's decision. That suggests conversely that ordinarily that information would be supplied.

30. The Press Association is keen to emphasise that the material sent to the Injunctions Alert Service is forwarded to the legal departments of the subscribing national news media. Those lawyers who work in those departments fully understand that the material has been sent for use only in connection with the process of deciding whether to make representations or submissions in a case. The question of publication of any information is a separate issue entirely as the media organisations which subscribe to the Injunctions Alert Service are well aware. Apart from anything else publication of information about a Court of Protection hearing or a case without the permission of the Court is, the Press Association suggest, a contempt under the terms of section 12 of the Administration of Justice Act 1960 and also covered by Court of Protection Rules 90-93.

31. Aside from the rules and their implementation, practically I am told there has been no breach of the system which has now been in place, and has worked well for many years. Indeed, even if there were some "maverick lawyer", in one of the subscribers to the service, in order for the information to be published, the material would additionally have to pass both sub and senior editor's desks and it is said therefore that it would be impossible for such information ever to reach the public domain.

32. It is suggested that the Injunctions Alert Service permits applicants seeking injunctions or reporting restrictions orders in the Family Division to give secure advance notification to national news organisations via a central point and at no charge (as the service is funded by the subscribing media organisations). Service of notification by this method has been accepted by the Courts and the media as meeting the requirements of section 12 of the Human Rights Act 1998. The benefits for the Court are that it is reasonable to assume that media who may wish to oppose an application or argue a particular restriction will be able to do so once they have received notification of an application. Therefore once an order has been made and assuming there is no major change in circumstances the Court should be able to assume that the issues of reporting restrictions and publicity have been dealt with properly at the start of the case and will not subsequently suddenly surface at various stages during the proceedings. An additional benefit, it is submitted, is that if the media should decide to make representations, they may well be able through discussion and exchange before or through the hearing to narrow the issues that go before the Court (see here also the example which occurred during the currency of the case heard by Baker J in W v M (supra) where an appropriate accommodation was reached and approved by the Court).

33. As I recorded earlier, paragraph 15 of the Practice Direction 13A lists the documents which should ordinarily be served. It does not, unlike the earlier Practice Note,

include a draft of the order. I, like Baker J, consider that that is undoubtedly because it is frequently unhelpful to serve a full draft on the media because, as often happens, the detailed terms of the order are often changed and adapted significantly during the course of a hearing. However, in the absence of any such requirement, it must be incumbent on the applicant to indicate clearly in the application and in the submissions the burden of the order being sought. Notice of course should indicate the categories of persons (if there are many, as for example with health professionals) whose identity would be kept confidential under the proposed order, if the applicant wishes to apply for an order restraining the media from communicating with those persons.

34. It is particularly notable that nowhere in any of the requirements for media notification of applications is there any provision for notification in which the parties are anonymised. The Practice Direction points out in paragraph 3:

> "The Court will bear in mind that legal advisors to the media; i) are used to participating in proceedings at very short notice where necessary; ii) are able to differentiate between information provided for legal purposes and information for editorial use. Service of applications via the CopyDirect service should henceforth be the norm."

The Practice Note also states in paragraph 3:

> "The applicant should prepare a) the application form; b) a witness statement justifying the need for an order; c) any legal submissions; d) a draft order and e) an explanatory note."

I bear in mind that this is a Practice Direction, not a Rule of Court.

35. Practice Direction 13A makes it clear that orders for the restriction of publication of information must be founded on "Convention rights" under the ECHR. The approach adopted is set out in paragraphs 24 and 25 of the Practice Direction:

> "24. Any application or own-initiative order which invokes Convention rights will involve a balancing of rights under Article 8 (right to respect for private and family life) and Article 10 (freedom of expression). There is no automatic precedence as between these Articles, and both are subject to qualification where (among other considerations) the rights of others are engaged.
>
> 25. In the case of an application, section 12(4) of the Human Rights Act 1998 requires the court to have particular regard to the importance of freedom of expression. It must also have regard to the extent to which material has or is about to become available to the public, the extent of the public interest in such material being published and the terms of any relevant privacy code (such as those of the Press Complaints Commission)."

36. When conducting the balancing exercise between Articles 8 and 10 of the ECHR the Court applies the four propositions identified in the House of Lords case Re S [2005] 1 AC 593.

> "1. Neither Article has as such a precedence over the other.
>
> 2. 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.
>
> 3. The justifications for interfering with or restricting each right must be taken into account.
>
> 4. The proportionality test must be applied to each. For convenience I will call this the ultimate of balancing tests."

37. The House of Lord decisions in Campbell [2004] UKHL 22 and in Re S emphasised that the terms of ECHR and the Human Rights Act should not be read as giving presumptive priority to Article 10. As Sir Mark Potter P said:

> "The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity in that neither Article has precedence over or "trumps" the other. The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each. It is not a mechanical exercise to be decided upon the basis of rival generalities. An intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary before the ultimate balancing test in terms of proportionality is carried out. Having so stated Lord Steyn strongly emphasised the interest in open justice as a factor to be accorded great weight in both parallel analysis and the ultimate balancing test."

38. Although there has been an understandable emphasis by the Press Association before me on Article 10, it seems to me that whilst any restraining order is obviously a significant restriction on Article 10, the balance for the Court in fact is the balance between Article 10 and Article 8 as the law as is well established. Practice Direction 13A very clearly follows House of Lords authority.

39. A number of important points also arise out of earlier decided case law.

1. A decision whether or not to allow publication of information in such cases may well engage the Article 8 rights of not only the incapacitated adult P but also the other members of their family. Accordingly the balancing exercise that must be undertaken in appropriate circumstances should consider the rights of other family members.

2. When focusing on the Article 8 rights of P and any other relevant person the Court should consider the real nature and strength of the evidence of risk of

harm. There must, as Jackson J observed in Hillingdon v Neary [2011] EWHC 413 (COP) at paragraph 15.3, be a proper factual basis for such concerns.

3. Whilst there may be cases in which the Court of Protection allows details (indeed even perhaps the name of the adult who is the subject of the proceedings to be reported), the pressing public interest in freedom of expression arising in serious medical cases, will usually lie in the publication of general issues arising on an application for an order (e.g. ones which might have the effect of leading directly or indirectly to the shortening of the life of an incapacitated adult).

4. Most importantly when conducting the balancing exercise the Court must bear in mind that there is a pressing public interest and concern for the practices and procedures of the Court of Protection to be properly and informatively understood. Jackson J expressed the point in Neary at paragraph 15.4:

> "4) There is a genuine public interest in the work of this court being understood. Not only is this healthy in itself – the presence of the media in appropriate cases has a bracing effect on all public servants, whether in the field of social services or the law – but it may also help to dispel misunderstandings. It is not in the interests of individual litigants, or of society at large, for a court that is by definition devoted to the protection of the welfare of disadvantaged people to be characterised (including in a report about this case, published as I write this judgment) as "secretive". It is part of our natural curiosity to want to know other people's secrets, and using pejorative descriptions of this kind may stimulate interest. The opportunity, in appropriate cases, to follow a process that has welfare, not secrecy, at its heart can only help the media to produce balanced reporting, and not fall back on clichés."

A statement which I would not only wish to adopt but also strongly support.

Pre-notification anonymisation

40. It is submitted by the Press Association that pre-notification anonymisation appears to becoming a practice amongst claimant lawyers, who appear to be under the erroneous misapprehension that not only would they be committing a contempt but that by identifying the parties to a claim to the media means that the media will or may publish the material before the Court has had the opportunity to consider and possibly prohibit publication. It also suggests that the assumption is being made that the applicant's right to privacy under Article 8 of the ECHR outweighs the media and public's rights under Article 10. That approach by lawyers representing applicants seeking reporting restrictions or injunctions in refusing to identify the parties involved in a case involves restricting the media's rights even before the Court has had an opportunity to consider the matter. That, it is said, leaves the media unable to take advice or make sensible and informed decisions as to what approach, if any, to take in a particular case.

41. When the Press Association raised the question of identification of the parties with the applicant's solicitors in this case, the response apparently was that the solicitors would be committing a contempt of court by disclosing the information; the argument put forward today by Mr Sachdeva QC is altogether different.

42. The short issue of course is whether there is an obligation subject to paragraph 15-17 of the Practice Direction 13A to disclose information.

43. Mr Sachdeva QC submits that there is apparently a pressing need for clarity, and that the notification rules as set out are unclear. If so it is surprising that this issue has not arisen before. He highlighted the position in relation to section 12 of the Administration of Justice Act 1960 and the publication of information, relying both on the interpretation of section 12 and the decision of Re B (a child) [2004] EWHC 411 (Fam), a decision of Mr Justice Munby (as he then was). By that decision it is clear that disclosure constitutes publication within section 12:

> "72 … In my judgment, and subject only to the exception, recognised by Thorpe LJ and Wall J, where there is a communication of information by someone to a professional, each acting in furtherance of the protection of children, there is a "publication" for the purposes of section 12 whenever the law of defamation would treat there as being a publication. I recognise that this means that most forms of dissemination, whether oral or written, will constitute a publication, but I do not shrink from that.
>
> 73 … There is a "publication" for this purpose whether the dissemination of information or documents is to a journalist or to a Member of Parliament, a Minister of the Crown, a Law Officer, the Director of Public Prosecutions, the Crown Prosecution Service, the police (except when exercising child protection functions), the General Medical Council, or any other public body."

44. The ambit of section 12(1)(a) is dealt with extensively in the case of Re B:

> "It suffices for present purposes to say that, in essence, what section 12 protects is the privacy and confidentiality: (i) of the documents on the court file; and (ii) of what has gone on in front of the judge in his courtroom. … In contrast, section 12 does not operate to prevent publication of the fact that wardship proceedings are on foot, nor does it prevent identification of the parties or even of the ward himself. It does not prevent reporting of the comings and goings of the parties and witnesses, nor of incidents taking place outside the court or indeed within the precincts of the court but outside the room in which the judge is conducting the proceedings. Nor does section 12 prevent public identification and at least some discussion of the issues of the proceedings."

45. This theme was picked up in the case of X v Dempster [1999] 3 FCR 757 (now to be read subject to section to section 97(2(of the Children Act 1989):

> "Thus in the absence of a specific injunction the following can be published:
>
> a) The fact if it be the case that a child is a ward of court and is subject to wardship proceedings or that a child is the subject of residence or proceedings under the Children Act 1989 or of proceedings relating wholly or mainly to his maintenance or upbringing.
>
> b) The name, address or photograph of such a child as is mentioned in a).
>
> c) The name, address or photograph of the parties (or if the child is the party, the other party) to such proceedings as are mentioned in a).
>
> d) The date, time or place of a past or future hearing of such proceedings.
>
> e) The nature of the dispute in such proceedings.
>
> f) Anything which has been seen or heard by a person conducting himself lawfully in the public corridor or other public precincts outside the court in which the hearing in private is taking place. And
>
> g) The text or summary of the whole or part of any order made in such proceedings."
>
> "What is it that cannot be published?"
>
> "In the first place it is quite clear that the effect of section 12 is to prohibit the publication of accounts of what has gone on in front of the judge sitting in private, as also the publication of documents such as affidavits, witness statements, reports, position statements, skeleton arguments or other documents filed in the proceedings, transcripts or notes of the evidence or submissions and transcripts or notes of the judgment. (I emphasise that this list is not necessarily exhaustive). Section 12 likewise prohibits the publication of extracts or quotations from such documents: Official Solicitor V Newsgroup Newspapers. Also the publication of summaries: X v Dempster. It's also quite clear in my judgment that the prohibition in section 12 applies equally whether or not the information or the document being published had been anonymised."

46. Mr Sachdeva QC further argues that it being a criminal offence to identify a child or their address pursuant to section 97(2) of the Children Act 1989 such prohibition on disclosure is also to the Press Association in such a case of a child and by analogy to an incapacitated adult. There needs to be good reason, he argues, to justify a different position for incapacitated adults and relies on the transparency guidance relating to the COP. He relies on what the President says:

> "Very similar issues arise in both the Family Court (as it will be from April 2014) and the Court of Protection in relation to the need to protect the personal privacy of children and vulnerable adults. The applicable rules differ, however, and this is something that needs attention. My starting point is that so far as possible the same rules and principles should apply in both the family courts (in due course the Family Court) and the Court of Protection."

47. It is argued that therefore there is a lacuna in the law which permits the media to publish the identity of parties including P. Munby J in the context of wardship considered that the fact that neither common law nor section 12 prevented the identification of a ward of court. Any lacuna may be covered by section 97, or alternatively there is no Court of Protection equivalent to section 97. With respect to Mr Sachdeva I consider that the analogy with section 97 of the Children Act may not necessarily be a good one having regard to sections 8(3), 8(4) and 10(1) as well as section 97(2) and the word "possible" should be given its ordinary meaning. It should be remembered too that wardship is a different animal, created in an entirely paternalistic age which would be unthinkable under the Mental Capacity Act 2005 today.

48. The questions therefore seem to be as follows. On the one hand the arguments in favour of revealing the parties' identity to the Press before such an order is made include Practice Direction 13A requiring that the application notice (COP 9) be served with the media notification. The COP 9 has the parties' names on it as of course does the witness statement (COP24). It is in accordance with open justice to allow the media fully to consider whether to object. It is pragmatic, otherwise the media would have to attend every case to learn the parties' identity. Arguably no harm is done by notification because the media cannot report the parties' identity despite no RRO being yet in place without being in contempt and the media will learn the parties' names once the RRO is made in any event.

49. Against the proposition is the assertion that the Practice Direction (which is a practice direction, not a Rule of Court) does not require the draft order to be served on the media (as noted by Baker J in Re M). However, he was considering the issue in relation to the identities of a considerable number of people who would be covered by the anonymity order. More directly than that it is simply unnecessary for the media to know the identity of P before forming an opinion on the terms of the RRO being sought, the issues being the centre of interest. Relevance is also placed on the absence of prohibitive order prior to hearing, a breach of which it is said is not clearly a breach of confidence or contempt of court.

Conclusion

50. Finally, it seems to me that there are a number of factors which come decisively together. Firstly, that the Practice Direction is inclusive, it covers the service of COP 9 and COP 24, it is silent as to the removal of the identities of the parties. Rule 17 of the Practice Direction appears to be predicated on the basis that there may be exceptional circumstances or circumstances in which some information, either an entire document or part of it, would be withheld until adjudicated upon by the Court. That seems to me to suggest that the norm would be that the information is given to the Press. Ultimately I am impressed by the arguments, two of which were stressed by Mr Dodd. The first is that the Court should work on the basis that just because it may hypothetically be that one rogue editor or subscriber takes a different view that the fact that one individual in the sector abuses or could abuse his position does not mean that that freedom is lost by all members of the Press.

51. Newspapers are responsible and should be trusted when it comes to issues of contempt. In R v Dhiren Barot ([2006] EWCA Crim 2692; [2007] EMLR 5) Sir Igor Judge, President of the Queen's Bench Division (as he then was) said (at paragraph 25 of the judgement):

> "We should make plain that, quite apart from the effect of Scarsbrook, which we adopt, the responsibility for avoiding the publication of material which may prejudice the outcome of a trial rests fairly and squarely on those responsible for the publication. In our view, broadcasting authorities and newspaper editors should be trusted to fulfil their responsibilities accurately to inform the public of court proceedings, and to exercise sensible judgment about the publication of comment which may interfere with the administration of justice. They have access to the best legal advice; they have their own personal judgments to make. The risk of being in contempt of court for damaging the interests of justice is not one which any responsible editor would wish to take. In itself that is an important safeguard, and it should not be overlooked simply because there are occasions when there is widespread and ill-judged publicity in some parts of the media."

52. Here there is an established system which has worked extremely well, no single example of a breach or "leak" has been brought to my attention over many years (I believe 10) from a system which was devised carefully by a previous President and has been implemented faithfully ever since.

53. Mr Dodd secondly argues also persuasively that if an individual or an organisation were sufficiently unwise to publish such information he submits that it would be a common law contempt of court.

54. Section 1 of the Contempt of Court Act 1981 provides:

> "In this Act "the strict liability rule" means the rule of law whereby conduct may be treated as a contempt of court as

> tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so."

Section 2 of the Act sets out the scope of strict liability. The following must be established to the criminal standard:

> a) publication addressed to the public at large, as any sections of the public;
>
> b) publication which creates a substantial risk that the course of justice in the proceedings in question will be severely impeded or prejudiced;
>
> c) publication occurs at a time when the proceedings are active.

So there is a double test, there has to be a risk that the proceedings in question will be affected at all and if affected, the effect will be serious.

55. Anything that has a deleterious impact on the conduct or outcome of proceedings is prejudicial to the course of justice (I have had regard to the definitions in Arlidge, Eady and Smith on Contempt (citing Re Lonhro 1990 2 AC 154 and AG v Times Newspapers Times 12/2/83).

56. I am clear that publication by the media of the identity of P or the parties is likely to amount to a contempt under section 1 or 2 of the 1981 Act (Re B deciding a different point) because:

> i) The requirements of publication addressed to the public at large or any section of it and at a time when proceedings are active are met.
>
> ii) There is more than a remote risk of serious prejudice or impediment to the course of justice (since it would render the application for reporting restrictions redundant) and in any event once P's identity is public, Article 10 freedom of expression is likely to outweigh P's Article 8 right to privacy, so unauthorised publication is likely to have a "deleterious effect".

57. In the unlikely event that statutory contempt is not established common law contempt (under section 6(c) of the Act) could clearly be established. The *actus reus* and *mens rea* both have to be established. Lord Bingham in A-G v Newspapers Publishing plc [1997] 1 WLR 926 at 936B-D set out the *actus reus* to be established:

> "We do not accept that any conduct by a third party inconsistent with an order of the court is enough to constitute the actus reus of contempt. Where it is sought to impose indirect liability on a third party, the justification for doing so lies in that party's interference with the administration of justice. It is not our view necessary to show that the administration of justice in the relevant proceedings has been wholly frustrated or rendered utterly futile. But it is, we think, necessary to show some significant and adverse effect on the administration of justice. Recognising that the restraints upon freedom of expression should be no wider than are truly necessary in a democratic society, we do not accept that

> conduct by a third party which is inconsistent with a court order in only a trivial or technical way should expose a party to conviction for contempt."

58. At 936H-937A, Lord Bingham set out what had to be established in respect of the necessary *mens rea*:

> "To show contempt, the [A-G] must establish, to the criminal standard of proof, that: 'the conduct complained of is specifically intended to impede or prejudice the administration of justice. Such intent need not be expressly avowed or admitted, but can be inferred from all the circumstances, including the foreseeability of the consequences of the conduct. Nor need it be the sole intention of the contemnor. An intent is to be distinguished from motive or desire …'"

59. The publication of material contained in an application for reporting restrictions prior to the hearing to determine those restrictions is likely to amount to a contempt of court at common law. It is likely to have a significant and adverse effect on the administration of justice by thwarting the very purpose of the application, thereby making the application for reporting restrictions redundant. Intent to impede or prejudice the administration of justice is likely to be inferred from the context that the publisher will be aware of the context of how the information was received, the purpose for which it was received and the likely restrictions sought in the application.

60. It is unnecessary in this judgment to review contempt proceedings governed by PD37A and Practice Guidance (3rd May 2013) and the use of cases from Mubarak [2001] 1 FLR 698 to date.

61. Further, I am entitled to have confidence on the contractual foundation which underpins the disclosure to the Press. Subscribers to the Injunction Alert Service have a contract with the Press Association which contains the following clause:

> "The Customer may only use any Application it receives from the PA for the purpose of evaluating whether or not the Customer should object to any proposed reporting restriction contained within the Application. The Customer agrees that it will not use any Application for any editorial purpose or otherwise exploit, publish or make available to the public any Application. The Customer will indemnify and keep indemnified the PA, to the fullest extent permissible by law, against all claims, demands, damages, liabilities, losses, costs and expenses of whatever nature (including any legal and other professional expenses) incurred or suffered by the PA directly or indirectly arising (in whole or in part) by reason of or in relation to any use, reproduction, distribution or making available to the public by the Customer (or any person authorised or permitted by the Customer) of all or any part(s) of any Application received as part of the Services in a manner not authorised by this Agreement."

That provision makes it clear that notification is solely related to the judicial process.

62. Mr Dodd argues that the membership of the Associations subscribing to the Press Association and the Organisation effectively give a collective undertaking which they have faithfully observed over many years that may additionally be so. It seems to me to be unnecessarily wieldy and cumbersome to require in every case for there to be an individual undertaking from each subscriber before any information can be released to them, especially as these applications are frequently heard as a matter of urgency. I am additionally impressed by the submission that there is a contractual bond (either in substance or by undertaking) which means that the recipients of the information are under an obligation not to reveal the identities of the individuals until the matter is determined by the Court, albeit to the Press Association.

63. Additionally, while it is not necessary to review it extensively here, the information is disclosed under a contractual duty to treat the information as confidential, and thus the media organisations are under an equitable duty to treat the information as confidential. Toulson and Phipps on Confidentiality (3rd ed) says:

> "The core principles of the law of confidentiality may be stated in broad terms as follows:
>
> (2) key factors in establishing an equitable obligation are the nature of the information, the circumstances in which it was established and notice of its confidentiality.
>
> (3) The circumstances must have been such as to purport an obligation of confidentiality. Such circumstances include cases where information:
>
> a) is received in the course of a relationship or venture which a reasonable person would regard as involving a duty of confidentiality …"

64. Shortly such a definition clearly applies here.

> i) The application concerns private information, for future consideration of press attendance and publication.
>
> ii) Any reasonable person would regard the information as confidential (and sent under express contractual arrangements).
>
> iii) any subscriber receives the information as "confidential".
>
> iv) In publishing or setting to publish information disclosed in that way it is misusing the information (which could be restrained by injunction).

65. If an organisation or an individual within it were to take a wholly maverick course for good reason or no reason at all and make public information in a particular case, the very careful administrative and practical arrangements which have been established and have been in practice over many years would at a stroke be destroyed. I am

satisfied that the arrangements which can and should be in place in every case (unless there are unusual circumstance which require the argument that part of a form or part of the information should not be disclosed) and should ordinarily be disclosed to the relevant bodies so that they can make a decision as to whether to make any observations, representations as to all or part of the order, are strongly and decisively supported by the principles below.

66. I also bear in mind the examples of the President of the Family Division in Justice for Families Ltd v Secretary of State for Justice [2014] EWCA Civ 1477 which emphasises the importance of transparency in such applications (there for habeus corpus) in all but the most exceptional cases, describing it as fundamental to the administration of justice. These principles, which should be taken to apply to the Court of Protection too, serve to underscore procedural fairness and openness as a vital aspect of the integrity of the process.

67. I am therefore completely satisfied that a number of factors come together preventing the media from revealing the parties' names, because

    1. It would be a statutory contempt.

    2. It would be a contempt of common law.

    3. It would be in breach of the express contractual arrangements between any subscriber and the Press Association (with a powerful deterrent effect).

    4. It would be a breach of confidence.

68. In the interests of transparency, the whole thrust of the law from the Practice Direction onwards dictates that in order to form a proper view the Press should see all the information including names. I therefore order the disclosure of the identity of P and the family to the Injunctions Alert Service so that the Press may respond if they wish to do so.