**IN CONFIDENCE**

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**The court is likely to wish to hand down its judgment in an approved final form. Counsel should therefore submit any list of typing corrections and other obvious errors in writing (nil returns are required) to the clerk to Sir Geoffrey Vos, Chancellor of the High Court, by email to , by on , so that changes can be incorporated, if the judge accepts them, in the handed down judgment.**

Neutral Citation Number: Double-click to add NC number

Case No: HC-2017-002064

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

The Rolls Building
The Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London EC4A 1NL

Date: Double-click to add Judgment date

**REDACTED VERSION**

**Before**:

**Sir Geoffrey Vos, Chancellor of the High Court**

**IN THE MATTER OF IAN STEWART-BRADY DECEASED**
**AND THE SENIOR COURTS ACT 1981**
**AND THE PUBLIC HEALTH (CONTROL OF DISEASE) ACT 1984**

**B E T W E E N**

**(1) Oldham Metropolitan Borough Council**
**(2) Tameside Metropolitan Borough Council**

**Claimants**

**and**

**(1) Robin Makin**
**(2) [REDACTED]**
**(3) Sefton Metropolitan Borough Council**

**Defendants**

**This note is to accompany the redacted judgment making clear that passages redacted have been removed at the judge's direction, but that the judgment will be published in an unredacted form when the judge so directs.**

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Mr Nigel Giffin QC (instructed by Hill Dickinson LLP) appeared for the claimants

Mr Richard Moore (instructed by E Rex Makin and Co) appeared for the first defendant

Ms Debra Powell QC (instructed by DAC Beachcroft LLP) appeared for the second defendant

Mr Louis Browne QC (instructed by Sefton Metropolitan Borough Council) appeared for the third defendant

Hearing dates: 9th and 10th October 2017

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# DRAFT JUDGMENT

**If this draft Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.**

**Sir Geoffrey Vos, the Chancellor of the High Court:**

Introduction

1. This claim concerns the question of whether certain orders should be made in respect of the disposal of the body of Ian Stewart-Brady, formerly Ian Brady (the "deceased"), one of the infamous Moors murderers.

2. The three alternative orders sought by the claimants are (i) to appoint the Oldham Metropolitan Borough Council ("Oldham") and the Tameside Metropolitan Borough Council ("Tameside") as administrators of the deceased's estate under section 116 of the Senior Courts Act 1981 ("Section 116") for the limited purpose of arranging for the disposal by the Sefton Metropolitan Borough Council ("Sefton") of the deceased's remains, alternatively (ii) that directions be given as to the disposal of the deceased's remains, alternatively (iii) a declaration that Sefton is obliged and entitled to cause the deceased's body to be buried or cremated pursuant to section 46(1) of the Public Health (Control of Disease) Act 1984 ("Section 46").

3. It will make this judgment more intelligible if I set out immediately the provisions of Sections 46 and 116. Section 46(1) provides that "[i]t shall be the duty of a local authority to cause to be buried or cremated the body of any person who has died or been found dead in their area, in any case where it appears to the authority that no suitable arrangements for the disposal of the body have been or are being made otherwise than by the authority". In this case, the relevant local authority is Sefton, which I re-joined as a party to these proceedings on the second day of the hearing in circumstances I shall shortly describe.

4. Section 116 provides that:-

> "(1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.
>
> (2) Any grant of administration under this section may be limited in any way the court thinks fit."

5. As things turned out at the hearing, the claimants sought an order that [REDACTED], be appointed as individual administrators for the limited purpose mentioned in place of Oldham and/or Tameside themselves. This change arose as a result of a contention made on behalf of the first defendant that letters of administration cannot be granted to bodies corporate like Oldham and Tameside unless they are trust corporations (which they are not). In the circumstances, I will not need to deal with this technical argument, since it is common ground that I can, at least in theory, make a grant of letters of administration to [REDACTED].

6. In addition to dealing with those issues, I shall give my reasons in this judgment for having ordered at the outset of the hearing on Monday 9th October 2017 that the proceedings should, subject to certain specific limitations and for limited periods, be heard in open court.

7. The competing positions of the parties are straightforward. The deceased died on 15th May 2017 at Ashworth high security psychiatric Hospital in the area of Sefton, having been incarcerated for many years after he received a sentence of life imprisonment for the Moors murders in the 1960s. He appointed Mr Robin Makin, a solicitor and the first defendant ("Mr Makin"), as his executor.

The claimants are concerned that Mr Makin has failed to make proper arrangements for the disposal of the remains of the deceased, now nearly 5 months after his death.

8. The second defendant is [REDACTED] ("X"). X has also made a cross-application for an order under the inherent jurisdiction of the court that if, within 28 days of the determination of the proceedings, the body has not been removed [REDACTED] by Mr Makin or another person so entitled, it should be permitted to arrange for its burial or cremation. X submits that the deceased's body should be lawfully and decently disposed of without further delay.

9. Mr Makin, as the deceased's designated executor, correctly claims that he is primarily entitled to dispose of the deceased's remains. As Hale J put the matter in *Buchanan v. Milton* [1999] 2 FLR 844 at pages 845-6:-

> "There is no right of ownership in a dead body. However, there is a duty at common law to arrange for its proper disposal. This duty falls primarily upon the personal representatives of the deceased (see *Williams v Williams* (1881) 20 ChD 659; *Rees v Hughes* [1946] KB 517). An executor appointed by will is entitled to obtain possession of the body for that purpose (see *Sharp v Lush* (1879) 10 ChD 468, 472; *Dobson v North Tyneside Health Authority and Another* [1997] 1 FLR 598, 602, obiter) even before the grant of probate. Where there is no executor, that same duty falls upon the administrators of the estate, but they may not be able to obtain an injunction for delivery of the body before the grant of letters of administration (see *Dobson*)".

10. Against that background, Mr Makin contended, until the hearing itself, that he had been attempting to dispose of the deceased's remains, but that he was justifiably "reluctant to give details to anyone as to what he is doing except as absolutely necessary". He claimed to have been hindered in that process by the other parties to these proceedings. Mr Makin submits that no injunction

has been sought against him, and even if it had, there would have been no basis on the available evidence for it to be granted. The claimant authorities are [REDACTED] away from the remains of the deceased and, therefore, have no standing to apply for an order under Section 46. In any event Mr Makin argues that his previous refusal to go into details of what he is trying to do in respect of arranging the deceased's disposal and funeral is obviously reasonable in the light of the public interest in the matter. As the remainder of this judgment will show, Mr Makin relented in the course of the hearing before me, and did, through his counsel, provide some details of how he intended to dispose of the deceased's body. He gave those details in the course of parts of the hearing that I permitted to take place in private.

The issues

11. After a number of changes of position in the course of the hearing, it seems to me that the following issues remain for my determination:-

i) Has the duty on Sefton under Section 46 been engaged? If so, how should it be carried out?

ii) Does the court have jurisdiction to make a partial administration order under Section 116 in favour of someone other than Mr Makin? If so, should it do so on the grounds that (a) special circumstances exist, and (b) it appears to the court to be necessary or expedient to do so?

iii) If the court is to appoint an administrator, who should be appointed?

iv) Can the court give detailed directions as to the disposal of the deceased's remains either under its inherent jurisdiction or under Section 116? If so, should it do so in this case?

v) If the court can and should give detailed directions as to the disposal of the deceased's remains, what directions are appropriate?

12. Before dealing in more detail with these issues, I should set out, so far as relevant, the factual background.

Factual Background

13. As I have said, the deceased died in the borough of Sefton, Merseyside on 15th May 2017. It appears that the deceased died leaving a will appointing Mr Makin as an executor. Mr Makin told me, through his counsel, that he had not yet applied for probate and that he did not intend to do so until after the disposal of the body, because the will would thereby become a public document. The court has not been shown a copy of the deceased's will.

14. On 16th May 2017, Mr Christopher Sumner, senior coroner (the "Coroner"), opened an inquest into the deceased's death. At the hearing, the Coroner said that he had received a request to release the deceased's body, but that he wanted certain assurances before doing so "as [public] emotions were [running] high". The assurances he sought were, first, that the person who asked to take over responsibility for the funeral had a funeral director and a crematorium able and willing to deal with the matter, and secondly, that the deceased's ashes would not be scattered on Saddleworth Moor (the location of some of Mr Brady's murders), which he said would be offensive. It appears

that the Merseyside Police may have expressed some concern to the Coroner about the potential for public disorder.

15. At the adjourned hearing of the inquest on 17th May 2017, the Coroner's officer is reported to have stated that he had spoken to Mr Makin, and that Mr Makin had said that there was "no likelihood" that the deceased's ashes would be disposed of on Saddleworth Moor, and that the suggestion that there had been a plan to do so was untrue.

16. On 18th May 2017, the Coroner issued a certificate authorising the mortuary to release the deceased's body. He had delayed doing so to allow for discussions between Mr Makin and Merseyside Police as to the arrangements that would be made, as a result of concerns about public order.

17. By 19th May 2017, the media were reporting suggestions that the deceased himself had wanted to be cremated and to have his ashes scattered in Glasgow. The Glasgow City Council said publicly that it would refuse any such request. It appears that private crematoria in Glasgow have also refused. It is also relevant to point out, for reasons that will later appear, that the Sun newspaper published an article on 19th May 2017 headed "Secrets of Brady's will: Ian Brady demands to be cremated to symphony charting killers' descent into hell then have his ashes dumped in Glasgow's River Clyde". The article went on to say that "the monster's ghoulish choice of Hector Berlioz's Symphonie Fantastique [the "Symphony"] tells of a killer haunted by his victim in the afterlife".

18. In response to public concerns that the deceased's ashes might be scattered in Tameside's area (which is an area also closely connected with the murders

committed by the deceased), Tameside wrote to Mr Makin on 19th May 2017 seeking his assurance that he did not intend to dispose of the deceased's remains within Tameside's area. On 24th May 2017, Oldham (which includes most of Saddleworth Moor) wrote in similar terms to Mr Makin. Mr Makin did not respond specifically to these requests or to the several reminders that were also sent, but he had of course already said something to the Coroner.

19. On 19th June 2017, Mr Makin emailed the claimants' solicitor's compliance officer complaining about their correspondence, saying that "…[t]here is no obligation on me to provide any comment and/or to respond to amongst other things fake news and speculation (of which I may become aware) and requests for information (in respect of which I have been inundated). For me to do so would be detrimental [including exacerbating the hysteria and, indeed, whatever is indicated could be exploited for commercial and political purposes] … Accordingly I am not making any further comment. As (and indeed if) I do so then I am anticipate what I may say is likely to be reported" (text and square and round brackets as in the original).

20. On 23rd June 2017, the claimants' solicitors sought an undertaking from X that it would not release the body of the deceased without giving them two days' notice. That undertaking was duly given on 26th June 2017.

21. On 11th July 2017, the claimant's solicitors sought unequivocal undertakings from Mr Makin not to dispose of the deceased's body in Oldham's or Tameside's areas and/or a clear and satisfactory description of the alternative arrangements that Mr Makin was able and willing to carry out, which might include allowing Sefton to dispose of the deceased's remains.

22. On 13th July 2017, Sefton wrote to the claimants confirming that it would "arrange for the disposal of the deceased's remains should it be required to do so by implementing the specific arrangements that it has for the purpose, the detail of such arrangements being a matter for its discretion". Sefton also wrote a second letter of the same date to the claimants setting out those "arrangements in place and the plans for the disposal of [the deceased's] body should [Sefton] be called upon to do so".

23. [REDACTED]

24. On 20th July 2017, these proceedings were issued against Mr Makin alone.

25. On 21st July 2017, Mr Makin wrote to Sefton asserting that he had made or was making suitable arrangements for the disposal of the deceased's body, but not providing any further details. On 26th July 2017, Sefton asked Mr Makin what arrangements he was making.

26. On 28th July 2017, Norris J ordered the hearing of the claim to be expedited, and that, if Mr Makin wanted to apply for privacy or anonymity of these proceedings, he should do so by application notice by 4th September 2017.

27. On 7th August 2017, Mr Makin responded to Sefton without stating what arrangements he intended to make for the disposal of the deceased's body, but suggesting that it was a private matter. This correspondence continued through August 2017 with Sefton repeating its request and Mr Makin not directly answering it.

28. On 5th September 2017, Master Price approved a consent order to the effect that "subject to any directions given by the judge at the hearing fixed for 9

October 2017 this claim shall be heard in private", and that a non-party may not inspect or obtain copies of any document from the court file without the permission of the court, and any non-party affected by the order may apply on notice to the parties to set aside or vary the order. No such application has been made.

29. On 5th September 2017, X gave notice to the claimants' solicitors that it was withdrawing the undertaking that it had given that it would not release the body of the deceased without giving them two days' notice.

30. On 8th September 2017, Sefton wrote to Mr Makin reiterating its request for him to say what he proposed to do with the deceased's body, so that it could respond accordingly.

31. On 18th September 2017, Master Price added X as the second defendant on its own application, and added Sefton as the third defendant of his own motion.

32. On 26th September 2017, Sefton issued an application notice seeking to be removed as a party to the proceedings, saying in paragraph 5 of its grounds that "[t]he dispute between the Claimants and [Mr Makin] does not directly affect Sefton. It will comply with the Order made by the Court on the Claimants' application. However, if the order of the court requires Sefton to act pursuant to Section 46, it reserves its position as to how precisely that statutory duty would be discharged by it".

33. On 27th September 2017, Deputy Master Cousins set aside Master Price's order joining Sefton as third defendant to these proceedings, reciting that no other party had objected to his doing so.

34. On 28th September 2017, the claimants' solicitors wrote to the clerk to Master Price saying that Sefton had, no doubt unintentionally, given the court the incorrect impression that the order removing Sefton as a party was one to which the other parties had consented and did not object. The claimants suggested that the order should be set aside, but no application was made to give effect to that suggestion, until I reinstated Sefton as third defendant on the second day of the hearing.

35. On 29th September 2017, Mr Makin put forward a draft order in an attempt to resolve the issues raised by these proceedings. The draft allowed for Sefton, if required, to provide its cremation and burial facilities to enable Mr Makin to "carry out his right and duty of affording the [deceased] a lawful and decent funeral". In fact, as Mr Makin's own fourth statement points out in its 5th footnote, the executor's duty is actually, in modern times at least, to provide a "decent disposal", rather than any kind of funeral. A funeral, as I pointed out in argument, is a ceremony. One definition is "a ceremony or service held shortly after a person's death, usually including the person's burial or cremation".

36. On Friday 6th October 2017, my clerk emailed the parties saying: "I have been asked by the Chancellor, who will be hearing this case on Monday, to inform you that he is concerned about the direction made by consent by Master Price that 'subject to any directions given by the judge at the hearing fixed for 9 October 2017 this claim shall be heard in private'. The parties will be aware of the provisions of CPR Part 39.2 and the general rule that proceedings should be heard in open court. The Chancellor will wish to hear submissions at the

outset of the hearing as to the reasons why any party suggests that a private hearing is necessary, and as to any other ways in which the confidentiality of particular facts or matters could be maintained whilst still allowing a hearing in public. The Chancellor would be grateful, if possible, to receive the parties' [written] submissions on this important issue by 9.00am on Monday morning." I am grateful to the parties' counsel for their prompt responses to my request.

37. In the course of the morning of the first day of the hearing, which took place mostly but not entirely in public, it was suggested that Sefton's existing correspondence was equivocal as to the question of whether or not, as a matter of fact, it appeared at this stage "to [Sefton] that no suitable arrangements for the disposal of the [deceased's] body [had] been or [were] being made otherwise than by [Sefton]" within the meaning of Section 46. Accordingly, I suggested that, in the light of Sefton having procured its removal from the proceedings against the wishes of some of the other parties, it should be asked by the claimants' solicitors for a clear statement of its position. It responded by letter that was put before me when I sat at 2.30pm on Monday 9th October 2017 by saying that it did not consider that the duty in Section 46 had yet been triggered, relying on the facts that Mr Makin had (i) told it on 14th September 2017 that Sefton was one of his options for disposing of the body, but not necessarily his first choice, (ii) stated on 20th September 2017 that Sefton's facilities would only be required by him as a last resort, and (iii) not been willing to tell Sefton about any arrangements he was making. The letter concluded by saying that Sefton understood that "Mr Makin intends to make other arrangements for the disposal of [the deceased's] body".

38. I am bound to say that I found this letter to be unhelpful in the light of what Sefton had always previously said in correspondence, its agreement to be bound by the outcome of this hearing, and its conduct in removing itself from proceedings that it knew to have been based in part at least on its duty under Section 46 having arisen.

39. Be that as it may, in the course of argument after the letter had been received from Sefton, it became apparent that any possible solution to the impasse that the parties had apparently reached depended on Sefton's acceptance of what was proposed or ordered in relation to the disposal of the deceased's body. For that reason, I decided, that subject to any submissions Sefton might make, I would re-join Sefton as third defendant to these proceedings on the ground that it was desirable to add it so that the court could resolve all the matters in dispute (see CPR Part 19.2(2)(a)). Sefton appeared as directed at 10.30am on Tuesday 10th October 2017 by Mr Louis Browne QC of counsel, who did not in the event object to Sefton being re-joined as a party. He told me that he had in fact been instructed in this matter by Sefton for some time, so that he was already well briefed on the issues before the court. I am bound also to say that I would have found it more helpful if Sefton had not adopted its stance of seeking (at least until ordered to do so) to avoid attending the hearing.

The evidence

40. Apart from the voluminous correspondence and press cuttings to which I have already made some reference, I have seen witness statements from the partner in the claimants' solicitors responsible for the conduct of these proceedings, and also from the leader of Oldham and the deputy executive leader of

Tameside. The latter explained the details of the sensitive and emotive issues raised by this case so far as concerns the 220,000 residents of Tameside. He said that "[d]espite these murders happening over 50 years ago, the horror and revulsion has not subsided for the people of Tameside, particularly as one of the children who was murdered was never found and given the burial his mother wished for". He also explained the public revulsion that followed reports that Myra Hindley's ashes had been scattered in Tameside. The deputy executive leader of Tameside also explained the concerns of Greater Manchester Police about the deceased's body being disposed of in Tameside or Greater Manchester.

41. Mr Makin prepared four witness statements in support of his case and of the need for the proceedings to be heard in private. He described the argument that he should be required to undertake that he was not intending to dispose of the deceased's remains in the claimants' areas as "misconceived". He relied on the fact that he had told the Coroner's officer that there was "no likelihood of that happening", and reiterated that that was the position. He referred to the fact of the Sun newspaper having published the article I have already referred to, suggesting that the deceased's wishes had been to be cremated in Glasgow (where he grew up) with his ashes being scattered in the River Clyde. That publication had taken place despite Mr Makin seeking to obtain an injunction to prevent publication, which Snowden J refused on the evening of Friday 19th May 2017. Mr Makin relied on the fact that he was a long-established solicitor and that he had often acted as an executor. He said expressly that he did not "believe that the Claimants are entitled to know what [his] intentions and plans are". He said also that he did not believe that Section 46 was

engaged because he was "in the course of arranging a lawful and decent funeral" himself.

The arguments advanced by the parties

42. In relation to the engagement of Section 46, Mr Nigel Giffin QC, leading counsel for the claimants, originally argued that the correspondence that I have set out above in a little detail demonstrated that it did indeed appear to Sefton "that no suitable arrangements for the disposal of the body have been or are being made otherwise than by [Sefton]" within the meaning of the Section 46. By the time that Sefton's letter of 9th October 2017 had been received, however, it was clear to me that that was not quite Sefton's view. Accordingly, Mr Giffin changed horses somewhat to place greater reliance on Section 116 and the inherent jurisdiction of the court, the existence of which was common ground before me. He submitted that it was almost common ground that Section 116 was engaged because there were indeed "special circumstances" in this case. The only real question was whether it was expedient to make the grant and to give directions for the disposal of the deceased's body.

43. I should say, however, that even after he had changed horses, Mr Giffin introduced a new argument as to why Section 46 was indeed engaged. He said that Sefton was misreading the statute. Under Section 46 the authority had to make the arrangements in any case where it appeared that no suitable arrangements were otherwise being made. Sefton was saying that it cannot so appear to it, because Mr Makin will not say what he is doing. But that, submitted Mr Giffin, must be wrong, because if Sefton is not assured after a

reasonable time that there will be a disposal, it must appear to it that no suitable arrangements are being made.

44. The parties all referred to the decision of Mr Jonathan Klein, sitting as a deputy judge of the Chancery Division, in *Anstey v Mundle* [2016] EWHC 1073 (Ch), which was a case where orders were made under the inherent jurisdiction, where Mr Klein said this at paragraphs 19 and 47:-

> "19. In the light of the authorities to which I refer below, I believe, and the parties accepted, that the court has, in this case, on its particular facts, an inherent jurisdiction, whether as part of its jurisdiction to regulate the administration of estates or otherwise, which is capable of being exercised so as to determine who should be responsible for the burial of Mr Carty's body. …
>
> 47. In the light of the authorities, I do not think that the court can determine or direct where or how Mr Carty is to be buried. What the court can do is to direct who has the power and duty to bury Mr Carty".

45. Mr Klein had referred to a number of cases in which there was a dispute as to which of competing sets of relatives should have the right to dispose of the body (see *Buchanan v. Milton supra*, *University Hospital Lewisham NHS Trust v. Hamuth* [2006] EWHC 1609 (Ch) (Hart J), and *Hartshorne v. Gardner* [2008] EWHC 3675 (Ch) (Ms Sonia Proudman QC)). But in none of those cases was there a specific dispute as to the propriety of the method of disposal proposed. Indeed, in *Hartshorne supra*, Ms Proudman had said at paragraph 10 that her jurisdiction doubtless **did** enable her to decide some other combination of place and method of disposal apart from those proposed by the parties. I shall return to that point in due course.

46. When I asked for further chapter and verse on the inherent jurisdiction, Mr Giffin submitted that it was not surprising that there was little older authority, because until the early 20th century, the only generally available method of

disposal was burial, which was governed by ecclesiastical law. He did, however, rely on Cranston J's treatment of the issue in *Burrows v. HM Coroner for Preston* [2008] 2 FLR 1225 where, in a Section 116 case, the court did make an order as to the specific details of the disposal, albeit that Ms Debra Powell QC, leading counsel for X, pointed out that that part of the order was made by consent.

47. Ms Powell submitted also that X was concerned at the delay since the deceased died, and sought an order that any disposal should take place within 28 days.

48. Mr Richard Moore, counsel for Mr Makin, originally put as his main argument on Section 46 that it could not be said that Sefton had the view that no suitable arrangements had been made, because its conduct was ambiguous. It had removed itself from the proceedings. It might have been expected that Sefton would have written to Mr Makin saying that they had formed the necessary view under Section 46, and warning him that they would dispose of the deceased's body if he had not done so within a certain time. But that had not happened. The only evidence was that Sefton had formed the view that its duty under Section 46 was not yet engaged, but was willing to be told otherwise by the court. There was no proper reason, argued Mr Moore, why the claimants should have sued Mr Makin rather than bringing judicial review proceedings against Sefton based on its Section 46 duty. Section 46 could not be read as Mr Giffin submitted.

49. Next, Mr Moore submitted that Section 116 was academic, because once the details of the disposal were agreed (as to which see below), there was no

reason why the formal responsibility could not be left in Mr Makin's hands. He helpfully referred me to the New Zealand Supreme Court decision in *Takamore v. Clarke* [2012] NZSC 116 where the majority (Tipping, McGrath and Blanchard JJ) thought that there was a common law rule in New Zealand under which personal representatives had both the right and duty of disposal of the body of a deceased. Interestingly, Elias CJ concluded at paragraphs 7 and 10 that "where there is a dispute as to burial, either party has standing to bring the dispute to the High Court for resolution". Though other members of the court disagreed with her reasons, I do not understand that they doubted that part of her conclusion (see paragraph 160 of the majority judgment, and paragraph 175 of the judgment of William Young J).

50. As regards Mr Makin's intentions as to the disposal of the deceased's remains, Mr Moore submitted that it was not Mr Makin that had been making any trouble, but Sefton who had been blocking his efforts. [REDACTED]

51. [REDACTED]

52. After Mr Makin had made clear the kind of process of disposal that he was contemplating, there were detailed submissions as to the propriety of what was proposed. [REDACTED]. Mr Giffin submitted that the court should direct precisely how the deceased's body should be disposed of. [REDACTED].

53. [REDACTED]

Privacy

54. Part 39.2 of the Civil Procedure Rules provides that "[t]he general rule is that a hearing is to be in public". It then goes on to define a number of exceptions including:-

i) if publicity would defeat the object of the hearing;

ii) if it involves confidential information and publicity would damage that confidentiality;

iii) if it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate;

iv) if the court considers privacy to be necessary, in the interests of justice.

55. Mr Makin relied on each of these exceptions in order to argue that these proceedings ought to have been heard in private.

56. The law was summarised in *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003 issued on 1st August 2011 by Lord Neuberger of Abbotsbury MR (cited also by Gloster LJ in her judgment in *Norman v. Norman* [2017] EWCA Civ 49, [2017] 1 WLR 2523 at paragraph 57):

> "4. Applications which seek to restrain publication of information engage article 10 of the Convention and section 12 of the Human Rights Act 1998 ('HRA'). In some, but not all, cases they will also engage article 8 of the Convention. Articles 8 and 10 of the Convention have equal status and, when both have to be considered, neither has automatic precedence over the other. The court's approach is set out in *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17. …
>
> Open justice
>
> 9. Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public: see article 6.1 of the Convention, CPR r 39.2 and *Scott v Scott* [1913] AC

> 417 . This applies to applications for interim non-disclosure orders: *Micallef v Malta* (2009) 50 EHRR 920 , para 75ff; *Donald v Ntuli (Guardian News & Media Ltd intervening)* [2011] 1 WLR 294 , para 50.
>
> 10. Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice They are wholly exceptional: *R v Chief Registrar of Friendly Societies, Ex p New Cross Building Society* [1984] QB 227 , 235; *Donald v Ntuli* [2011] 1 WLR 294, paras 52–53. Derogations should, where justified, be no more than strictly necessary to achieve their purpose.
>
> 11. The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test: *M v W* [2010] EWHC 2457 (QB) at [34].
>
> 12. There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case: *Ambrosiadou v Coward* [2011] EMLR 419, paras 50–54. Anonymity will only be granted where it is strictly necessary, and then only to that extent.
>
> 13. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: *Scott v Scott* [1913] AC 417, 438–439, 463, 477; Lord Browne of *Madingley v Associated Newspapers Ltd* [2008] QB 103, paras 2–3; *Secretary of State for the Home Department v AP (No 2)* [2010] 1 WLR 1652, para 7; *Gray v W* [2010] EWHC 2367 (QB) at [6]–[8]; and *H v News Group Newspapers Ltd (Practice Note)* [2011] 1 WLR 1645, para 21.
>
> 14. When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings … On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their article 8 Convention right is entitled …".

57. I would refer also in this connection to Morgan J's recent judgment in a Variation of Trusts Act case *V v. T,A* [2014] EWHC 3432 (Ch) at paragraphs

12-17, and to Gloster LJ's exposition in *Norman v. Norman supra* at paragraphs 54-70.

58. As regards confidentiality, it was suggested that the entire proceedings needed to be in private in order to preserve the secrecy of the location of the deceased's body. I do not agree. Counsel simply needed to ensure that they said nothing in open court that disclosed the whereabouts of the deceased's body. As a matter of fact, they managed to achieve that objective without difficulty during the hearing.

59. Mr Makin also relied upon the "intense media speculation and interest in the deceased and the disposal of his body", suggesting that publicity could inflame the situation and make it more difficult for a lawful and decent disposal to take place. Again, I do not see why that should have been the case. The issues I am determining are both legal and factual. The details of the plans for the manner of disposal could be, and in fact subsequently were, dealt with in private without the need to sit in private for long parts of the hearing. Mr Makin put forward some evidence of his discussions with Greater Manchester Police to seek to counteract the evidence I have mentioned about the reported views of the Merseyside Police. It did not seem to me that these differing views took the matter much further.

60. I also disagree with the submission that the case concerns funeral arrangements that are confidential to Mr Makin. The case started out on the basis that it was simply about who should be responsible for making arrangements for the disposal of the deceased's remains in all the factual circumstances disclosed by the evidence. It is true that it later developed into

an argument about the precise form that the disposal should take, but those details can and will remain private until after the disposal.

61. I do not accept that the proceedings are uncontentious proceedings in relation to an estate. They are far from that.

62. The real issue here is whether the interests of justice demanded that the proceedings should be conducted in private. After careful consideration of Lord Neuberger's guidance, I concluded that they did not. Mr Makin's submission that there was a strong interest in maintaining the confidentiality of these proceedings cuts across, in my judgment, the strong public interest in open justice. Countless authorities over the years have made clear that justice should be done in public for a host of reasons. I need only refer to *Scott v. Scott* [1913] AC 417 where the House of Lords affirmed the principles of open justice. The question of whether cases should be heard in public is not one of discretion or convenience; it rests entirely on the basis of necessity. Viscount Haldane LC said at page 439 that: "[a] mere desire to consider feelings of delicacy or to exclude from publicity the details which it would be desirable not to publish is not, I repeat, enough as the law now stands. I think that to justify an order for hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made".

63. In my judgment, the public interest demanded that these proceedings were heard in public. We operate these courts openly. We do not operate a system of secret justice in which any litigant can demand for his own reasons that his case is determined away from the sterilising glare of the public eye. It is true

that the public is interested in the deceased because of his serious crimes, but that did not make it any the less important that the issues before this court were determined in public.

64. All that said, at the request of the second defendant, I ordered that it should remain anonymous until 7 days after the final disposal of the remains of the deceased, and that no references should be made in the course of the hearing or reported in relation to the current whereabouts of the remains of the deceased, or in relation to any intended proposals for the disposal of the deceased's body. I made these orders in order to avoid the possibility of public unrest and in the interests of justice. The details that are at the moment kept private will be made public after the deceased's body has been disposed of lawfully and decently in accordance with the order it will shortly appear I am intending to make.

Issue 1: Has the duty on Sefton under Section 46 been engaged? If so, how should it be carried out?

65. Section 46(1) provides, as I have said, that "[i]t shall be the duty of a local authority to cause to be buried or cremated the body of any person who has died or been found dead in their area, in any case where it appears to the authority that no suitable arrangements for the disposal of the body have been or are being made otherwise than by the authority".

66. As it seems to me, the proper construction of Section 46 is relatively straightforward. For Section 46 to be triggered, it must, in this case "[appear] to [Sefton] that no suitable arrangements for the disposal of the [deceased's] body have been or are being made otherwise than by [Sefton]". There is no real doubt what the section means by "appearing to". It means that Sefton

must have formed that view. If it has not formed that view itself, then there may (or may not) be a case for saying that it has acted improperly, but it cannot be said that it has actually formed a view that it has not. I cannot, therefore, accept Mr Giffin's submission that, simply because a reasonable time has elapsed, it must appear to it that no suitable arrangements are being made, whatever its actual view.

67. In my judgment, Sefton's 9th October 2017 letter, from which Mr Browne did not resile in oral argument, is conclusive for this purpose. It is not conclusive because it said expressly that it did not appear to Sefton that no suitable arrangements were being made. It did not. But it is conclusive because it said expressly that Sefton's understanding was that "Mr Makin intends to make other arrangements for the disposal of [the deceased's] body". It was on that basis that Sefton thought its duty under Section 46 had not **yet** been triggered, envisaging that it might in future appear to it that no suitable arrangements were being made, but that that was not the present position, because of its ongoing dealings with Mr Makin.

68. It might, of course, be said that it is somewhat odd for the authority to have the absolute power to dictate when the Section 46 duty to dispose of a body actually arises. It would, at least in theory, have that power if the trigger to Section 46 turns on the view that the authority itself forms. But the legislation would, it seems to me, obviously envisage that the authority would act in good faith, and there are always public law remedies available if it forms an irrational view. I hasten to add that nothing of that kind has been suggested in this case.

69. In these circumstances, I take the clear view that, whatever I may think about the delays that have occurred in making arrangements for the disposal of the deceased's body, Sefton's view must prevail with regard to the triggering of a Section 46 duty. In my judgment, that duty has not been triggered, and I am not therefore able to make any order under Section 46, whether by way of declaratory relief or otherwise. I do not, therefore, need to decide the question of the claimants' standing to apply for the relief they sought. I can, however, indicate that, had I thought that Sefton's duty had been triggered, I would very likely have thought it appropriate to make a declaration to that effect at the behest of the claimants, who have a distinct interest in protecting the citizens of their areas from offence and impropriety.

70. I also do not need to consider under this heading how the duty under Section 46 needs to be carried out.

Issue 2: Does the court have jurisdiction to make a partial administration order under Section 116 in favour of someone other than Mr Makin? If so, should it do so on the grounds that (a) special circumstances exist, and (b) it appears to the court to be necessary or expedient to do so?

71. Section 116 gives the court a discretion to appoint "as administrator such person as it thinks expedient" for limited purposes if, by reason of any special circumstances, it appears to the court to be necessary or expedient to appoint someone other than the executor. There are, therefore, 2 main questions. First, whether there are any "special circumstances", and secondly whether the court should take the view that it is necessary or expedient to appoint an administrator in this case.

72. These questions are not free from authority. That authority was well summarised by Cranston J in *Burrows supra* at paragraphs 12-17. I shall not

repeat his analysis. It is instructive, however, to note the "special circumstances" found by Hale J in *Buchanan supra* (and summarised in paragraph 16 of Cranston J's judgment) which included the deceased's Aboriginal heritage and the importance attached to correct burial procedures, an initial agreement reneged upon after death, the interests of other members of the Australian family and the deceased's wishes. On the facts of *Burrows supra*, Cranston J decided both that there were special circumstances and that it was necessary to make an appointment.

73. In this case, I agree with Mr Giffin that it cannot be much in doubt that special circumstances exist. The contrary has not really been suggested, save that Mr Moore submitted in his skeleton argument that Mr Makin's discretion as to disposal of the remains should only be overruled where it was being exercised dishonestly, capriciously or unreasonably (see *Re Grandison* (1989) The Times 10th July 1989 per Vinelott J). Moreover, he says that Mr Makin, as an experienced and disinterested solicitor, should be trusted to perform his duty of disposal.

74. I would wish to make clear that I have no doubt that Mr Makin can be trusted. That is not my concern on the evidence I have seen, nor is it really the question I have to answer. As to special circumstances, it is clear that the deceased was someone described by Lord Steyn in *R v. Secretary of State for the Home Department ex parte Hindley* [2001] 1 AC 410 as "uniquely evil". Secondly, there is undoubtedly real and genuine public anger and distress about what may happen to the deceased's body. Thirdly, the families of the deceased's victims may well be legitimately offended by an insensitive

disposal. Fourthly, there is a real public interest in ensuring that the disposal does not create unrest or disorder. Finally, the deceased's body has now been refrigerated for 5 months, and there is a public policy requiring that any body should be disposed of decently and lawfully with due dispatch (see Hayden J at paragraph 11 in *Re K (a child)* [2017] 4 WLR 112). I do not wish, in this context, to criticise or allocate blame for the delays that have occurred. Even without doing so, however, it seems clearly to be the reality that, in the absence of a satisfactory outcome to these proceedings, there is the distinct prospect that the deceased's body might remain undisposed of for a further significant period of time, something that the court simply cannot contemplate. In these circumstances, I am entirely satisfied that there are indeed special circumstances in this case. I have not ignored the deceased's wishes and his decision to put the matter in the hands of Mr Makin, but in my judgment the public interest must here prevail for the reasons I have given.

75. The next question is the one of necessity and expedience. It is in this context that I need to take into account the executor's duty that I would be displacing by making an order. The circumstances here are very different from those in any of the cases I have been shown. Even after a hearing that has lasted for 1½ days, the parties have not been able to agree precisely how the deceased's body should be disposed of. In those circumstances and for the reasons given in the previous paragraph, I am satisfied also that it is both necessary and expedient for the matter to be taken out of the executor's hands if the deceased's body is to be disposed of quickly, lawfully and decently. Things have simply gone on far too long. There is no reason to suppose, taking into account the tone and content of the correspondence, that agreement will be

reached between these parties in short order if the court does not impose a solution. Feelings seem to run high on all sides, but most importantly the public interest demands that the matter is concluded swiftly.

76. In my judgment, therefore, the circumstances exist where the court can and should make an order for an administration of the deceased's estate under Section 116, limited to the disposal of the deceased's body.

Issue 3: If the court is to appoint an administrator, who should be appointed?

77. Mr Makin objected to the administrator being one of the claimants. As a result, the claimants have suggested either [REDACTED]. It seems to me that it would be expedient to appoint [REDACTED] to the role of administrator for reasons that will become apparent when I come to deal with the method of disposal.

Issue 4: Can the court give detailed directions as to the disposal of the deceased's remains either under its inherent jurisdiction or under Section 116? If so, should it do so in this case?

78. Since I have held that Section 116 is engaged, the relevance of the inherent jurisdiction of the court is diminished. Since, however, the matter was argued, I should deal with it briefly. There do not seem to be any old cases that deal expressly with the inherent jurisdiction of the court to make directions concerning the disposal of human remains. I shall not deal in detail with the modern cases.

79. Briefly, however, in *Grandison supra*, Vinelott J expressed the view, with which I find myself in complete agreement, that he would have been surprised to find that he had no power in any circumstances to override an executor's

decision as to the method of disposal of a body. Ms Proudman's decision in *Hartshorne supra* included the view at paragraph 10, as I have said, that she did have jurisdiction to decide a combination of place and method of disposal of a body which had not been proposed by the parties. In *Anstey supra*, as I have also said, Mr Klein said that he did not think that the court could determine or direct where or how the body was to be buried. I am not sure, however, that the authorities on which he relied reached that conclusion, and it would seem to be inconsistent with the authorities I have mentioned and with the persuasive decision of the New Zealand Supreme Court in *Takamore supra*. I am conscious that Jackson J in *In re JS (A Child) (Disposal of Body: Prospective Orders)* [2017] 4 WLR 1 reached a different conclusion, in reliance on *Anstey supra* at paragraphs 47-9, but he was not concerned with a situation even remotely similar to that which faces this court. Moreover, in *Burrows supra*, Cranston J did make an order directing how the body should be disposed of, albeit by consent.

80. In my judgment, the court does have an inherent jurisdiction to direct how the body of a deceased person should be disposed of. The court will normally, as I have said, be deciding between the competing wishes of different sets of relatives, and will only need to decide who should be responsible for disposal rather than what method of disposal should be employed. I cannot see, however, why the court's inherent jurisdiction over estates is not sufficiently extensive to allow it, in a proper case, to give directions as to the method by which a deceased's body should be disposed of. In my view, it is. Moreover, I am, for the reasons I have given in relation to Section 116, prepared to exercise that jurisdiction in this case.

Issue 5: If the court can and should give detailed directions as to the disposal of the deceased's remains, what directions are appropriate?

81. I have taken into account all the competing positions that have been expressed by the parties. In my judgment, however, the overwhelming factor in this case is the public interest. The deceased's wishes are relevant, but they do not outweigh the need to avoid justified public indignation and actual unrest. The claimants were right to bring these proceedings when they genuinely feared that the deceased's body might be disposed of in such a way as to give legitimate offence to the families of the victims of the deceased and to the public generally.

82. Mr Moore argued that the claimants were trying to reintroduce by the back door the requirement in section 6 of the Capital Punishment Amendment Act 1868 requiring burial for those executed in the prison grounds, when that section was repealed by the Murder (Abolition of the Death Penalty) Act 1965. I do not agree. The claimants were right to seek to ensure that there is a lawful and decent disposal of the deceased's body without causing justified public indignation or unrest. I do not think that Mr Makin has been justified in being so secretive about how he was intending to dispose of the deceased's body. Had he discussed the matter openly with the claimants and Sefton and given clear undertakings that he was not intending to scatter the deceased's ashes in their areas, these proceedings might have been avoided. Even now, he has refused to say what he intends to do with the ashes if he is allowed custody of them. He offered to tell me alone, but not the other parties to the proceedings. That was not good enough. I refused to be the only person to be

told, because I could not then have heard any submissions as to the propriety of the arrangements he proposed.

83. In these circumstances and for the reasons I have given, I do not think that Mr Makin can be entrusted with the ashes for disposal. Even if I were to limit their disposal to private ground, against his wishes, that private ground might be somewhere where public access was possible. Even the process of allowing Mr Makin to take possession of the ashes is fraught with potential difficulty. It does not matter that those difficulties might not be of his own making. He said he only intended to tell one other (unidentified) person how he would dispose of the ashes. But there remains the possibility that his plans would be discovered, and there could be public disorder if a member of the public sought to stop Mr Makin doing what he wanted to do with the ashes.

84. I have, therefore, determined that in the extremely unusual circumstances of this case, I should direct precisely how the deceased's body is to be disposed of. I shall even need to decide whether music can be played during the cremation.

85. For the reasons I have already given, I am entirely satisfied that it would be dangerous and inappropriate to allow Mr Makin to dispose of the deceased's ashes. It is unfortunate that Sefton is no longer able to arrange their disposal, but instead [REDACTED] has said that she will do so, and I am satisfied that that is the best proposal available.

86. As to the playing of the fifth movement of the Symphony during the cremation, I need only quote the description of that movement from Wikipedia for it to be seen how inappropriate it would be:-

> "Fifth movement: "Songe d'une nuit du sabbat" (Dream of the Night of the Sabbath): In both the program notes, Berlioz wrote:
>
> [The musician] sees himself at a witches' sabbath, in the midst of a hideous gathering of shades, sorcerers and monsters of every kind who have come together for his funeral. Strange sounds, groans, outbursts of laughter; distant shouts which seem to be answered by more shouts. The beloved melody appears once more, but has now lost its noble and shy character; it is now no more than a vulgar dance tune, trivial and grotesque: it is she who is coming to the sabbath ... Roar of delight at her arrival ... She joins the diabolical orgy ... The funeral knell tolls, burlesque parody of the Dies irae, the dance of the witches …".

87. I have no difficulty in understanding how legitimate offence would be caused to the families of the deceased's victims once it became known that this movement had been played at his cremation. I decline to permit it. It was not suggested by Mr Makin that the deceased had requested any other music to be played or any other ceremony to be performed, and in those circumstances, I propose to direct that there be no music and no ceremony.

88. I will therefore direct under Section 116 that [REDACTED] shall be appointed as administrator of the estate of the deceased for the limited purpose of disposing of the body of the deceased in the following manner. I also direct under the inherent jurisdiction of the court and under Section 116 that [REDACTED] as administrator shall be responsible for ensuring that the body of the deceased is disposed of in the following manner: [REDACTED]

89. I would be grateful if counsel could draw an order for my approval.