Neutral Citation Number: [2016] EWCOP 38

Case No: 95908524

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 August 2016

Before:

SIR JAMES MUNBY PRESIDENT OF THE COURT OF PROTECTION

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In the matter of A (A Patient)
In the matter of applications by and against Desmond Maurice Fitzgerald

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- -

Mr Desmond Maurice Fitzgerald in person
Mr Charles Howard QC and Ms Charlotte Hartley (instructed by Hughes Fowler Carruthers) for Ms Frances Mary Theresa Hughes and Hughes Fowler Carruthers
Mr Ian Clarke QC (instructed by Hughmans) for A's deputy C

Hearing dates: 15-16, 22 March 2016

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Approved Judgment

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

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SIR JAMES MUNBY PRESIDENT OF THE COURT OF PROTECTION

This judgment was delivered in private. The judge has since, on 18 August 2016, given leave for the judgment to be published on condition that neither A nor C is to be named: see *Re A (A Patient), Re applications by and against Desmond Maurice Fitzgerald (No 2)* [2016] EWCOP 39, para 14. 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.

Sir James Munby, President of the Court of Protection :

1. I have before me a number of applications which arise in relation to an elderly lady, A, whose affairs have been administered for almost 60 years by the Court of Protection, by its predecessor the 'old' Court of Protection, and, before that, pursuant to an inquisition held in 1959. Each of the applications is made by or against A's nephew, Desmond Maurice Fitzgerald.

2. Mr Fitzgerald has been unrelentingly pertinacious in pursuit of what he believes to be his aunt's best interests. Unhappily, his pursuit of that laudable endeavour has become obsessive and his desire to litigate (most of the time as a litigant in person) and to correspond with all and sundry has become compulsive. This obsessive compulsion is marked by the very large number of applications which Mr Fitzgerald has sought to make to the Court of Protection (at least 23; see below) and by the enormous number of emails with which he has bombarded all and sundry since 2013: see, for example, the emails and letters contained in Exhibits FMTH1 and FMTH2 to the affidavit of Ms Frances Mary Theresa Hughes which I refer to in paragraph 18(iii) below. These are facts which need to be borne in mind when considering the quantum of costs asserted to have been incurred by others in relation to all this litigation. The hearing which took place before me on 15-16 and 22 March 2016 marks the culmination, though I fear only for the time being.

The litigation since 2013

3. For present purposes, the story starts on 28 May 2013, when SJ Lush appointed her niece, C, to be A's deputy for property and affairs. SJ Lush gave a written judgment. In it he recorded that between 7 March 2013 and 9 May 2013 Mr Fitzgerald had filed no fewer than nine applications with the Court of Protection. He recorded a number of allegations of very serious misconduct, including fraud and intentionally misleading the court, which Mr Fitzgerald had levelled against both C and the solicitors, MacFarlanes, then acting for her and against C's predecessor as A's deputy, A's sister B. In relation to that, SJ Lush said this:

> "There has been no effective challenge to C's competence or integrity. Mr Fitzgerald's allegations in this respect are simply bluff and bluster."

4. Turning to the question of costs, SJ Lush referred to rules 156 and 159 of the Court of Protection Rules 2007. Rule 156 provides that:

> "Where the proceedings concern P's property and affairs the general rule is that the costs of the proceedings or of that part of the proceedings that concerns P's property and affairs, shall be paid by P or charged to his estate."

5. Rule 159 permits the court to depart from rule 156 "if the circumstances so justify". Rule 159 continues:

> "(1) … in deciding whether departure is justified the court will have regard to all the circumstances, including –

> (a) the conduct of the parties;
>
> (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
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> (c) the role of any public body involved in the proceedings.
>
> (2) The conduct of the parties includes –
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> (a) conduct before, as well as during, the proceedings;
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> (b) whether it was reasonable for a party to raise, pursue or contest a particular issue;
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> (c) the manner in which a party has made or responded to an application or a particular issue; and
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> (d) whether a party who has succeeded in his application or response to an application, in whole or in part, exaggerated any matter contained in his application or response."

With effect from 1 July 2015, an additional sub-paragraph (e) has been inserted in rule 159(2):

> "(e) any failure by a party to comply with a rule, practice direction or court order."

6. SJ Lush continued (I set out the relevant passage in full):

> "This is a case in which the court is justified in departing from the general rule in rule 156 because of Mr Fitzgerald's conduct and the fact that he has not succeeded on any part of his case.
>
> Most of the issues he raised, pursued or contested had no bearing at all on the court's decision to appoint a new deputy for A and were simply a prolongation of his dispute with Macfarlanes. I find myself in agreement with the observations of the Deputy Chief Legal Ombudsman, when he said "I can see nothing in what you have said by way of reply having any bearing on the decision that has to be made."
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> The manner in which he made or responded to the application was, as [counsel] said, 'repetitive and vociferous', 'tantamount to harassment', and 'actionably defamatory'.
>
> The persistence with which he kept filing application notices, if not intentionally designed to disrupt and derail the litigation process, almost succeeded in having that effect. As Sir Alan Ward recently observed in paragraph 2 of *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234:

> "What I find so depressing is that the case highlights the difficulties increasingly encountered by the judiciary at all levels when dealing with litigants in person. Two problems in particular are revealed. The first is how to bring order to the chaos which litigants in person invariably – and wholly understandably – manage to create in putting forward their claims and defences. Judges should not have to micro-manage cases, coaxing and cajoling the parties to focus on the issues that need to be resolved"

> Mr Fitzgerald's conduct undoubtedly resulted in the costs of the proceedings being greater than they would otherwise have been and it would be unjust to expect them to be paid by A, as would be the position under rule 156.

> Accordingly, I order that the applicant's costs be assessed on the standard basis and that Mr Fitzgerald pay the applicant's assessed costs to the extent that they exceed £7,500 (including VAT).

> I have selected the sum of £7,500 as this is broadly the amount that I would have expected Macfarlanes to have charged if this application had been uncontested. It covers the costs of the application itself, the application fee, the supplementary documentation relating to the 1978 settlements and, of course, Value Added Tax."

7. Mr Fitzgerald sought permission to appeal. His application came before me on 19 December 2013.[1] At that hearing, Mr Fitzgerald was represented by Leading Counsel. I gave Mr Fitzgerald permission to appeal, limited to two grounds of appeal: (i) the issues of the Court's jurisdiction and A's capacity to manage her property and affairs; and (ii) the order for costs made by SJ Lush on 28 May 2013. I gave directions for the instruction of an expert "to assess and report on A's capacity to manage her property and affairs as at the date of assessment and on and since 15 May 2013." I directed that the "issue of A's capacity to manage her property and affairs (a) at the date of assessment and (b) on and since 15 May 2013" was to be determined at a further hearing before me. The permission to appeal SJ Lush's costs order was confined to the grounds (see below) set out in a schedule to my order – the relevant paragraphs in

[1] In his email dated 8 August 2016 (see paragraph 71 below) Mr Fitzgerald says this: "In your resume of proceedings prior to 2016 I would be grateful if you include reference to Order of Your Own Motion of 11 November 2013 in which you direct me to: a) Provide variations to SJ Lush's Orders of 28 May 2013 in my aunt's best interests; b) Grounds for proceedings against SJ Lush under the Human Rights Act 1999. I would be grateful if you would refer to my Responses filed with your court on 6 December 2013; to include: i) My proposal there should be an Interim Independent deputy for my aunt's property and affairs while her capacity was properly assessed; b) [C]'s acceptance that my aunt possessed capacity to manage her property and affairs within limits (excluding trusts of extraordinary legal complexity) through the Report and findings to that effect of my aunt's GP Dr Graham Gibson obtained by [C] on 10 December 2013 and filed with your court on 17 December 2013." I saw, and see, no need to include reference to these matters in this judgment. In relation to the question of A's capacity, I point out that, so far as I am aware, Mr Fitzgerald has never sought to challenge, whether in the Court of Appeal or elsewhere, either my order (see paragraph 12 below) or my findings (see paragraph 13 below).

the schedule being B4-9. I directed (paragraph 8 of the order) that the detailed assessment of costs as between C and Mr Fitzgerald pursuant to the costs order made by SJ Lush on 28 May 2013 was to be stayed until determination of Mr Fitzgerald's appeal on costs. I directed that "Except with the prior written permission of The President [Mr Fitzgerald] is not to make any further application to the Court or to file any further documents with the Court." I directed that all other applications to the court made by Mr Fitzgerald be stayed until further order. I reserved the matter to myself. Finally, so far as material for present purposes, I ordered (paragraph 11 of the order) that the costs of the hearing be reserved.

8. On 10 June 2014, at a hearing at which Mr Fitzgerald was again represented by Leading Counsel, I made an order directing that a named psychiatrist, Dr T, be instructed in accordance with the directions I had given on 19 December 2013. The letter of instructions, in a form which I had approved with only minor amendments to the draft prepared by C's solicitors, Hughes Fowler Carruthers, was signed by Mr Fitzgerald in my presence. Mr Fitzgerald gave the court undertakings (i) not to correspond with C and (ii) not to personally attend the offices of Hughes Fowler Carruthers save with prior written permission. I directed (paragraph 5 of the order) that the costs of the hearing be reserved.

9. It emerged that Dr T was not available. On 13 November 2014, by which time Mr Fitzgerald was appearing in person, I made an order that Professor Robert Howard of the Institute of Psychiatry, Kings College London, be instructed to prepare the assessment in accordance with the order I had made on 19 December 2013 and a letter of instructions in the same form as the one I had approved on 10 June 2014. I directed (paragraph 5 of the order) that the costs of the applications by C (one, dated 24 October 2014, seeking the instruction of Professor Howard in place of Dr T; the other, dated 5 November 2014 seeking an injunction against Mr Fitzgerald) be reserved.

10. Professor Howard reported on 8 December 2014. On 11 December 2014 I made an order directing that if Mr Fitzgerald wished to put any further questions to Professor Howard then he must formulate his questions in writing and send them to my Clerk. The order provided that, subject to my being satisfied that the questions were appropriate to be put to Professor Howard, they would be forwarded to him.

11. On 30 December 2014 I made an order of my own motion which recorded that in eleven emails dated 11 December 2014, 15 December 2014 (6 emails) and 16 December 2014 (4 emails) Mr Fitzgerald had set out forty questions for Professor Howard. I directed that the question of A's mental capacity was to be determined at a hearing on 20 January 2015 which I directed that both Professor Howard and Mr Fitzgerald "shall" attend. I directed that Professor Howard should by 16 January 2015 prepare a supplemental report

> "responding succinctly to such of the questions (or parts of the questions) with the exception of Questions 12, 31, 32, 36, 38 and 40 (which he is not required to answer) as he is in a position to answer and which in his professional judgement it is appropriate for him to answer. If in his professional judgement any question can properly be answered either 'Yes' or 'No' then such answer will suffice."

Professor Howard's supplemental report is dated 6 January 2015.

12. At the hearing on 20 January 2015, I heard oral evidence from Professor Howard, who was cross-examined by Mr Fitzgerald (again, appearing in person). At the end of the hearing, and having given judgment, I declared that[2]

> "A lacks and has since 15 May 2013 lacked capacity to make decisions for herself in relation to a matter or matters concerning her property and affairs (the court making no declaration as to whether or not she had such capacity previously)."

Again, (paragraph 3 of the order) I reserved the costs of the hearing.

13. In the course of my judgment, I said this:

> "Really everything is one way."

I continued:

> "Mr Fitzgerald, in reality, had difficulty in disputing that, as matters stand today, the patient does – in relation to the management of her property and affairs – lack capacity. He accepted in terms that she is extremely suggestible in relation to matters financially. He accepted that she did not really have the ability, for example, to manage the payment of care home fees. The real thrust of his case was … that, whatever her current lack of capacity, that was not something which, as in the view of both Dr Hirst [who did not give evidence] and Professor Howard, was irreversible; but, on the contrary, that, given time with appropriate help (including from members of the family) and in a much less restrictive setting, she would in fact with ongoing assistance be able to deal with and spend her money in such a way as no longer to lack capacity and to manage her property and affairs,
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> The sad reality, in my judgment, is that A plainly at present lacks and has for many, many decades lacked capacity to manage her property and affairs. One would in effect have to reject almost the totality of Professor Howard's evidence to come to any different conclusion and there is simply no basis for such a rejection

[2] In his email dated 8 August 2016 (see paragraph 71 below) Mr Fitzgerald says this: "In referring to your Order in Declaration of 25 March 2015 please confirm that you reported five assessments of capacity on my aunt for the period 2013-2015 by her carers and clinicians all finding her to possess capacity to make important decisions in her life for herself, and that she possesses this capacity at present despite her age and life history." The judgment which I gave on 20 January 2015 (see paragraph 13 below), of which the transcript is available, speaks for itself. I repeat (see footnote 1 above) that, so far as I am aware, Mr Fitzgerald has never sought to challenge, whether in the Court of Appeal or elsewhere, either my order (paragraph 12) or my findings (paragraph 13).

> In terms of the future I regret that the prospect of any change is, if it exists at all and the reality is that it does not, vanishingly small. The fact is, as I find in accordance with Professor Howard's evidence, that the fundamental cause of the patient's intellectual deficits are the schizophrenia present for many, many decades and the tragic consequences of the surgery to which she was subjected all those years ago. Her difficulties have not been assisted, to an extent they have been compounded, by what might be called the social realities of that short period of her life before she became institutionalised and more particularly by the institutionalisation to which she has been subjected for so many decades. But it is perfectly apparent, in my judgment, that, even if the adverse consequences of those social deprivations and institutionalisation were to be wholly removed and reversed, she would not thereby – even with the maximum of appropriate assistance – regain the capacity which manifestly she does not have at present. I repeat the incapacity is unhappily the consequence of schizophrenia which has been present for many decades and the irreversible consequences of the surgery."[3]

14. In paragraph 5 of an order which I made of my own motion on 21 August 2015 I gave C liberty to apply on notice in relation to (a) the costs referred to in paragraph 8 of the order dated 19 December 2013 and (b) the various costs reserved by paragraph 11 of that order, paragraph 5 of the order dated 10 June 2014, paragraph 5 of the order dated 13 November 2014 and paragraph 3 of the order dated 20 January 2015.

15. By a letter dated 5 November 2015, Hughes Fowler Carruthers on behalf of C confirmed the giving of written notice to Mr Fitzgerald of C's application in relation to the costs referred to in paragraph 5 of the order dated 21 August 2015. By a letter dated 6 November 2015, Mr Fitzgerald stated his intention to apply (i) for the committal of C's solicitor, Ms Frances Mary Theresa Hughes, for alleged contempt of court and (ii) for a wasted costs order against Hughes Fowler Carruthers.

16. By an order dated 11 November 2015, which I made of my own motion, I gave directions in relation to all these matters, with a view to a hearing which I directed was to take place before me (in the event, on 15 March 2016). It is convenient to set out separately the directions I gave in relation to each matter:

    i) Committal: I directed (paragraph 1) that Mr Fitzgerald was to file his application by 27 November 2015 "in a form complying in all respects with the rules and practice of the Court of Protection and … accompanied by an affidavit or

[3] In his email dated 8 August 2016 (see paragraph 71 below) Mr Fitzgerald says this: "You may or may not recall that Professor Robert Howard's evidence to your court was that my aunt's supposed schiyophrenis [sic] displayed no symptoms which would justify her restrained in locked psychiatric detention, as she was found to be during Hearing before SJ Lush in 2013. Professor Robert Howard also confirmed that she definitely does not suffer dementia or any dementa-related condition despite her present restraint in dementia ward. If you are unable to recall Professor Howard's evidence to you of January last year, please direct that the transcript of his evidence to your court of 20 January 2015 is prepared free of charge." The judgment I gave on 20 January 2015 speaks for itself. I repeat what I have said in footnote 2 above. I refuse to direct the preparation at public expense of a transcript of Professor Howard's evidence.

affidavits setting out all the evidence [he] seeks to rely upon in support of the application." I gave further directions for (paragraph 3) the filing of evidence in answer by Ms Hughes and, by 8 January 2016 (paragraph 5(b)), of any evidence in response by Mr Fitzgerald and any written submissions which he sought to rely upon.

ii) Wasted costs: I directed (paragraph 1) that Mr Fitzgerald was to file his application by 27 November 2015 "in a form complying in all respects with the rules and practice of the Court of Protection and … accompanied by an affidavit or affidavits setting out all the evidence [he] seeks to rely upon in support of the application." I directed that the application "must be accompanied by a schedule or schedules itemising in appropriate detail all the costs being claimed by" Mr Fitzgerald. I gave further directions for (paragraph 4) the filing of evidence in answer by Hughes Fowler Carruthers and, by 8 January 2016 (paragraph 5(c)), of any evidence in response by Mr Fitzgerald and any written submissions which he sought to rely upon.

iii) C's application: I directed (paragraph 2) that C was to file by 16 December 2015 a schedule or schedules itemising in appropriate detail all the costs being claimed by her, an affidavit or affidavits setting out all the evidence she sought to rely upon and any written submissions she sought to rely upon. I gave further directions (paragraph 5(a)) for the filing by Mr Fitzgerald of evidence in response and any written submissions he sought to rely upon.

17. In consequence of the applications intended to be made by Mr Fitzgerald against Ms Hughes (committal) and Hughes Fowler Carruthers (wasted costs), neither she nor the firm was able to go on acting for C. Other solicitors, Hughmans, were instructed in their place.

18. Pursuant to the directions I had given on 11 November 2015, the following documents were filed:

i) Committal: Mr Fitzgerald's 'application' is dated 6 January 2016. It has not been filed.[4] It contains no particulars of any alleged contempt, except to say that the grounds are set out in an affidavit. There is, in fact, no affidavit, merely a witness statement by Mr Fitzgerald, with a statement of truth, dated 27 November 2015. Ms Hughes swore an affidavit in response on 16 December 2015. Mr Fitzgerald's witness statement in response is dated 6 January 2016. He also produced a case summary dated 27 November 2016.

ii) Wasted costs: Mr Fitzgerald's 'application' is dated 6 January 2016. Again, it has not been filed.[5] It contains no particulars, except to say that the grounds are set out in evidence attached. This is a reference to a witness statement by Mr Fitzgerald, with a statement of truth, dated 27 November 2015. Ms Hughes

[4] In the draft judgment I had added here, as also in paragraphs 18(ii) and 23, the words "nor has the appropriate court fee been paid." In his email dated 9 August 2016, 13:59 (see paragraph 71 below) Mr Fitzgerald disputes that any such fee was payable and asks that I remove from the judgment all references to his supposed non-payment of court fees. I agree that this should be done, and have accordingly deleted the relevant words from paragraphs 18(i), 18(ii) and 23.

[5] See footnote 4 above.

swore an affidavit in response on 16 December 2015. Mr Fitzgerald's evidence in response is contained in his witness statement dated 6 January 2016 to which I have already referred.

iii) C's application: C filed an affidavit by Ms Hughes, sworn on 16 December 2015. This was supplemented by a witness statement from Mr Matthew George Jenkins of Hughmans dated 26 February 2016. Apart from some passing references in his witness statement dated 6 January 2016 to which I have already referred, Mr Fitzgerald's only written response to this material, notwithstanding the directions I had given on 11 November 2015, was a witness statement dated 29 February 2016, none of it relevant to any issue I have to determine. Only after I had adjourned the hearing on 16 March 2016 to come back on 22 March 2016, did Mr Fitzgerald file a position statement dated 21 March 2016. (That, it should be noted, was *after* I had dismissed, on 16 March 2016, his committal and wasted costs applications against Ms Hughes and Hughes Fowler Carruthers as being totally without merit: see paragraphs 40 and 47 below.) Much of this position statement is irrelevant to anything I have to determine. It contains wild and scurrilous allegations against various people, including C, of "income tax fraud" and "criminal tax evasion", of which, Mr Fitzgerald asserts, Ms Hughes had "almost certain knowledge." He accuses Ms Hughes of "deliberate falsification" in her evidence to the court and invites me to refer her to the Attorney General for committal (which I unhesitatingly decline to do). Despite the vast amount of material put before me by Mr Fitzgerald, it is perfectly obvious that there is no factual merit in any of these allegations, in particular, in any of his allegations against C and Ms Hughes, allegations which, in my judgment, are scurrilous and fatuous and which should never have been made.

Costs warnings

19. Unsurprisingly, given his behaviour, Mr Fitzgerald has been given numerous warnings about the possible costs implications. I draw attention to three in particular.

20. First, SJ Lush gave Mr Fitzgerald a costs warning as recorded in his judgment of 28 May 2013:

> "On 8 May 2013, following a spate of application notices filed by Mr Fitzgerald, I considered it necessary to issue the following costs warning:
>
> 1 These application notices and any further applications yet to be filed, if relevant, will be considered at the attended hearing at 11 AM on Wednesday 15 May 2013.
>
> 2 Insofar as any application has no bearing on the applicant's suitability to be appointed A's deputy for property and affairs and to exercise the powers of appointment and consent vested in her, the parties' attention is drawn to the provisions of rule 159 of the Court of Protection Rules 2007."

21. Secondly, on at least one occasion during the interlocutory hearings, I myself pointed out to Mr Fitzgerald that the consequence of his approach to the litigation, in particular the volume of correspondence he was generating, was, almost inevitably, to drive up the costs very substantially.

22. Finally, in the run up to the hearing on 15 March 2016, Mr Fitzgerald was repeatedly warned by Hughes Fowler Carruthers that in their view his applications were wholly without merit and that they would be seeking orders for costs against him on an indemnity basis: see, for example, letters dated 7 January 2016, 12 February 2016 (warning him that counsel's brief fees would become payable on 15 February 2016) and 4 March 2016. Under cover of a letter dated 10 March 2016, they sent him a schedule of costs in relation to the committal application amounting in all to £56,081.40 (inclusive of VAT) and a schedule of costs in relation to the wasted costs application amounting in all to £45,914.40 (inclusive of VAT).

The hearing on 15-16 and 22 March 2016

23. At the hearing on 15 March 2016 I was presented with a large number of lever arch files containing, in addition to the documents I have already referred to, a mass of other materials, much of only the most tangential, if indeed any, relevance. Included amongst all this were bundles lodged by Mr Fitzgerald, who appeared in person, containing no fewer than twelve further 'applications' by him, each with accompanying documents. As with his other 'applications', none of these had been filed with the court.[6] Mr Fitzgerald had labelled ten of these Applications A, B, C, D, E, F, G, H, J and K. They included claims for such matters as: damages for A (Application A); committal of Ms Hughes for contempt (Application C); a claim against SJ Lush (Application D); a stay of execution of an order made by a District Judge in the family court in financial remedy proceedings between Mr Fitzgerald and his wife (Application E – the basis of the application being that the District Judge's order allegedly "interfered" with the proceedings in the Court of Protection); wasted costs against C's solicitors (Application F); specific performance of certain family trusts (Application G); a declaration that Ms Hughes "has acted unlawfully" (Application H); and wasted costs against Hughes Fowler Carruthers (Application J). Mr Fitzgerald made two further 'applications', neither having been filed:[7] an application for the committal of both C and Ms Hughes and an application for permission to appeal against an order made by SJ Lush on 9 March 2016. None of these applications came within the ambit of the order I had made on 11 November 2015, identifying the issues I would be determining at this hearing.

24. I dealt first, and as a discrete issue, with Mr Fitzgerald's application for the committal of Ms Hughes. Mr Fitzgerald appeared in person; Ms Hughes was represented by Mr Charles Howard QC and Ms Charlotte Hartley. They submitted at the outset that, properly analysed and without there being any need to refer to the evidence of Ms Hughes in answer, Mr Fitzgerald's application was doomed to inevitable failure; that it was in fact totally without merit. Mr Fitzgerald sought to parry this attack by seeking an adjournment to enable him to amend. I refused his applications to adjourn and to amend. I dismissed his application for the committal of Ms Hughes as being totally without merit. I refused him permission to bring a further application for the

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6 See footnote 4 above.

7 See footnote 4 above.

committal of Ms Hughes, pursuant to rule 14 of the Court of Protection Rules, as being totally without merit. I ordered Mr Fitzgerald to pay the costs of Ms Hughes on an indemnity basis, summarily assessed in the sum of £55,000 (inclusive of VAT). That order was made on and is dated 16 March 2016.

25. I dealt next with Mr Fitzgerald's application for wasted costs against Hughes Fowler Carruthers. Again, Mr Fitzgerald appeared in person; Hughes Fowler Carruthers were represented by Mr Charles Howard QC and Ms Charlotte Hartley. Again, they submitted at the outset that Mr Fitzgerald's application was hopeless and totally without merit. Again, Mr Fitzgerald sought an adjournment to enable him to amend. I refused his applications to adjourn and to amend. I dismissed his application for wasted costs as being totally without merit. I ordered Mr Fitzgerald to pay the costs of Hughes Fowler Carruthers on an indemnity basis, summarily assessed in the sum of £37, 000 (inclusive of VAT). That order also was made on and is dated 16 March 2016.

26. I interpolate that on 17 March 2016, Moylan J granted Hughes Fowler Carruthers an interim charging order in the sum of £92,500 (being the aggregate of the sums of £55,000 and £37,000 referred to in my two orders) in respect of Mr Fitzgerald's interest in his former matrimonial home.

27. I then turned to deal with C's application. C was represented by Mr Ian Clarke QC; Mr Fitzgerald appeared in person. It was necessary to adjourn the matter part heard until 22 March 2016. At the end of that hearing I made three orders, each dated 22 March 2016:

    i) The first related to the appeal against SJ Lush's costs order of 28 May 2013. I allowed the appeal and, exercising my discretion afresh, ordered Mr Fitzgerald to pay C's costs, in excess of £7,500, on the standard basis. I ordered Mr Fitzgerald to make an interim payment of £60,000 (inclusive of VAT) on account. I reserved judgment on the balance of C's application. I reserved C's costs of the hearing on 15, 16 and 22 March 2016 and gave directions for those reserved costs to be determined without a hearing once the parties had filed further written submissions by 29 March 2016.

    ii) The second order was an interim charging order in the sum of £60,000 in respect of Mr Fitzgerald's interest in his former matrimonial home.

    iii) The third order was an extended civil restraint order, to remain in effect until 21 March 2018, restraining Mr Fitzgerald from issuing claims or making applications in any court "concerning any matter involving or relating to or touching upon or leading to the proceedings in which this order is made or the subject matter of or any application or proposed draft application therein." There were expressly excluded from the ambit of this order the proceedings in the family court between Mr Fitzgerald and his wife and certain proceedings brought against Mr Fitzgerald in the Chancery Division.

28. On 24 March 2016 I notified the parties of my decision in relation to the balance of C's application. The same day I made two orders:

i) The first[8] related to the costs reserved by the orders dated 19 December 2013, 10 June 2014, 13 November 2014 and 20 January 2015. In relation to the costs reserved by the order dated 13 November 2014, I ordered Mr Fitzgerald to pay C's costs of the application dated 24 October 2014 on the standard basis. In relation to the costs reserved by the order dated 20 January 2015 I ordered Mr Fitzgerald to pay 50% of certain specified parts of those costs, again on the standard basis. I ordered Mr Fitzgerald by way of interim payment to pay £7,000 (inclusive of VAT) on account of the former and £16,000 (inclusive of VAT) on account of the latter.

ii) The second order was an interim charging order in the sum of £23,000 (being the aggregate of the sums of £7,000 and £16,000) in respect of Mr Fitzgerald's interest in his former matrimonial home.

29. I must now explain why I made these various orders.[9]

Committal

30. I deal first with Mr Fitzgerald's application for the committal of Ms Hughes.

31. Procedure in relation to committal applications in the Court of Protection is governed by rules 185-188. Rule 186(1) provides as follows:

> "An application for an order of committal must be made by filing an application notice, stating the grounds of the application, and must be supported by an affidavit made in accordance with the relevant practice direction."

Rule 188(1) provides as follows:

> "Except where the court permits, no grounds shall be relied upon at the hearing except the grounds set out in the application notice."

32. In breach of these rules, and notwithstanding the very clear directions I had given in my order dated 11 November 2015, Mr Fitzgerald (see paragraph 18(i) above) has not in

[8] In his email dated 8 August 2016 (see paragraph 71 below) Mr Fitzgerald says this: "By your Order of 24 March 2016 you direct that no further costs orders are to be made in this case. Your Order is of record in your court (as well as being presently lodged with the Court of Appeal) and I would be most grateful if you would confirm its terms. At Paragraph 70 of Draft Judgement you make exactly the further costs order which you have directed should not be made. Please confirm that your further costs order of Paragraph 70 of Draft Judgement is rescinded. Please also confirm that Hughmans' Draft Order of today's date will not be issued by your court." Mr Fitzgerald mistakes the meaning and effect of this order of 24 March 2016, which needs to be read in conjunction with the earlier order I had made on 22 March 2016, referred to in paragraph 27(i) above. My directions in paragraph 70 below stand.

[9] In his email dated 8 August 2016 (see paragraph 71 below) Mr Fitzgerald says this: "Your Orders of 22 & 24 March are now invalidated by [C]'s failure to comply with standard costs assessment process. With your permission I will now enter an Application to you to rescind these Orders as ineffective, unenforceable, and tending to obstruct the independent and impartial investigation of [C]'s tax-evasion on our aunt's estate by the statutory authorities. I would be grateful if you would confirm permission for this application to you this week." I have made clear to Mr Fitzgerald (emails dated 9 August 2016, 11:19, 11:53) that I will consider his application for permission (required by the civil restraint order I made on 22 March 2016) if the application is made in proper form. As yet, so far as I am aware, no such application has been made.

fact "filed" any application, his unfiled 'application' does not state the grounds of his application, and his 'application' is supported not by an affidavit but by a witness statement. The grounds of his application are set out in two places: first, in paragraph 1 of his witness statement dated 27 November 2015, where he identifies 17 alleged contempts;[10] secondly, in paragraph 30 of his witness statement dated 6 January 2016, where he identifies 10 alleged contempts. These passages require to be set out in full, exactly as drafted by Mr Fitzgerald. Accordingly, I have set them out verbatim in an Annexe to this judgment.

33. I have power to waive Mr Fitzgerald's non-compliance with the requirements of rules 186 and 188. Should I do so? Making every proper allowance for the fact that Mr Fitzgerald was by then acting as a litigant in person, I have concluded that I should not. My order dated 11 November 2015 was very clear and very precise; yet Mr Fitzgerald has proceeded in wholesale breach of the very clear requirements of rules 186 and 188. He is an articulate and intelligent man. Why in these circumstances should he be relieved? Justice and fairness to him do not, in my judgment, justify giving him relief; justice and fairness to Ms Hughes, on the other hand, require, in my judgment, that he should not be given relief. I add one further point. Even if I had been prepared to waive the initial defects, and to treat the grounds of his application as having been adequately set out in his witness statement dated 27 November 2015 (on the ground that his 'application' and contemporaneous witness statement would naturally be read together), I would not in any event have permitted him to rely upon the matters set out in his witness statement dated 6 January 2016. Absent proper particularisation in the committal application, the defect simply cannot, in my judgment, be cured by a witness statement served separately and more than a month later.

34. It follows that, on these grounds alone, the application for committal must be dismissed.

35. Despite this, justice both to Mr Fitzgerald and to Ms Hughes require me, in the unusual and indeed extreme circumstances of the case, to address the merits, or, rather, the palpable demerits, of Mr Fitzgerald's application.

36. There are, in principle, three types of contempt: first, contempt in the face of the court (which is not alleged here); second, contempt by breach of or non-compliance with a court order; and, third, contempt by improper interference with the administration of justice. Mr Fitzgerald appears, though in places his language is somewhat opaque, to be alleging various contempts of both the second and third type.

37. Mr Howard submits that Mr Fitzgerald makes wild and fanciful allegations that are either unsupported by the evidence or in some cases demonstrably wrong. I agree. He submits that none of Mr Fitzgerald's allegations as they have been pleaded and particularised by him in his witness statements amount to a prima facie case of

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[10] In his email dated 8 August 2016 (see paragraph 71 below) Mr Fitzgerald says this: "In your Annexe A you set out in full my Affidavit in Committal of solicitor Frances Hughes dated 27 November 2015 and lodged with your court on that date. You refer to its contents elsewhere in Draft Judgement. Please confirm that it is made in the required format of the Court of Protection Practice Direction in so far as a Litigant-in-Person can be reasonably expected to comply with the Practice Direction." I decline to provide the confirmation Mr Fitzgerald seeks. I draw attention to what I had said, and say, in paragraph 33 below.

contempt capable of being substantiated at trial (there is, as it were, he says, simply no case fit to go to a jury) so that Mr Fitzgerald's application can, and therefore should, be dismissed *in limine* and without Ms Hughes being required to give evidence in her defence. I agree.

38. In my judgment there is not the slightest arguable merit in any of the 17 alleged contempts set out in Mr Fitzgerald's witness statement dated 27 November 2015. All of them are devoid of any remotely arguable factual substance and most of them are equally devoid of any legal substance. I can deal with them in turn quite briefly:

    i) Allegation 1 is meaningless and, if it has any meaning at all, absurd.

    ii) Allegations 2-4 and 17 are of "obstruction of" various of my orders. Comparison of the allegations with the terms of the relevant orders demonstrates that the matters alleged do not involve either breach of or non-compliance with the orders. Moreover, the allegations of "obstruction" are groundless and, even if established, would not amount to improper interference with the administration of justice.

    iii) Allegations 5, 7, 9-10 and 14-15 are of "contempt of" or "non-compliance with" an order (allegation 5), various "directions" (allegations 7, 10, 14-15) and my judgment (allegation 9). Comparison of the allegations with the terms of the relevant orders demonstrates that the matters alleged do not involve either breach of or non-compliance with any of the orders. Moreover, the allegations are groundless and, even if established, would not amount to improper interference with the administration of justice.

    iv) Allegations 6 and 8 are of "improperly" initiating process. Whatever these allegations mean, they are devoid of any remotely arguable factual or legal substance.

    v) Allegations 11-13 are of "interfering with the administration of justice." The allegations, so far as they allege contempt, are devoid of any remotely arguable factual substance and in any event, as pleaded, do not in law constitute any contempt of the Court of Protection.

    vi) Allegation 16 is, as a matter of law, capable of constituting a contempt. But it is devoid of any remotely arguable factual substance.

39. Again, in my judgment, there is not the slightest arguable merit in any of the 10 alleged contempts set out in Mr Fitzgerald's witness statement dated 6 January 2016. Again, none of them has any remotely arguable factual substance and most of them are equally devoid of any legal substance. Insofar as they allege "contempt" of various orders (allegations (1)-(8) I repeat what I have said in paragraph 38(iii) above. In relation to allegations (9)-(10) I repeat what I said in paragraph 38(v) above.

40. In my judgment Mr Fitzgerald's application is, in all its aspects, misconceived, devoid of factual merit, in major part legally groundless and totally without merit. His allegations against Ms Hughes are scurrilous, fatuous and should never have been made. His application for her committal is a farrago of nonsense.

41. I refused Mr Fitzgerald's application for an adjournment because it was totally without merit. He is an articulate and intelligent man, who had had ample opportunity to formulate a valid claim if he had one. My order dated 11 November 2015 had spelt out exactly what he had to do. He had failed to comply with that order and come up with a farrago of nonsense, making allegations which, as I have said, were scurrilous and fatuous and should never have been made. There was not the slightest reason to believe – and Mr Fitzgerald said nothing to make me think – that, if given time, he would be able to formulate a proper case. There was no reason at all why Ms Hughes should be exposed to any prolongation of this nonsense.

42. Manifestly, in the circumstances, justice demanded that the general rule as to costs in rule 156 be dis-applied and that all the costs of this misconceived and meritless application be borne by Mr Fitzgerald, and, moreover, on the indemnity basis sought by Mr Howard.

43. As I have mentioned, the schedule of these costs had been sent to Mr Fitzgerald on 10 March 2016. The total amount of £56,081.40 (inclusive of VAT) was divided as between £25,222.20 (inclusive of VAT) solicitors' costs and £30,859.20 (inclusive of VAT) counsel's fees. Given the very grave nature of the allegations being made against her, this was, in my judgment, plainly a case where Ms Hughes was justified in briefing both Leading and Junior Counsel and in expecting Mr Fitzgerald to pay their fees. Although given the opportunity, Mr Fitzgerald had difficulty in articulating or making good any focused challenge to the detailed contents of the Schedule. There was no basis for disputing that the work had been done as alleged, or that the work actually done was reasonably required to be done, nor, as it seemed to me, any sensible basis for challenging the fees being charged by counsel. Mr Fitzgerald suggested that the various solicitors' charging rates were perhaps on the high side and that work done by partners could have been done, at lower hourly rates, by assistant solicitors. All in all, I was left in a situation where, having been appropriately invited by Mr Howard to perform a summary assessment, I had to do my best, inevitably adopting a somewhat impressionistic approach. In the event I concluded that, all things considered, I should summarily assess the costs in the sum of £55,000 (inclusive of VAT).

Wasted costs

44. I deal next with Mr Fitzgerald's application for a wasted costs order against Hughes Fowler Carruthers.

45. I can take this quite shortly. Quite apart from the other defects in the 'application' to which I have already drawn attention, Mr Fitzgerald, as Mr Howard points out, has not produced a schedule of the costs he seeks; that is a direct breach of the order I had made on 11 November 2015. But there are much more fundamental problems with Mr Fitzgerald's case.

46. The simple reality is that, on Mr Fitzgerald's own case, this is not in truth an application for wasted costs or, indeed, for any kind of costs. In his witness statement dated 27 November 2015, Mr Fitzgerald identifies the sum claimed as being £200,000, representing:

> "three years loss of maintenance of £25,000 per year for the years 2013, 2014 and 2015, and five years loss of maintenance for the years 2016-2020 caused by the breakup of my marriage for which Hughes Fowler Carruthers' irresponsible and negligent conduct is the cause."

He continues:

> "Frances Hughes has pursued a strategy of "costs intimidation" against a self-represented litigant-in-person with the intention of depriving that litigant-in-person of his home, his livelihood and his maintenance, and that she has acted for no other purpose than her own enrichment … Frances Hughes has intentionally sought to destroy my marriage in order to achieve this end. I believe the court is justified in imposing a wasted costs order in the sum of £200,000 on her firm."

He concedes in terms that "I have never at any time had any legal costs of my own." In his witness statement dated 6 January 2016 Mr Fitzgerald invites me:

> "to award exemplary and punitive damages in the form of wasted costs order against her and her firm."

47. In my judgment Mr Fitzgerald's application is, self-evidently, utterly misconceived and totally without merit. He convicts himself out of his own mouth. What he wants are exemplary and punitive damages for the alleged destruction of his marriage. That is, as he himself formulates it, a claim for damages. It is not a claim for costs, let alone for wasted costs. On that ground alone, his application was misconceived and doomed to inevitable failure. I should add that despite the vast amount of material Mr Fitzgerald has put before me, it is perfectly obvious that there is, as in other allegations he has made against her, no factual merit in these allegations against Ms Hughes, allegations which, like the others, are, in my judgment, scurrilous and fatuous and which should never have been made. I agree with Mr Howard's characterisation of Mr Fitzgerald's evidence as "littered with allegations that are (i) unfounded, (ii) fanciful, (iii) scurrilous, (iv) lack any specificity of detail and (v) irrelevant." The simple reality is that Mr Fitzgerald has identified no legal or factual basis for any claim against Hughes Fowler Carruthers, whether for costs or otherwise.

48. I refused Mr Fitzgerald's application for an adjournment because it was totally without merit. He is an articulate and intelligent man, who had had ample opportunity to formulate a valid claim if he had one. My order dated 11 November 2015 had spelt out exactly what he had to do. He had failed to comply with that order and come up with a farrago of nonsense, making allegations which, as I have said, were scurrilous and fatuous and should never have been made. There was not the slightest reason to believe – and Mr Fitzgerald said nothing to make me think – that, if given time, he would be able to formulate a proper case. There was no reason at all why Ms Hughes and Hughes Fowler Carruthers should be exposed to any prolongation of this nonsense.

49. Manifestly, in the circumstances, justice demanded that the general rule as to costs in rule 156 be dis-applied and that all the costs of this misconceived and meritless

application be borne by Mr Fitzgerald, and, moreover, on the indemnity basis sought by Mr Howard.

50. As I have mentioned, the schedule of these costs had been sent to Mr Fitzgerald on 10 March 2016. The total amount of £45,914.40 (inclusive of VAT) was divided as between £25,276.80 (inclusive of VAT) solicitors' costs and £20,572.60 (inclusive of VAT) counsel's fees. Given the very grave nature of the allegations being made against them, this was, in my judgment, plainly a case where Ms Hughes and Hughes Fowler Carruthers were justified in briefing both Leading and Junior Counsel and in expecting Mr Fitzgerald to pay their fees. Although given the opportunity, Mr Fitzgerald had difficulty in articulating or making good any focused challenge to the detailed contents of the Schedule. There was no basis for disputing that the work had been done as alleged, or that the work actually done was reasonably required to be done, nor, as it seemed to me, any sensible basis for challenging the fees being charged by counsel. Mr Fitzgerald suggested that the various solicitors' charging rates were perhaps on the high side and that work done by partners could have been done, at lower hourly rates, by assistant solicitors. All in all, I was left in a situation where, having been appropriately invited by Mr Howard to perform a summary assessment, I had to do my best, inevitably adopting a somewhat impressionistic approach. In the event I concluded that, all things considered, I should summarily assess the costs in the sum of £37,000 (inclusive of VAT).

The appeal against SJ Lush's costs order

51. These are the costs referred to in paragraph 8 of the order dated 19 December 2013. The very detailed Bill of Costs put forward by C shows the total amount claimed as being £127,465.59 net, after deduction of the sum of £7,500 allowed by SJ Lush.

52. As formulated by Leading Counsel then acting for Mr Fitzgerald and set out in the schedule to the order I made on 19 December 2013, there are six grounds of appeal. The first (paragraph B4 in the schedule) is that Mr Fitzgerald was given no opportunity to address SJ Lush before the costs order was made, and that accordingly the order was made unfairly and in breach of natural justice. Mr Clarke denies that this was so, but does not object to my considering the matter afresh. Adopting a pragmatic view, I am content to adopt this approach though without, I make clear, making any finding that there is any merit in this ground of appeal.

53. I turn therefore to consider the other five grounds of complaint, exercising my discretion afresh:

    i) Ground B5: It is said, correctly, that SJ Lush did not impugn Mr Fitzgerald's good faith. It is asserted that, because he acted in good faith and raised what were said to be a number of legitimate points in the interests of A, no order for costs should have been made against Mr Fitzgerald. I do not agree. Rule 159 does not require proof of bad faith, thought its absence is no doubt relevant. I agree with SJ Lush that most of the matters pursued with such vigour by Mr Fitzgerald (and I agree with SJ Lush's characterisation of them, while noting, as Mr Clarke points out, that there is no appeal against the part of SJ Lush's findings which I have quoted in paragraph 3 above) were irrelevant to the only issue to be determined. The "legitimate points" prayed in aid in paragraph B5

were, in large part, irrelevant. What SJ Lush described as the "sensible reasons" put forward by Mr Fitzgerald in his challenge to C's appointment were convincingly answered by SJ Lush in a part of his judgment (paragraphs 45-55) with which I find myself in complete agreement. The simple fact, in my judgment, is that Mr Fitzgerald chose to oppose C's appointment in a way which was, for the most part, utterly unreasonable and which had, as a direct consequence, the grotesque driving up of the costs. If ever there was a case for the application of rule 159, this was that case. I cannot improve upon the way in which SJ Lush explained why the order should be made. I agree with both his reasoning and his conclusions, including his reasons for determining the appropriateness of the figure of £7,500 for which he made allowance.

ii) Ground B6: It is asserted that, because SJ Lush placed reliance upon the costs warning he had issued on 8 May 2013, any order for costs against Mr Fitzgerald should have been limited to costs incurred thereafter. I do not agree. The giving of a costs warning is not a pre-requisite to the application of rule 159, and the fact that such a warning is given cannot immunise a litigant from the application of rule 159 to previously incurred costs. Moreover, it is not as if the giving of the costs warning induced Mr Fitzgerald to moderate his behaviour in the slightest. He simply carried on regardless.

iii) Ground B7: It is asserted that no order for costs should have been made against Mr Fitzgerald given that he "had at no stage been given any indication as to the scale of the costs he was at risk of having to pay", alternatively, that the costs "should have been capped at a reasonable foreseeable sum so as to not to permit the exorbitant claim for £127,500." There is nothing in either of these points. There is no requirement, whether in law or in practice, for someone in Mr Fitzgerald's position to be given such an indication. And the second point is met by the fact that the order (that is, both the order that SJ Lush made and the order I made) provides for a detailed assessment of the costs, so there is no risk of Mr Fitzgerald being required to pay anything unreasonable, let alone exorbitant.

iv) Ground B8: It is asserted that, in breach of the principles laid down in *Re RC deceased* (2010) COPLR Con Vol 1022, para 73, SJ Lush made no inquiry of Mr Fitzgerald as to his means to pay any order for costs and that, if he had done so, the award "would have been capped at a more reasonable and proportionate level." The short answer to this is that, in my judgment, *Re C* lays down no principle requiring such an inquiry before rule 159 is applied, and the court can, as here, properly apply rule 159 without first conducting such an inquiry.

v) Ground B9: Finally, it is asserted that SJ Lush's "open-ended order" has "effectively left the deputy's lawyers free to charge a grossly disproportionate and unreasonable sum" and that the court should now intervene to ensure that Mr Fitzgerald is not "disproportionately punished for objecting to" C's appointment as A's deputy. This is simply a variant on Ground B7. I reject it for the reasons already given.

54. Mr Fitzgerald, in his position statement dated 21 March 2016,[11] identifies the "three principle [sic] reasons" why C should not be awarded her costs as being (i) the "dangerous precedent" which he says will be set in awarding costs in the Court of Protection on what he calls a 'success follows the event' principle, (ii) C's "conduct on obtaining the deputyship and in exercising it", and (iii) the impossibility of my conducting a just assessment of the Bill of Costs. There is nothing in any of these points. As to the first, the present case is simply an application of the jurisdiction conferred by rule 159 – no more and no less; the second, which for reasons that will be apparent is devoid of factual merit, is in any event simply irrelevant; the third I have already dealt with – there is to be a detailed assessment. I should point out, in this connection, that the sum I directed by way of interim payment – £60,000 (inclusive of VAT) – was somewhat less, expressed as a percentage, than what is often conventionally directed by way of interim payment.

55. Accordingly, while allowing Mr Fitzgerald's appeal from the order of SJ Lush, and exercising my discretion afresh, I found myself at the end of the day in agreement with SJ Lush's decision and reasoning.

C's other applications for costs

56. These applications relate to the various costs reserved by paragraph 11 of the order dated 19 December 2013, paragraph 5 of the order dated 10 June 2014, paragraph 5 of the order dated 13 November 2014 and paragraph 3 of the order dated 20 January 2015. I deal with them in turn.

57. In certain instances, Mr Clarke submits that the general rule in rule 156 should be disapplied and that the costs (or some part of them) should be directed to be paid by Mr Fitzgerald, on the standard basis. He does not seek indemnity costs.

58. Mr Fitzgerald, for his part, did not seek any order in relation to any of these costs.

59. Paragraph 11 of the order dated 19 December 2013: Mr Clarke did not seek any order against Mr Fitzgerald in relation to these costs. He submitted that neither party had acted unreasonably and that C should, in the usual way, have her costs out of A's estate. I agree. Mr Fitzgerald sought to argue that C should not have her costs. I do not agree. The order I made on 24 March 2016 so provided.

60. Paragraph 5 of the order dated 10 June 2014: Mr Clarke seeks an order for costs against Mr Fitzgerald on the footing that his objections to the letter of instruction as drafted by Hughes Fowler Carruthers, and approved by me with only minor amendments (see

[11] In his email dated 8 August 2016 (see paragraph 71 below) Mr Fitzgerald says this: "You omit all mention of my written submissions to your court of 21 March. At hearing on 16 March you directed I file written submissions in Response to Ian Clarke Counsel for [C] by 21 March. My written submissions to your court of 21 March detail how the tax evasion practiced by [C] on our aunt's estate is proved on documents filed by [C] herself with your court. Please Report the contents of my written submissions to you of 21 March in Final Approved Judgement." This is simply wrong: I referred to Mr Fitzgerald's position statement in some detail in paragraph 18(iii) above, and both there and in this paragraph I actually quote parts of it. However, as I explained in paragraph 18(iii) above, much of his position statement "is irrelevant to anything I have to determine", being taken up with "wild and scurrilous allegations", for example of tax fraud on the part of C and complaints of "falsification" and "wrongdoing" on the part of Ms Hughes. Included in Mr Fitzgerald's position statement are some specific complaints in relation to particular items in the Bill of Costs. These, however, are matters for consideration by the Taxing Judge on the detailed assessment I have directed, not by me.

paragraph 8 above), were both unreasoned and unreasonable. While I can see the force of Mr Clarke's submission, and confess that on this point my mind wavered, I was not at the end of the day persuaded that there was justification for dis-applying rule 156. Mr Fitzgerald's reasons for arguing that C should not have her costs lack both coherence and merit. Accordingly, the order I made on 24 March 2016 provided for C to have her costs out of A's estate.

61. Paragraph 5 of the order dated 13 November 2014: These costs, as we have seen (paragraph 9 above) relate to two applications made by C: one, dated 24 October 2014, seeking the instruction of Professor Howard in place of Dr T; the other, dated 5 November 2014 seeking an injunction against Mr Fitzgerald. Mr Clarke made no application in relation to the second. In relation to the first, he sought an order for costs against Mr Fitzgerald because he had unreasonably opposed the instruction of Professor Howard (on the basis that he did not have suitable expertise) and further unreasonably and unnecessarily increased the costs by bombarding Hughes Fowler Carruthers and Professor Howard with what, Mr Clarke said, was aggressive and threatening correspondence. I agree with Mr Clarke that Mr Fitzgerald's objection to Professor Howard, a manifestly suitable expert, was unreasonable. I am therefore entitled, if persuaded that this is the just outcome, to direct that rule 156 be dis-applied. In my judgment, justice to C demands that Mr Fitzgerald be ordered to pay these costs. Why, after all, should A's estate be diminished in consequence of Mr Fitzgerald's unreasonable – in my judgment, wholly unreasonable – objection to the appointment of an expert of some eminence and manifest suitability? Accordingly, I ordered Mr Fitzgerald to pay C's costs of the application dated 24 October 2014 (but not of the application dated 5 November 2014) to be assessed if not agreed on the standard basis. The total costs claimed amounted to £14,032.60 (inclusive of VAT). Mr Clarke sought an interim payment. I directed an interim payment in the sum of £7,000 (inclusive of VAT), taking into account in fixing this figure that the issue as to the extent to which the costs should reflect the volume and content of Mr Fitzgerald's correspondence made it inappropriate to take a higher percentage. Points raised by Mr Fitzgerald go if at all, in my judgment, to the detailed assessment of these costs, not to the question of principle as to whether he should be liable.

62. Paragraph 3 of the order dated 20 January 2015: Mr Clarke submitted that it was unreasonable for Mr Fitzgerald to pursue the capacity issue in the way he did having received Professor Howard's *first* report. He accepted that Mr Fitzgerald should not have to pay all the costs. He submitted that Mr Fitzgerald should, in accordance with rule 159, be ordered to pay (i) the costs of obtaining Professor Howard's *second* report and (ii) 75% of each of C's solicitors costs of attendance on Mr Fitzgerald and their costs of attending the hearing on 20 January 2015, Professor Howard's costs of attending that hearing and counsel's fees for that hearing. I agree with Mr Clarke that Mr Fitzgerald's pursuit of the capacity issue was to an extent unreasonable (see what I said in my judgment quoted in paragraph 13 above), but not to the extent suggested by Mr Clarke. There was, in my judgment, no reason why Mr Fitzgerald should have to pay the costs of obtaining Professor Howard's second report. And in my judgment, having regard to all the circumstances, and comparing how the hearing would have proceeded if Mr Fitzgerald had by then been acting reasonably with how it actually proceeded, it seemed to me that a figure of 50% better reflected the realities and the justice of the case than the figure of 75% proposed by Mr Clarke. Accordingly, I ordered Mr Fitzgerald to pay 50% of the costs in (ii), but not the costs in (i). The total

costs claimed in respect of the items in (ii) amounted to £54,582 (inclusive of VAT): see paragraph 12.4 of C's skeleton argument dated 16 December 2015. One-half of that would be £27,296. Mr Clarke sought an order for detailed assessment and an interim payment. I directed an interim payment in the sum of £16,000 (inclusive of VAT).

The charging orders

63. As a matter of law, I had jurisdiction to make interim charging orders in relation to each of the costs orders I had made against Mr Fitzgerald, and notwithstanding that the time for payment had not arrived. It was, in all the circumstances, just and fair that I do so. It was known that Mr Fitzgerald was involved in acrimonious divorce proceedings which exposed his interest in the former matrimonial home to potential claims by other creditors. There was no reason why those of his creditors (as they now are) who were before me should not be given the security of interim charging orders and every reason why they should.

The Extended Civil Restraint Order

64. As foreshadowed in his case summaries dated 9 March 2016, Mr Howard sought an extended civil restraint order against Mr Fitzgerald for two years. It is clear that the statutory requirements for the making of such an order were satisfied. And in the light of Mr Fitzgerald's extreme behaviour over an extended period (I have in mind in particular the matters referred to in paragraphs 2, 6, 18(iii), 38-40 and 47 above) the imperative need for such an order to enable the court to control any further proceedings in relation to these matters, whether in this court or elsewhere, is compellingly made out. Those who have been harried by Mr Fitzgerald are entitled to be protected. The court is entitled to protect itself, its processes and, indeed, other litigants from having so much of its time taken up – wasted – by Mr Fitzgerald.

65. Accordingly, I made the order I have referred to, restraining Mr Fitzgerald from issuing claims or making applications in any court "concerning any matter involving or relating to or touching upon or leading to the proceedings in which this order is made or the subject matter of or any application or proposed draft application therein." But, as I have mentioned, I expressly excluded from the ambit of this order the proceedings in the family court between Mr Fitzgerald and his wife and certain proceedings brought against Mr Fitzgerald in the Chancery Division. These were proceedings brought *against* Mr Fitzgerald and of which I knew very little. It would not have been right for me, sitting in the Court of Protection, to prevent him participating in this litigation as he might think fit. *If* he abuses that liberty, no doubt an appropriate application can be made elsewhere.

Other matters

66. Amongst the deluge of emails sent to my Clerk by Mr Fitzgerald, many relate to his many and various complaints in connection both with the matrimonial proceedings in the family court and with other litigation in which, apparently, he is or may be involved. I mention this simply to make clear that the *only* proceedings concerning Mr Fitzgerald in which I have at any time been judicially involved are these proceedings in the Court of Protection. I have, and have had, no judicial involvement either in the proceedings in the family court or in any proceedings in any other court.

The costs reserved by the order of 22 March 2016

67. As set out in paragraph 27(i) above, one of the orders I made on 22 March 2016 reserved C's costs of the hearing on 15, 16 and 22 March 2016 and gave directions for those reserved costs to be determined without a hearing once the parties had filed further written submissions by 29 March 2016. By then, I had announced my decision in relation to the balance of C's application (see paragraph 28(i) above).

68. In the email dated 24 March 2016[12] in which I announced that decision, I said that "In relation to the costs of the hearing I am provisionally minded, but subject to further submissions, to order Mr F[itzgerald] to pay 75% of the costs." The response from C's solicitors, in an email sent the same day, was that in a 'without prejudice save as to costs' email sent to Mr Fitzgerald on 15 February 2016, C had made an offer as to

[12] In his email dated 8 August 2016 (see paragraph 71 below) Mr Fitzgerald says this: "Please confirm immediately that your email of 24 March (to which you refer in your Paragraph 68) was not sent to me, but sent only to solicitors for [C]. Please confirm that I was given no knowledge of its contents and no opportunity to respond. Please confirm that I have been given no opportunity to made the "further submissions" referred to by you in your previously undisclosed email of 24 March." In his email dated 9 August 2016 (11:34) Mr Fitzgerald says this: "As presiding judge your responsibility is to ensure the parties are placed on an equal footing. This is the fundamental principle of all civil proceedings in all Divisions and jurisdictions in England and Wales. There can scarcely be an example of a judge paying less regard to this fundamental principle than for that judge to enter into "one-sided" deliberations with the legal representatives of one party to the utter exclusion of the other. When these deliberations involve costs against the excluded party which are to met by deprivation of his equity in his home, I believe this to be a matter of public concern. When these deliberations are conducted by a judge who is aware of provable allegations of tax-evasion against the favoured party, I believe this to be a resignation issue." In his email of 9 August 2016 (12:55) Mr Fitzgerald says: "I believe your "one-side" deliberations with [C]'s legal representatives conducted at a time when you were aware of provable allegations of tax-evasion against her and of immediate relevance to those deliberations to be a resignation issue." The facts, as shown by the emails sent at the time, of which I have contemporaneous copies, are as follows: My email of 24 March 2016 was sent to Mr Clarke and Hughmans at 08:53, with a request that it be copied to Mr Fitzgerald. It was forwarded by Hughmans to Mr Fitzgerald the same day at 09:49. The submissions by Hughmans in relation to the costs were sent to me by an email the same day at 10:24, that email also being copied to Mr Fitzgerald. Since I drafted this footnote, there have been further emails. An email sent by Mr Jenkins of Hughmans to Mr Fitzgerald on 9 August 2016 (14:47) reads as follows: "The events of 22 and 24 March 2016 were as follows: 1. On 22 March 2016 the President made an Order (a copy of which is attached) (a) allowing your appeal and exercising his discretion afresh (b) reserving his judgment on the remaining issues in dispute and (c) ordering each party to file and serve short written submissions as to the costs of the March 2016 hearing by 4pm on 29 March 2016. 2. On 24 March 2016 at 08.53 Mr Clarke and I received an email from the President notifying us of his decision in relation to the remaining issues in dispute and of his provisional view as to the costs of the March 2016 hearing. He asked us to submit a revised draft order by email, with copy to you, and also to provide you with a copy of his 08.53 email. 3. At 09.49 I sent an email to the President attaching the draft order as requested and asking for a further charging order. I copied you into that email, which also appended a copy of the email Mr Clarke and I had received from the President at 08.53. A further copy of my email is attached. 4. At 10.24 I sent a further email to the President with our submissions as to the costs of the March 2016 hearing. Again, I copied you into that email. A further copy of that email is also attached. You will note that there have been no "one sided deliberations" as you have alleged. You were provided with copies of the emails at the time." Mr Fitzgerald replied to Mr Jenkins (9 August 2016, 15:27): "Both you and the President are aware that I was not copied in to your emails of 09.49 and 10.24 of 24 March." He followed this with a further email to me (9 August 2016, 15:35): "I trust you will have the judicial integrity to confirm that Hughmans Solicitors' emails referred to below were not copied to me at the time and you will not seek to rely on the questionable evidence of a solicitor who in breach of his professions code of conduct has been assisting his clients in concealment of serious fraud and tax-evasion." I make no observations in relation to Mr Fitzgerald's attacks on my integrity, beyond emphasising that the facts, as I believed them to be at time and when I prepared the draft of this judgment, and as I now believe them to be, are as I have set them out above. Despite Mr Fitzgerald's bluster in relation to Hughmans, there is, in my judgment, no substance in any of the allegations he makes against either the firm or Mr Jenkins.

costs which, in the aggregate, they said, was handsomely beaten by the various orders I had made. Thus, although they had sought C's costs of the hearing on 10 June 2014 (which I refused), they had offered to accept 50% of the hearing before SJ Lush (as against the 100% I ordered) and to forego the costs of the hearing on 20 January 2015 (as to which I awarded 50%). There was no response from Mr Fitzgerald, who filed no written submissions either (as directed) by 29 March 2016 or at all.

69. In the circumstances it is, in my judgment, fair and just that I order Mr Fitzgerald to pay the reserved costs in full.

70. These costs, according to two schedules of costs which have been filed, one relating to the costs of Hughes Fowler Carruthers down to 31 January 2016 in the sum of £18,911.68 (inclusive of VAT), and the other to the costs of Hughmans thereafter in the sum of £51,022.80 (inclusive of VAT), amount in all to £69,934.48 (inclusive of VAT). I am invited to assess these costs summarily. In all the circumstances I think there should be, as in relation to the other costs claimed by C, a detailed assessment, on the standard basis. I will direct an interim payment of £35,000 (inclusive of VAT) on account. I will also, as requested, make a further interim charging order in the sum of £35,000 in respect of Mr Fitzgerald's interest in his former matrimonial home.[13]

Postscript

71. This judgment was sent to the parties in draft on 6 August 2016 with the usual invitation to identify any "typing corrections or other obvious errors." With the exception of Mr Fitzgerald, no-one suggested any corrections or additions, except for the insertion of a date which was missing in the draft of paragraph 26 above. On 8 August 2016 I received by email from Hughmans drafts of the orders they proposed I should make to give effect to my decisions in paragraph 70 above.[14] Subsequently on 8 August I received from Mr Fitzgerald an email identifying what he described as "a number of errors, omissions, mistakes and lapses of memory" which he asked me to correct. None of his observations call for any correction to the judgment or any additions to the text. For the sake of completeness, I set out each of his observations, with my response, in a footnote to the relevant part of the judgment. Subsequently, on 9 August 2016, I received seven further emails from Mr Fitzgerald (timed at 11:34, 11:42, 12:55, 13:59, 15:27, 15:35 and 15:52). Except in relation to one point,[15] none of his observations call for any correction to the judgment or any additions to the text. Again, for the sake of completeness, I set out each of his observations (except where they are merely repetitious), with my response, in a footnote to the relevant part of the judgment.

72. The judgment as finalised is being sent to the parties by email on 9 August 2016 at approximately 17:00. Because this is after close of business I will treat it as having been handed down, in private, I emphasise, on 10 August 2016. I invite the parties now to make such submissions as they wish in relation to whether or not the judgment

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13 See further, paragraph 28 above, footnote 8.

14 In his email dated 8 August 2016 (see below) Mr Fitzgerald says this: "Please confirm that I was not given any prior knowledge of Hughmans' Draft Order of today's date before circulation of your Draft Judgement on Saturday past 6 August. I would be grateful if you would give this confirmation this week." This is self-evidently correct; as Hughmans' email of 8 August 2016 makes clear, it was sent in response to their receipt of the draft judgment.

15 See paragraphs 18(i), 18(ii) and 23, footnotes 4-7, above.

as I have handed it down in private should be released for publication. My preliminary view, subject to considering the parties' submissions, is that, in accordance with usual practice, the judgment should be released for publication.

Annexe

73. Particulars of contempt as set out in Mr Fitzgerald's witness statement of 27 November 2015:

> "1. Accepting Instructions in Violation of Her Own Compliance (21st February 2014 and continuously thereafter)
>
> 2. Obstruction of Implementation of Para 2. of the President's Order of 19th December 2013 (21st February 2014 continuously until 13th November 2014)
>
> 3. Obstruction of Implementation of Para 2.a of the President's Order of 19th December 2013 (18th June 2014 to 13th November 2014)
>
> 4. Obstruction of Implementation of Para 4 of the President's Order of 19th December 2013 (21st February 2014 until 10th June 2014)
>
> 5. Contempt of the President's Order of 10th June 2014 Appointing Dr [T] Jointly Instructed Expert
>
> 6. Improperly Obtaining Injunction on the Respondent In Order to Obstruct Proceedings (10th June 2014)
>
> 7. Non-Compliance with the President's Direction to Reintroduce Injunction Application of 13th November 2014 in Proper Legal Form (13th November and continuously thereafter)
>
> 8. Improper Filing of COP1 Applications in the Patient's Property and Affairs and Health and Welfare to a Court Without Jurisdiction (14th January 2015 to 20th January 2015)
>
> 9. Contempt of the President's Reported Judgment of 20th January 2015 by Pursuance of Unlawful COP1 Application in the Patient's Health and Welfare in a Court Without Jurisdiction (20th January 2015 and continuously thereafter)
>
> 10. Contempt of the President's Direction to the Parties of 20th January 2015 to Seek Consent In All Areas Possible In Furtherance of the Court of Protection's Overriding Objective (20th January 2015 to 21st August 2015)

> 11. Interfering With the Administration of Justice in the President's Court By Deliberately Misleading the Respondent's Wife As To The Factual Position With Regard To Her Claim For Financial Remedy In Family Division Proceedings (13th January 2015 to 12th August 2015)
>
> 12. Interfering With the Administration of Justice in the President's Court By Disclosing Information Confidential to the President's Court to Hughmans Solicitors For The Purposes of Depriving the Respondent of His Home (13th November 2014 to 19th March 2015)
>
> 13. Interfering With the Administration of Justice in the President's Court By Releasing Information Confidential to the President's Court to Hughmans Solicitors For The Purposes of Seeing the Respondent Prosecuted For Contempt of Court (Unknown Date in May 2015)
>
> 14. Contempt of the President's Direction on Applicant's Counsel to Draft His Order At Hearing of 20th January 2015 As Per Determination and Findings (20th January 2015 to 26th January 2015)
>
> 15. Contempt of the President's Direction on the Parties To Co-operate In The Drafting of His Procedural Directions Order for Further Proceedings (20th January 2015 to 21st August 2015)
>
> 16. Filing Dishonest and Misleading Evidence Under Her Statement of Truth To the President's Court (14th January 2015 and thereafter)
>
> 17. Obstruction of the President's Order of 21st August 2015 Directing Deputy's Replacement To Be Determined By Order of SJ Lush Or The District Court (21st August 2015 continuously to present)"

74. Particulars of contempt as set out in Mr Fitzgerald's witness statement of 6 January 2016:

> "(1) Contempt of the President's Order of 19th December 2013 by:
>
> (a) Taking instructions in a case prohibited by her compliance with a view to seeing that order's implementation frustrated
>
> (b) Taking instruction in the Court of Protection at a time when prohibited from doing so by the provisions of Mental Capacity Act 2005

(c) Drafting a Letter of Instruction intended to see that order's implementation frustrated

(d) Obstructing Annabel's assessment by the initially jointly agreed expert Dr Janet Grace

(2) Contempt of the President's Order of 10th June 2014 by obtaining that order naming Dr [T] as jointly instructed independent expert to the President's court and then frustrating its implementation with a view to seeing justice defeated in the President's court; the Patient's best interests improperly overridden; and her human rights violated

(3) Contempt of the President's Order of 13th November 2014 to reintroduce Applicant's COP9 injunction application in proper form and with the intention of "leaking" confidential information concerning that hearing in the hope of seeing justice defeated in the President's court. (The President gave further direction that this COP9 Application should be reintroduced in his court on 20th January 2015, and Frances Hughes is in contempt of this direction also.)

(4) Contempt of the President's Order of 10th December 2014 ordering the Patient's capacity to manage her property and affairs be determined in his court on 20th January 2015 by introduction COP1 Application in property and affairs in the District Court of Protection lacking the mandatory COP3 Assessments of Capacity in advance of the President's determination reserved to himself

(5) Contempt of the President's Determination of 20th January 2015 that her COP1 Application in the Patient's health and welfare could not proceed as lacking the mandatory COP3 Assessment of Capacity

(6) Contempt of the President's Direction on the Parties of 20th January 2015 to Seek Agreement in Compliance with the Overriding Objective by:

(a) Seeking Respondent's agreement to Applicant's continuation as deputy when Applicant's evidence to the President was that she wished to resign

(b) Refusing contact for the purposes of agreement with the Respondent following the President's intervention by Order of 26th January 2015

(7) Contempt of the President's Order of 21st August 2015 directing the District Court of Protection to issue the orders necessary for the Applicant's resignation as Patient's deputy for

property and affairs by obstructing the District Court of Protection in doing so

(8) Contempt of the President's Order of 11th November 2015 directing Frances Hughes to give truthful evidence to his court by giving knowingly misleading evidence in her Affidavits of 16th December 2015

(9) Contempt of the President's Court by "Leaking" Confidential Information on Proceedings to Hughmans Solicitors on or before 20th November 2014; this being done with a view to seeing justice defeated in the President's court; the Patient's best interests overridden; and her human rights violated

(10) Contempt of the President's Court by Improperly Giving False Information in the Respondent's Divorce Proceedings with a view to seeking justice defeated in the President's court; the Patient's best interests overridden; and her human rights violated"